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September 16, 2011

Via Electronic Mail and Hand Delivery

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000
commentletters@waterboards.ca.gov

Re: Comment Letter – Russian River Frost Protection Regulation (Cal. Code Regs., tit. 23, § 862.)

Dear Board Members:

This letter is submitted on behalf of the Russian River Water Users for the Environment ("RRWUE") and Allan Nelson, Munselle Vineyards (Billy Munselle), Robert Terry Rosetti, Redwood Ranch and Vineyards (Jim Reed), and Charlie Sawyer who are members of RRWUE (hereafter referred to as the "Individuals"). RRWUE and the Individuals object to the State Water Resources Control Board's ("SWRCB") proposed frost protection regulation, the latest version of which was circulated on September 1, 2011 (hereafter referred to as Section 862), on several substantive grounds, and also object to adoption of the environmental impact report for the project ("EIR").

Section 862 Is Invalid.

In summary, Section 862 is substantively invalid because:

1. Section 862 improperly declares all frost protection diversions to be unreasonable, without an adjudicatory or quasi-adjudicatory determination of this fact, which is required by law (See *State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3d 743, 752; *Imperial Irrigation Dist. v. SWRCB* (1986) 186 Cal.App.3d 1160, 1170);

2. Section 862 improperly declares all frost protection diversions to be unreasonable, without consideration of the seniority of a water user's right. (See *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 966 [court held that when

applying the rule of reasonable use, "every effort . . . must be made to respect and enforce the rule of priority."].);

3. Only frost protection diversions are declared unreasonable, without consideration of the impacts from other diversions – including major diversions that are junior in seniority to most frost protection diverters (e.g., Sonoma County Water Agency ("SCWA") diversions to Lake Mendocino and Lake Sonoma);

4. Section 862 applies equally to dozens of water users whose lands and operations can have absolutely no impact on the river reaches where the isolated salmonid strandings were observed (e.g., Dry Creek water users);

5. Groundwater use is declared unreasonable, despite the SWRCB's lack of jurisdiction to regulate groundwater use and lack of evidence demonstrating that frost protection groundwater pumping contributes to the immediate streamflow reductions that are alleged to strand salmonids;

6. Section 862 improperly delegates the power to alter water rights that is reserved to the courts and the SWRCB (delegation is to "governing bodies" enforcing corrective action plans) (see *Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396 - 397, citing *Morton Bros. v. Pacific Coast S.S. Co.* (1898) 122 Cal. 352, 353-355.);

7. All regulations must be "reasonably necessary" to effectuate their underlying statutory or constitutional authority, but Section 862 is not "reasonably necessary" to effectuate article X, section 2 of the California Constitution, nor Water Code section 100, nor the public trust doctrine. (Gov. Code, § 11350(b)(1).) Section 862 is not reasonably necessary because:

a. The only evidence available indicates salmonid strandings occurred at specific and limited river reaches, and there is no evidence that any, some, or all frost protection diversions harm listed species;

b. Since the 2008 events, there have been several responsive actions taken to ensure that frost protection diversions do not harm fish, including:

i. Coordination with SCWA and Russian River Flood Control District on frost protection diversions (so that all parties are aware of instream demands when determining releases from Lake Mendocino);

ii. Construction of offstream storage for frost protection purposes by several diverters near Hopland, the site of one salmonid stranding event;

iii. Installation of a new USGS gauge at Talmage, which allows for closer monitoring of the river stage;

iv. Creation of the Russian River Frost Program, Russian River Property Owners Association, and Sonoma County Vineyard and Orchard Frost Protection Ordinance, all of which enhance coordination of frost protection diversions;

v. Removal of the pump that allegedly was a factor in the Felta Creek salmonid stranding; and

vi. There is no evidence that pumping of hydraulically connected groundwater has any relationship to the immediate stream reductions that are allegedly caused by or are contributed to by frost protection diversions.

The EIR Fails to Meet the Standards of the California Environmental Quality Act.

The EIR remains significantly deficient in many ways, including but not limited to:

The project purpose and description are too narrowly defined – focusing solely on frost protection pumping without consideration of the impacts to fish habitat from *all* water diversions;

The EIR fails to adequately explain what flow criteria will be mandated by Section 862, thereby making impossible the analysis of the environmental impacts of the project;

The EIR fails to analyze the impacts to other listed species that are reasonably likely to occur as part of the water demand management programs ("WDMPs");

The EIR fails to adequately analyze the farmland conversions that will likely occur as a result of Section 862;

There is not substantial evidence to support some of the key conclusions, including the extreme extrapolation whereby the identification of 10 dead salmonids in a 75-meter stretch of the Russian River is extrapolated to assume that 28,000 fish were actually killed throughout the Russian River watershed; and

Improper deferral of mitigation measures associated with known components of WDMPs.

Incorporation of Comments.

In addition to the comments and issues set forth in this letter, RRWUE and the Individuals assert the issues and arguments set forth in those comments previously submitted by this law firm and the California Farm Bureau Federation ("CFBF"). A copy of the comments submitted by us and the CFBF are attached to this letter for your reference.

Unlawful Impacts to Growers and the Environment.

In summary, proposed section 862 will result in significant unlawful impacts to grape and pear growers, and the environment throughout Mendocino and Sonoma counties. The EIR is significantly deficient, and fails to discuss or identify many of the true impacts to the regional environment from implementing Section 862. The RRWUE and the Individuals respectfully request that the SWRCB decline to adopt Section 862 and, instead, allow to succeed the many regional efforts currently in place to address the health of the Russian River watershed and its environment.

Very truly yours,

Jesse W. Barton

Attch. (2)

cc: Clients
Jack Rice, CFBF

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July 5, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

By hand delivery

RE: Comment Letter – Proposed Russian River Frost Protection Regulation

Dear Board Members:

On behalf of Williams Selyem, California Farm Bureau Federation, Fetzer Vineyards, Whispering Oak Vineyards, LLC, AG Unlimited, Lyman/Tremont, Saini Farms Inc., Yokayo Wine Company, Orr's Creek Vineyard LP and other interested parties, we submit this comment letter on the State Water Resources Control Board's (SWRCB) proposed Russian River Frost Protection Regulation. This letter is divided into Sections I, II and III.

Section I explains that as a threshold matter, the SWRCB has not fulfilled the prerequisites for enacting a reasonable use regulation pursuant to Water Code section 100 and Article X, Section 2 of the California Constitution. The SWRCB has not made the necessary factual and legal findings to conclude that water use for frost protection in the Russian River watershed is an unreasonable use of water unless managed in accordance with a water demand management plan.

Section II discusses the following flaws with the SWRCB's draft EIR (DEIR).

1. The project purpose and project description are defined so narrowly that they prohibit consideration of a reasonable range of alternatives.
2. The DEIR's failure to define and analyze the basic project objective – to prevent stream stage changes to avoid stranding – prevents meaningful impact disclosure and comparison of alternatives.
3. The DEIR fails to identify assessment methodologies and thresholds of significance.
4. The DEIR fails to disclose and analyze significant effects.
   a. The DEIR fails to disclose and analyze significant effects on agriculture.
   b. The DEIR's failure to address SCWA's operation of Warm Springs Dam and Coyote Dam and rediversion for municipal purposes will frustrate the regulation and does not disclose associated impacts.
5. The regulation and DEIR mitigation measures do not have a substantial nexus to the regulated frost water use, and accordingly are constitutionally invalid.
6. The DEIR mitigation measures are not feasible.
7. The DEIR improperly defers development of mitigation to a later time.

8. The mitigation measures are overbroad and may cause significant redirected impacts.
9. The DEIR improperly rejects and does not consider feasible alternatives with fewer environmental effects.
10. The conclusions and assumptions in the DEIR are not supported by substantial evidence.

Section III discusses the multitude of legal standards the SWRCB has failed to meet.

11. The regulation is not necessary.
12. The regulation is overbroad.
13. The regulation is too narrow.
14. The regulation is not supported by the findings or the evidence.
15. The SWRCB has not proceeded in the manner required by law.
16. The SWRCB underestimates the costs that will be associated with implementation of the regulation.
17. The SWRCB is unable to meet the findings that will be necessary for the regulation to pass OAL review and survive legal challenge.

Basically, the administrative record lacks the factual and legal basis necessary to adopt and implement the proposed regulation. The SWRCB has also failed to adequately disclose the environmental and economic impacts associated with the regulation. As a result, the proposed regulation threatens to put many wine grape and pear growers out of business, impose substantial unnecessary costs on those who can remain in business, create unmitigated environmental impacts, generate reams of unusable "scientific" data, and not save a single fish.

We encourage the SWRCB to abandon its top-down regulatory approach and allow the collaborative efforts already underway, and extremely effective, in Sonoma and Mendocino counties to continue.

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I. AUTHORITY TO ENACT REASONABLE USE REGULATIONS

The SWRCB asserts the public trust doctrine and the reasonable and beneficial use doctrine as the legal authority for the proposed regulation:

> The State Water Board has a duty to protect, where feasible, the State's public trust resources, including fisheries. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . ." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine.[1]

Using this authority, the SWRCB asserts that an entire purpose of use—frost protection in the 1485 square mile Russian River watershed—is unreasonable based on two cases of alleged frost protected related stranding and a study that documented stage changes in ***one*** stream.

Yet these allegations, and this single study on a single stream, do not fulfill the prerequisites for enacting a reasonable use regulation pursuant to the public trust doctrine and Article X, Section 2 of the California Constitution because the SWRCB does not have actual evidence of harm caused by frost protection water diversions. Evidence of actual harm is required to make the necessary factual and legal findings to conclude that water use for frost protection in the Russian River watershed is an unreasonable use of water unless managed in accordance with a water demand management plan. The SWRCB cannot unilaterally declare an entire method of water use unreasonable with no evidence, or a suspicion based upon a mere presumption of harm only. Although the proposed regulation might provide the SWRCB the information necessary to make reasonable use determinations for individual water diversions in the future, it cannot adopt a regulation based on an unsubstantiated assumption alone. Accordingly, the SWRCB lacks the legal authority to adopt the regulation with the evidence presently in the record.

While the SWRCB may appeal to the Napa River frost regulation as regulatory "precedent" for the Russian River frost regulation, the proposed Russian River frost regulation differs substantially from the Napa River frost regulation in that the SWRCB had actual evidence that the supply of water in the Napa River was inadequate to accommodate the demand for all water rights during frost protection. As a result, the SWRCB "concluded that the only feasible solution to the problem was: (1) to require the winter storage of water for frost protection, and (2) to develop other supplemental sources of water so that no direct pumping of water for frost protection would be necessary."[2]

[1] *Draft* Initial Statement of Reasons, May 3, 2011, at p. 2.
[2] *Draft* Initial Statement of Reasons, May 3, 2011, at p. 4.

II. DISCUSSION OF DRAFT EIR

1. The Project Purpose and Project Description are Defined So Narrowly That They Prohibit Consideration of a Reasonable Range of Alternatives.

The DEIR must include a clearly written statement of objectives to help the SWRCB develop a reasonable range of alternatives to evaluate in the EIR.[3] Further, the EIR must analyze a reasonable range of alternatives to the proposed project that would feasibly attain *most* of the project's basic objectives while reducing any of its significant effects.[4]

Commenters on the Notice of Preparation expressed concern that the basic project purpose defined in the NOP was too narrow because it would constrain the alternatives analysis by identifying only one acceptable alternative, *the proposed regulation* in the Project Description.[5]

The DEIR attempts to address this NOP shortcoming by expanding the project purpose to include the adoption of a "regulation that will prevent salmonid stranding mortality while minimizing the impacts of the regulation on the use of water for purposes of frost protection", but the DEIR still myopically limits the regulation to the "diversion for purposes of frost protection of crops in the Russian River watershed…"[6] This narrow objective precludes consideration of other regulation alternatives that, for example, would apply to all water use during frost protection periods that could contribute to salmonid stranding. The DEIR unreasonably limits the regulation to "water diversion for purposes of frost protection of crops" despite evidence in the record that there are multiple natural and water diversion-related causes of salmonid stranding, including other non-frost related diversions that are within the regulatory authority of the Board.[7]

The DEIR also constrains the consideration of alternatives with the following "goals":

> (a) promote local development and governance of programs that prevent stranding mortality during the frost season, (b) provide transparency of diversion and stream stage monitoring data, (c) ensure that the State Water Board can require any changes to WDMP's that are necessary to ensure that WDMP's are successful and implemented on a timely basis, (d) provide for State Water Board enforcement against non-compliance, and (e) develop a comprehensive regulation that includes all diverters of water for frost protection use, including diverters who pump groundwater that is hydraulically connected to the stream system.[8]

Although the revised project objectives and goals in the DEIR may appear to be meaningful improvements at first blush, the DEIR suffers the same failing of the NOP in that it continues to constrain the alternatives analysis by ensuring that the proposed regulation is the only acceptable alternative.

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[3] Cal. Code Regs., tit. 14, § 15126.6(a). Hereinafter, all references to Title 14 of the Code of Regulations shall be to "CEQA Guidelines."
[4] CEQA Guidelines § 15126.6(a).
[5] NOP, p. 2.
[6] DEIR, p. 8.
[7] DEIR, pp. 38-40.
[8] DEIR, p. 8.

2. The DEIR's Failure to Define and Analyze the Basic Project Objective to Prevent Stream Stage Changes to Avoid Stranding Prevents Meaningful Impact Disclosure and Comparison of Alternatives.

The basic project objective is to adopt a regulation that prevents diversions for frost protection from "causing salmonid stranding mortality." The DEIR summarily concludes that "the regulation will operate to protect the environment by ensuring that water diversions for the purposes of frost protection are coordinated in a manner that the instantaneous cumulative diversion rate does not result in a reduction of stream stage that causes salmonid stranding mortality."[9] The DEIR, however, does not define what "a reduction of stream stage that causes salmonid stranding mortality" actually is, because the DEIR acknowledges that this information will be obtained only through studies conducted by the WDMPs.[10] Without this information, the DEIR does not disclose and assess the actual impacts to streamflow and salmonids from the regulation. For example, the DEIR assumes, without evidence, that a WDMP will be effective, when in fact development of the lower limits of the stream stage to protect salmonids may result in salmonid mortality. Further, the DEIR cannot evaluate whether the project objective will be accomplished with the proposed project or alternatives.

3. The DEIR Fails to Identify Assessment Methodologies and Thresholds of Significance

Program EIRs may be "prepared on a series of actions that can be characterized as one large project and are related . . . to . . . [in] connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program."[11] Used properly, a Program EIR may "consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts."[12] Although focused on a regulation that applies to a large geographic region, the Program EIR nevertheless must disclose and assess the impacts of the project.[13] An accurate discussion of the environmental setting, including rare or unique environmental resources in the project area, are essential for complete disclosure and analysis of a project's impacts.[14] Clear impact assessment methodologies and thresholds of significance are just as necessary for a Program EIR as they are for a site-specific project EIR.[15] The discussion of the project's impacts "should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development),

[9] DEIR p. 55.
[10] DEIR p. 15.
[11] CEQA Guidelines 15168(a).
[12] CEQA Guidelines 15168(d).
[13] Pub. Resources Code § 21068.5, CEQA Guidelines § 15160. "All EIRs must meet the content requirements discussed in Article 9 beginning with Section 15120."
[14] CEQA Guidelines § 15125(c). "Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context."
[15] See Remy, et al., Guide to CEQA (11th Ed. 2007) at 638. ("the authors believe that the agency, to be prudent, should formulate and adopt performance standards or objectives . . . that can function as 'first tier mitigation' and then be translated into site-specific mitigation measures when site-specific CEQA analysis is required".)

health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services."[16] The overgeneralization of the proposed project in order to defer impact analyses as too speculative deprives the public of the opportunity to assess the actual impacts of the regulation.[17]

The DEIR Section 6 effects analysis reduces potential impacts to mere generalities without discussion of the impact assessment methodologies or reliance on thresholds of significance.

For example, the analysis regarding the removal of surface water diversions in Section 6.4.2 concludes that, "In general, the foreseeable, indirect environmental consequences of these diversion structure modifications would likely be beneficial in terms of anadromous fish passage and habitat, and adverse with respect to construction-related effects that may cause short-term impacts on aesthetic, water, and biological resources and short-term noise-related impacts."[18] The DEIR justifies this simplistic conclusion on mere generalities:

> Surface water diversion structure removal can have beneficial ecological effects in terms of returning the stream to a more natural hydrograph, temperature regime, dissolved oxygen content, and sediment transport system. It can promote the rehabilitation of native species including fish; biodiversity and the population densities of native aquatic organisms increase when structures are removed. The removal of a surface water diversion structure may provide new upstream habitat to anadromous fish if they were unable to pass the structure previously. It can reduce predation of endangered anadromous fish that get caught in pools below structures. Removal of diversion structures returns the natural flow of streams, which benefits the life cycles of many aquatic organisms. Frequent and more natural flooding resulting from diversion structure removal may promote wetland and riparian growth along river edges.[19]

The DEIR fails to discuss specific impact mechanisms and assessment methodologies, including impacts that are affected by factors not in the proposed regulation, and thresholds of significance that are essential for assessing the proposed regulation, including but not limited to the following.

Stranding can occur as a result of natural declines in flow, municipal water withdrawals, and other non-frost diversion causes.[20] The DEIR fails to discuss the extent to which the non-frost diversions may cause or contribute to stranding that occurs during frost protection periods, and whether these causes impair the effectiveness of the regulation. In short, the DEIR does not adequately analyze whether the objective of reducing stranding will actually occur.

The DEIR fails to identify what "adequate stream stage"[21] is, and therefore does not provide an analysis of impacts associated with changing stream flow and stage.

Potential beneficial impacts to biological resources of the alternatives are compared on a "net-benefit" standard rather than through analysis of actual environmental impacts to individual

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[16] CEQA Guidelines § 15126.2.
[17] CEQA Guidelines §§ 15144. ("Drafting an EIR or preparing a negative declaration necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can."), § 15145 (lead agency may defer an analysis as too speculative only "after thorough investigation").
[18] DEIR, p. 68.
[19] DEIR, pp. 68-69.
[20] DEIR p. 39.
[21] e.g., DEIR p. 125.

species. The DEIR relies on sweeping conclusions of net-benefit to avoid analysis of the varied impacts to different species: "As stated above, however, the proposed regulation as a whole will protect biological resources, including salmonids, by providing adequate stream stage to prevent stranding mortality of juveniles and redds during the frost season."[22] Such an analysis is not permissible.[23]

4. The DEIR Fails to Disclose and Analyze Significant Effects.

Construction of new reservoirs may result in increased recreation on those reservoirs. This impact is not discussed.[24]

Removal or modification of existing onstream reservoirs that provide flood control or otherwise attenuate peak flows may increase flooding and property damage. This impact is not discussed.

Removal or modification of existing water diversions may reduce the water supply, and reliability of supply, for agricultural and domestic uses dependent on those diversions. Reliability of supply for new water diversions may be affected by environmental protection (e.g., bypass flow) conditions and conditions for the protection of senior water rights. Loss of and decreased reliability of supply may reduce the quantity of lands in agricultural production. These impacts are not discussed in DEIR Section 6.4.[25]

The use of recycled water will likely increase if the regulation is adopted. The DEIR does not analyze this impact. The sole discussion of recycled water in the DEIR incorrectly concludes that the use of recycled water is not economically feasible to be done at a large scale to serve as an alternative to the project, citing one example where a regional recycled water program ("NSCARP") was not adopted by SCWA and the statement that there may not be funds available to complete a proposed Mendocino County recycled water project.[26] The large cost and uncertain standards of the regulation are likely to make these and other recycled water options relatively cost-effective and feasible.

The DEIR impermissibly uses a net-biological benefit standard to compare alternatives ("As stated above, however, the proposed regulation as a whole will protect biological resources, including salmonids, by providing adequate stream stage to prevent stranding mortality of juveniles and redds during the frost season"[27]) even though the DEIR discloses that certain measures to protect salmonids (e.g., removal of onstream diversions) may harm the habitat for non-salmonid species.[28] This approach underestimates the significant adverse effects to certain non-salmonid species including amphibians.

The reduction of water diversions for frost protection purposes during the frost protection season and other times of the year may increase the amount of water in stream for non-frost water uses. The failure of the regulation to address non-frost diversions may result in increases in non-frost

[22] DEIR p. 125.
[23] CEQA Guidelines § 15125(c).
[24] DEIR p. 68.
[25] DEIR pp. 68-72.
[26] DEIR p. 87.
[27] DEIR p. 125.
[28] DEIR p. 69.

water use, which may adversely affect salmonid and other biological resources and impair the effectiveness and feasibility of the regulation. These impacts are not addressed in the DEIR.

4a. The DEIR Fails to Disclose and Analyze Significant Effects on Agriculture.

The draft EIR did not utilize the recommended Environmental Checklist that is part of the California Environmental Quality Act Guidelines Appendix G when it evaluated the environmental impacts of the draft regulation. As a result, the draft EIR does not consider or evaluate numerous potential impacts. We repeat several questions from the Checklist here.

Will the project convert prime farmland, unique farmland, or farmland of Statewide importance, as shown on the maps prepared pursuant to the farmland mapping and monitoring program of the California Resources Agency, to non-agricultural uses?

Yes. Although the SWRCB raised the issue of farmland conversion, it quickly discounted the possibility under Section 6.9 ("Other Potential Actions Identified in the Notice of Preparation But Considered Not Likely to Be Implemented"). The SWRCB writes:

> Land conversion was not considered a feasible method of compliance. The proposed regulation does not restrict operations or financially impact the vineyard or orchard owner at a significant enough level to assume that an owner would forfeit the agriculture business and explore other land use alternative.

The SWRCB apparently disregards its own economic analysis that estimates the cost of this regulation. According to the SWRCB, this regulation is expected to cost a typical 160-acre vineyard from $9,600 to $352,000 in order to initially comply with its mandates. It will cost an additional $3,000 to $36,200 per year to keep that 160-acre vineyard in compliance. It is expected to cost a typical 40-acre vineyard from $2,400 to $87,880 in order to initially comply with its mandates. It will cost an additional $750 to $9,000 per year to keep that 40-acre vineyard in compliance (see **Exhibit A**). If we look at the higher end of these expected costs, one must suspend common sense to argue small farms will not go out of business as a result of this regulation. Attached as **Exhibit B** are ten declarations from small family farms in Mendocino and Sonoma counties stating that if forced to incur these types of expenses, they will have no choice but to cease farming and possibly put the property up for sale. The DEIR fails to identify, evaluate, and mitigate the significant environmental effects associated with land conversion.

It is important to note that conversion of farmland to either housing or deep pit gravel mining is likely. Deep pit gravel mining has already taken hundreds of acres of farm land out of production along the Russian River below Healdsburg and in several locations in Ukiah. According to the Department of Conservation's California Geological Survey the Northern San Francisco Bay Area will need 647 million tons of aggregate over the next 50 years. Currently only 46 million tons are available through permitted sites. This discrepancy combined with the high yields of aggregate found in the floodplain valleys of the Russian River make farmland to pit mine conversion a very likely possibility. None of these significant effects were analyzed or mitigated in the DEIR.

Would the project conflict with existing zoning for agricultural use, or a Williamson Act contract?

Yes. Under the Williamson Act, landowners promise to keep land in agriculture in return for a

substantial reduction in real estate taxes. The Act is clear that land must be retained in agriculture and from time to time a county may require the landowner to document the agricultural use using receipts and inventories for crops or livestock. If the land is not kept in agricultural production, a county may initiate termination of the contract for breach of contract, which subjects the landowner to a significant penalty and loss of tax benefits. With the effective elimination of State open space subventions to counties since fiscal year 2009/2010, the counties have greater incentive to terminate Williamson Act contracts due to nonproduction.

It is likely that many landowners will be unable to assume the costs of the draft regulation and will have to let land lie fallow, or sell it. If that land is covered by a Williamson Act contract, the landowner may no longer be able to conform to the terms of the contract due to loss of water essential to successful farming. As a consequence, a county has the authority to terminate the contract based on noncompliance. The landowner in turn, no longer being under the obligations of the Williamson Act and faced with the burden of much higher property taxes and a termination penalty, may subdivide and sell the land for development, which will lead to many significant impacts. Therefore, the draft regulation is likely to conflict with Williamson Act contracts.

Would the project induce substantial population growth in an area, either directly or indirectly?

Yes. The regulation will cause land to be taken out of production. If water becomes unavailable for frost protection, and growers are unable to acquire alternative forms of frost protection, there is a high probability that some landowners will let their land lie fallow and pull it out of production. A likely land use change would be to develop houses, especially in areas peripheral to cities, and to rural residential areas away from cities. Implementation of the regulation will therefore result in significant impacts to housing and population.

4b. The DEIR's Failure to Address SCWA's Operation of Warm Springs Dam and Coyote Dam and Rediversion for Municipal Purposes Will Frustrate the Regulation and Does not Disclose Associated Impacts.

"An EIR may not define a purpose for a project and then remove from consideration those matters necessary to the assessment whether the purpose can be achieved."[29] Here, the prevention of stage changes that strand salmonids is an objective of the proposed project, but the SWRCB excludes the largest diversion of water in the stream system from the regulation.

The DEIR and regulation unfairly give Sonoma County Water Agency (SCWA) a free pass on the theory that its diversions are "coordinated" per the terms of Decision 1610:

> DIVERSIONS ABOVE COYOTE DAM AND WARM SPRINGS DAM
> The proposed regulation would not apply to diversions above Coyote Dam or Warm Springs Dam because those two dams are barriers to salmonid migration. Accordingly, diversions for purposes of frost protection above the dams do not have the potential to harm threatened or endangered salmonids above the dams. **In addition, any potential effects of diversions at or above the dams on salmonids below the dams would be mitigated by the large storage capacity of the reservoirs and the instream flow requirements imposed by Decision 1610. The regulation would apply, however, to water released from Lake Mendocino or Lake Sonoma and subsequently rediverted at downstream points of diversion. The uncoordinated diversion or rediversion of**

[29] *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 10.

> **water below Coyote Dam or Warm Springs Dam does have the potential to harm salmonids, despite the instream flow requirements imposed by Decision 1610, as evidenced by the fish stranding mortality event on the mainstem of the Russian River in April, 2008.**[30]

The DEIR does not acknowledge that Decision 1610 obligates SCWA to maintain minimum streamflows in the mainstems of the Russian River and Dry Creek irrespective of other downstream diversions, and SCWA failed to meet its minimum streamflow obligation during the fish stranding mortality event in April 2008. Yet the record demonstrates that SCWA would not be subject to the proposed regulation, even though it has adversely affected salmonids during frost protection periods. The failure to include SCWA's diversions will impair the effectiveness of the proposed regulation, and therefore the environmental effects of the proposed regulation have been misstated.

This intentional omission of SCWA diversions from the regulation and EIR "impermissibly truncate[s]" the project.[31] The failure to include in the regulation SCWA's releases of water from Coyote Dam and Warm Springs Dam and rediversion of water by SCWA will impair the effectiveness and feasibility of the regulation and result in significant redirected impacts to frost water users and biological resources.

5. The Regulation and DEIR Mitigation Measures do not Have a Substantial Nexus to the Regulated Frost Water Use, and Accordingly are Constitutionally Invalid.

The CEQA Guidelines section 15126.4(a)(4) provides that mitigation measures must have an "essential nexus" to a legitimate governmental interest and must be "roughly proportional" to the impacts of the project:

> Mitigation measures must be consistent with all applicable constitutional requirements, including the following:
>
> (A) There must be an essential nexus (i.e. connection) between the mitigation measure and a legitimate governmental interest. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and
>
> (B) The mitigation measure must be "roughly proportional" to the impacts of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Where the mitigation measure is an ad hoc exaction, it must be "roughly proportional" to the impacts of the project. *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

The DEIR would impose substantial costly requirements on hundreds of frost water users on the unsubstantiated assumption that their actual diversions are adversely affecting stream stage and salmonids. The rationale is that this class of diversion is presumptively "unreasonable." The SWRCB does not have evidence of a water diversion's specific, particular harm and unreasonableness. Accordingly, there is no nexus between the regulation's and DEIR's exactions on water use. The DEIR mitigation measures are not "roughly proportional" to the

[30] DEIR p. 16 (emphasis added).

[31] *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 10 (holding that the misleading data about the quantity of water that would be exported versus used within the region is an "'impermissibly truncated' project definition [that] severely distorted not only the critical project but the alternatives to the project.").

actual impact of water use because the actual impacts on stream stage and species are not known.[32]

6. The DEIR Mitigation Measures are not Feasible.

Throughout the draft EIR, the SWRCB identifies several potentially significant impacts. For example, the regulation could result in:

- Increased groundwater extraction and use.
- Construction of new or expansion of existing offstream storage facilities.
- Modification or removal of surface water diversion structures.
- Use of wind machines.
- Installation and operation of orchard heaters.
- Installation of USGS stream gauging stations.

For each of these potentially significant impacts, the SWRCB's mitigation is nearly identical: "Project proponents will comply with any mitigation measures imposed by (*fill in the blank*)." Depending upon the context, this is not mitigation. This is deferral of mitigation without standards.

In many cases, a Lead Agency may require "compliance with environmental regulations [a]s a common and reasonable mitigating measure."[33] However, this approach is permissible only when the agency has "meaningful information reasonably justifying an expectation of compliance."[34] With regard to several of the mitigation measures, the SWRCB has no "meaningful information" that reasonably justifies an expectation of compliance.

For example, with respect to groundwater pumping, the SWRCB states in mitigation measure GW-MM-1 that "groundwater pumpers shall comply with any mitigation measures imposed by state and local agencies to mitigate potentially significant impacts associated with action taken in response to the regulation." The problem with this "mitigation measure" is that the SWRCB has not identified a regulatory agency that will be responsible for mitigating any significant impacts. The SWRCB has no meaningful information that reasonably justifies an expectation of compliance with this mitigation measure. The mitigating agencies, and therefore the measures, are purely fictional. The same is true of GW-MM-2 and GW-MM-5. As such, this regulation could result in significant unmitigated impacts to aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology, hazardous materials, hydrology, land use and planning, noise, transportation, utilities services, groundwater depletion, saltwater intrusion, degradation of groundwater quality, land subsidence, and aquifer overdraft.

There is a similar problem with the mitigation measures for the use of wind machines (WM-MM-1, WM-MM-2). The installation, operation, and maintenance of such facilities are not regulated by any identified agency and therefore the impacts from their use will not be mitigated. As a result, this regulation could result in significant unmitigated impacts to air quality, biological resources, cultural resources, geology, hazardous materials, hydrology, land use and planning, noise, traffic, utilities, and aesthetics.

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[32] *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374.
[33] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308, 248 Cal.Rptr. 352.
[34] *Id.*

7. The DEIR Improperly Defers Development of Mitigation to a Later Time.

The WDMP, the central element of the regulation, is a form of mitigation to be developed after the EIR. It is impermissible to defer discussion and analysis of this critical mitigation.[35] The DEIR does not define what acceptable stage means and how a WDMP would develop a plan for ensuring acceptable stage, and accordingly the DEIR is flawed for failing to define this mitigation in the DEIR.

8. The Mitigation Measures are Overbroad and May Cause Significant Redirected Impacts.

The DEIR mitigation measures themselves have significant redirected impacts due to extensive cost of compliance. For example: measure OFS-MM-6 would require obtainment of a permit or waiver from the Army Corps of Engineers for wetland impacts without any reason to presume that a project will affect wetlands:

> Mitigation Measure OFS-MM-6
> Inclusion of the following permit terms, substantially as follows, in new or amended water right permits, may reduce potential short-term impacts to wetlands from storage facility construction activities to less-than-significant levels:
> • Prior to the start of construction, or diversion or use of water under this permit, Permittee shall obtain the appropriate permit from the United States Army Corps of Engineers and file a copy with Division of Water Rights. If a permit from the United States Army Corps of Engineers is not necessary for this permitted project, the Permittee shall provide the Division of Water Rights with a letter from the United States Army Corps of Engineers affirming that a permit is not needed.[36]

The Army Corps of Engineers will not provide a letter that a permit is not needed without the water diverter completing a wetland survey called a "jurisdictional determination," a report that often costs tens of thousands of dollars to prepare. In practice, an environmental consultant will not undertake such an effort unless required in his or her professional judgment. The added cost of compliance for this unnecessary mitigation measure was not included in the economic analysis.[37] This added cost will increase the financial pressure on agriculture and result in additional conversion of agricultural land to non-agricultural purposes. These impacts were not analyzed in the DEIR.

Other mitigation measures are undefined and overbroad such that the impacts associated with compliance cannot be assessed. For example:

> Mitigation Measure SWD-MM-3
> Project proponents **will comply with any mitigation measures imposed by the United States Army Corps of Engineers** (US ACE) and the State Water Resources Control Board to reduce potential short-term impacts to wetlands from construction activities to less-than-significant levels. Where applicable, measures will be applied on a project-

[35] *Id.* at 306-308 (EIR improperly assumed sludge disposal would be available despite evidence in record of lack of disposal site).
[36] DEIR p 106.
[37] See Appendix D to DEIR.

level basis and may be tailored in consultation with the US ACE depending on the severity of the wetland impacts.

Mitigation Measure SWD-MM-4
Project proponents **will comply with any mitigation measures imposed by the Department of Fish and Game** (DFG) to reduce potential short-term impacts to fish and wildlife from construction activities to less-than-significant levels. Where applicable, measures will be applied on a project-level basis and may be tailored in consultation with the DFG depending on the severity of the wetland impacts.[38]

These mitigation measures may themselves have significant impacts or may be so costly to comply with that they result in additional conversion of agricultural land to non-agricultural purposes.

9. The DEIR Improperly Rejects and Does Not Consider Feasible Alternatives with Fewer Environmental Effects.

CEQA requires an EIR to evaluate "alternatives that might eliminate or reduce the Project's significant adverse environmental effects."[39] There is a four-part test for suitable alternatives discussed in an EIR. Potential alternatives are reviewed to determine whether they:

1. can substantially reduce significant environmental impacts
2. can attain most of the basic project objectives
3. are potentially feasible
4. are reasonable and realistic[40]

An alternative need not fully satisfy all project objectives/purpose. The CEQA Guidelines provide that an alternative need only feasibly attain most of the project's basic objectives while reducing any of its significant effects.[41]

The DEIR correctly concludes that, other than the no action alternative, the "local stakeholder voluntary programs" alternatives are environmentally superior to the proposed project.[42] The DEIR impermissibly rejects these environmentally superior alternatives: "[n]either of these two alternatives however, fully meets the basic project objective of preventing salmonid stranding mortality."[43] A DEIR cannot reject an alternative because it does not "fully" meet the project objectives, where those objectives were drawn so narrowly as to reject all but the proposed project.[44] The SWRCB attempts to reject the local stakeholder voluntary programs alternatives by narrow criteria:

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[38] DEIR p. 112 (emphasis added).)
[39] *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 873 134 Cal.Rptr.2d 322.
[40] 14 Cal. Code Regs. § 15126.6(c).
[41] See Guidelines section 15126.6(a).
[42] See DEIR p iii ("Among the remaining alternatives, the environmentally superior alternative is the local stakeholder voluntary programs.").
[43] DEIR p iii.
[44] *See City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438 (holding that when project objectives are defined too narrowly an EIR's treatment of analysis may also be inadequate). See also Remy, et al, Guide to CEQA, p. 589 ("overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives.")

> In summary, this alternative would have less incidental environmental impacts than the proposed regulation, but this alternative does not adequately meet the objective of the proposed project. Although the local stakeholder proposals submitted to the State Water Board were detailed, none of the proposals fully met the objective and goals of the proposed project. The content of the proposals demonstrate the diversity of approaches that local groups could implement without clear direction from state and federal agencies. However, none of the programs could ensure full participation, and some programs did not provide transparency of information with public agencies. Reliance on voluntary participation is not enough to ensure all frost irrigators will work to reduce their cumulative instantaneous demand. The monitoring components of the programs would not be sufficient to prevent salmonid stranding mortality, particularly on the tributaries. In addition, local stakeholder programs are not equipped to take enforcement action should salmonid stranding and mortality occur.[45]

The DEIR could have made three simple additions to the local stakeholder voluntary program alternative – mandatory participation, transparency of information, and enforcement by the State Board – that would preserve the environmentally beneficial aspects of the alternative while addressing State Board objectives and goals. The local stakeholder voluntary programs with the above changes should be adopted as the preferred alternative and proposed project in the Final EIR.

The DEIR failed to evaluate the proposed alternative to regulate all diversions during the frost protection period.[46] As stated above, the failure to include the release of water and rediversion by SCWA will impair the regulation and result in unanalyzed environmental impacts. By comprehensively addressing all water diversions this proposed alternative regulation would feasibly attain *most* of the project's basic objectives while reducing any of its significant effects because it would be more effective in managing stream stage and preventing salmonids stranding.[47]

The DEIR failed to evaluate the proposed alternative to exclude from the regulation diversions of water from the mainstem Russian River and Dry Creek below the large municipal reservoirs. These stream reaches are already managed according to State Board-imposed minimum stream flows.[48] By excluding diversion of water from the regulated mainstem rivers that does not have an instantaneous adverse effect on stream stage, and thereby reducing the cost of compliance for a large number of mainstem water diverters, this proposed alternative regulation would feasibly attain *most* of the project's basic objectives while reducing many of its significant effects.[49]

The DEIR failed to evaluate the proposed alternative to exclude from the regulation the pumping of groundwater. The pumping of groundwater does not have an instantaneous effect on stream stage.[50] By excluding groundwater pumping that does not have an instantaneous adverse effect on stream stage, and thereby reducing the cost of compliance for a large number of groundwater

[45] DEIR p. 90.
[46] See Mendocino County Farm Bureau *et al*. Scoping Comments, p. 7.
[47] CEQA Guidelines § 15126.6(a).
[48] See Mendocino County Farm Bureau *et al*. Scoping Comments, p. 7.
[49] CEQA Guidelines § 15126.6(a).
[50] See Mendocino County Farm Bureau *et al*. Scoping Comments, p. 7.

pumpers, this proposed alternative regulation would feasibly attain *most* of the project's basic objectives while reducing many of its significant effects.[51]

The DEIR also fails to consider reducing the intensity or scope of the regulation, which would necessarily reduce all of the regulation's significant environmental impacts.

There is no evidence in the record to support the SWRCB's conclusion that the less restrictive alternatives will not achieve the program's objectives. In fact, all of the evidence in the record indicates that program objectives are addressed very effectively without a regulation in every instance where stranding mortality is known to occur. The possible effects of diversions for frost protection on the stranding events on both Felta Creek and the mainstem of the Russian River near Hopland were resolved. Furthermore, numerous improvements have been made in locations where no stranding occurred, but where there were concerns that diversions for frost protection could be harmful. These facts, thoroughly documented in the record, completely contradict the SWRCB's assertion that the project objective cannot be achieved through less restrictive alternatives.

10. Conclusions and Assumptions in the SWRCB draft EIR are not Supported by Substantial Evidence.

Many of the conclusions and assumptions in the draft EIR are not supported by substantial evidence. For example, Page 57 of the draft EIR describes a NMFS GIS layer "Potential Stranding Sites." This layer was then used in conjunction with a layer titled SWRCB Water33.sde "USDA Prime Imagery" to determine the location and acreage of vineyards upstream of "potential stranding sites."

The NMFS stranding layer shows portions of tributary creeks distributed throughout the Russian River watershed. The metadata for the potential stranding layer states:

> *The criteria used to select these locations included proximity to vineyards, presence of salmonids, and presence of Intrinsic Potential habitat. Stream segments that intersected vineyard footprints or were adjacent to the vineyards, have documented salmonid presence, and have salmonid Intrinsic Potential habitat were extracted. Intrinsic potential measures the potential for development of favorable habitat characteristics as a function of the underlying geomorphic and hydrological attributes, as determined through a Digital Elevation Model (DEM) and mean annual precipitation grid. The model does not predict the actual distribution of "good" habitat, but rather the potential for that habitat to occur, nor does the model predict abundance or productivity. Additionally, the model does not predict current conditions, but rather those patterns expected under pristine conditions as related through the input data. Thus, IP provides a tool for examining the historical distribution of habitat among and within watersheds, a proxy for population size and structure, and a useful template for examining the consequences of recent anthropogenic activity at landscape scales.*

It is important to emphasize that the "Intrinsic Potential Model" identifies general stream conditions good for salmonids under "pristine" conditions. Further, this model uses a Digital

[51] CEQA Guidelines § 15126.6(a).

Elevation Model (DEM) which has a resolution of 1 pixel = 10 meters or 32.8 feet. This means that no topographic feature smaller than 10 meters is part of the model. The creeks evaluated with this method rarely have salmonid habitats (riffles, pools, gravel bars) larger than 10 meters in length. Additionally, the DEM is created from USGS topographic maps typically at a scale of 1:24,000. These maps were originally created using photogrammetric methods from aerial photos and involve very little field verification. This general level of topographic data and mean annual precipitation data were then used with another GIS layer (SWRCB Water33.sde) that is not accessible to the public but can be assumed to be vineyard areas to create a map of "potential stranding areas." The only criterion used was vineyards near stream channels. No information regarding water sources or even if water is used for frost control was included.

According to the NMFS accounts of the 2008 strandings on the Russian River near Hopland, 10 one-inch steelhead were stranded in three to six-inch gravel and cobble due to a 1cm/hr drop in water stage. An analysis using data layers with a resolution of 32.8 feet and a model that looks at landscape scale patterns in creeks cannot be used to predict where stranding will occur due to such miniscule changes in stream stage. This is an example of a generalized, largely data-free analysis. This analysis was created to justify the assumption that the incident, which occurred in 2008, in a drought year with a very cold spring, occurred over a much larger area. The potential stranding GIS layer is an inadequate database to determine the acreage of vineyards that may cause stranding and therefore are affected by the frost regulation.

On a related note, page 6 of the Statement of Reasons requires a detailed site-specific approach "for determining the stream stage that would prevent stranding mortality on gravel bars, side channels and pocket pools along river margins." This approach requires site specific transects at potential stranding locations and stream flow gauging. If this level of site specific evaluation is required to demonstrate stranding potential, how is it that NMFS can judge this feature of the Russian River channel with no site specific field work? Further, how is it that NMFS can determine stranding potential using GIS layers with a 10-meter resolution?

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III. DISCUSSION OF REGULATION

In addition to the defects in the SWRCB's draft EIR, the SWRCB has failed to meet a variety of legal hurdles necessary to adopt a regulation of such broad scope and consequence.

11. This Regulation is Not Necessary

In order to adopt this regulation, the SWRCB must find that the regulation is legally "necessary." The necessity must be supported by "substantial evidence." Government Code section 11350 provides:

> (a) Any interested person may obtain a judicial declaration as to the validity of any regulation…by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure….The regulation…may be declared invalid for a substantial failure to comply with this chapter….
>
> (b) In addition to any other ground that may exist, a regulation…may be declared invalid if either of the following exists:
>
> > (1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

"Substantial evidence" has been defined in the administrative context as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion," or "evidence of ponderable legal significance…reasonable in nature, credible, and of solid value."[52]

In addition, the Office of Administrative Law (OAL) must agree with the SWRCB's determination. Government Code section 11349.1 provides:

> (a) The office shall review all regulations adopted…and submitted to it for publication in the California Code of Regulations Supplement…and make determinations using all of the following standards:
> (1) Necessity
> * * *

In various documents related to this regulation, including the draft EIR, and the draft Initial Statement of Reasons, the SWRCB states that the "necessity" for the regulation is based upon a letter dated February 19, 2009, from NMFS, which requests that the SWRCB take immediate action to address concerns that high instantaneous demand for water for frost protection contributes to significant salmonid mortality. NMFS based this letter upon two alleged strandings that occurred in 2008, one on the Russian River mainstem near Hopland and one on Felta Creek, a small tributary to the Russian River in Sonoma County. Of these two strandings, NMFS claims 10 fish were found stranded in the mainstem Russian River below Hopland, and 31 fish were found stranded on Felta Creek, a tributary of the Russian River. While every reasonable effort should be made to preserve endangered species, the regulation being offered by the SWRCB is legally unnecessary because it will do nothing to preserve the endangered salmonids in the Russian River watershed. As such, it is not supported by "substantial evidence"

[52] 1 Cal. Administrative Mandamus (Cont.Ed.Bar 3rd ed. 2010) §6.171, p. 298.

for the reasons outlined below.

The first reason this regulation is not necessary is that the real cause of the drop in streamflow in April of 2008 near Hopland was the failure of the Sonoma County Water Agency (SCWA) to comply with the terms of its water right permits. In Decision 1610, the SWRCB made the following term a part of SCWA's permit 12947A:

> 18. For the protection of fish and wildlife, and for the maintenance of recreation in the Russian River, permittee shall pass through or release from storage at Lake Mendocino sufficient water to maintain:
> ***
> (B) The following minimum flows in the Russian River between the East Fork Russian River and Dry Creek:
>
> (1) [During normal water years]
> From April 1 through May 31 185 cfs

However, during the entire month of April, SCWA failed to meet this permit term on 24 of the 30 days, with one day, April 21, supplying a flow of only 123 cfs, or only 66% of the required amount. Please see attached as **Exhibit C** the CDEC report of daily discharge on the Russian River at Hopland during the month of April 2008 and a graph, generated by CDEC, showing that the SCWA failed to meet its permit term 80% of the time during the month of April, yet no enforcement actions have been taken against SCWA.

While many diversions may exist between the East Fork of the Russian River and Hopland, the SCWA is still required to meet these flow requirements. Section 15.14, page 44, of D-1610 provides as follows:

> Mendocino Improvement District asserted in the hearing that landowners within its service area have non-appropriative or riparian water rights. We note that all of SCWA's permits herein are subject to any prior water rights. Consequently, if the landowners have any water rights in addition to those appropriative rights issued by this Board that are senior to SCWA's, such rights are not impaired by this decision.

Put differently, SCWA must meet its minimum instream flows regardless of other senior and riparian diverters on the system. This position is bolstered by the fact that on page 41 of D-1610, the SWRCB removed permit term 68 for other post-1949 appropriative water rights (which prohibited these diverters from diverting when the only water in the system matched SCWA's releases) and made SCWA solely responsible to meet the instream flows stipulated between it and the Department of Fish and Game. Therefore, why is the SWRCB imposing this regulation on frost diverters when the SCWA is obligated under D-1610 to meet instream flows?

The second reason this regulation is not necessary is that whatever strandings may have occurred do not justify the basis for the regulation. Based upon the results of several Public Records Act requests and Freedom of Information Act requests, the regulation is based upon two strandings—both in 2008. Without minimizing NMFS' claim that 41 endangered fish were lost, but based upon these 41 fish, the SWRCB has proposed a regulation that spans 1,778 miles of stream systems, or 1,485 square miles in two different counties, that is conservatively projected to cost $10 million over three years.[53] This is a grossly disproportionate and unreasonable response that

[53] See Table 4.12, Economic Impacts of the Proposed Russian River Frost Regulation, May 2, 2011, Appendix D to the SWRCB draft EIR.

will do nothing to improve habitat conditions for fish, particularly when any contribution diversions for frost protection may have had on the only two documented instances of stranding have been fully resolved.

Recognizing the lack of justification for such a broad regulation, and in an effort to undermine the remedial actions undertaken by wine grape growers to address the strandings, NMFS has developed a paper, Biological Context of the Spring 2008 De-Watering Event in the Upper Mainstem of the Russian River, dated March 2011 (see **Exhibit D**) (the "NMFS Document"). NMFS alleges in this document that the 10 steelhead fry found stranded in the Russian River in 2008 actually mean 25,872 fish were stranded. The NMFS Document is unsigned and provides no references or bibliography to support the assumptions or conclusions within it. The methodology employed in the NMFS Document is without merit for several reasons.

- One of the assumptions employed in the NMFS Document is that a stage change of 1 centimeter per hour caused the stranding of the steelhead fry, but no reference is made that would justify that statement. In fact, published data on the subject suggests that a stage change of up to one inch (2.4 centimeters) per hour is safe to prevent stranding of steelhead fry (Hunter 1992)(see page 8 of **Exhibit E**). This same study was incorporated into the Biological Assessment for Flood Control Operations at Coyote and Warm Springs Dams and represents the best available science on stage changes (see **Exhibit F**).
- The NMFS Document assumes 25 percent of the Russian River channel is uniform enough to cause stranding, yet the Russian River is not uniform in width to depth ratio, sinuosity or bed composition over the 28 miles in question. Extensive fieldwork is needed to document where conditions mimic those found just downstream of the USGS Hopland Gage and have the same hydrologic impacts. The Hopland gage is located in a nearly straight, partially confined channel in order to provide the best conditions for stream flow measurement. The downstream gravel bar where the stranding occurred is in this straight section. This reach is not representative of most of the 28 miles of the Russian River channel.
- The Hopland gage is midway on the 28-mile reach and the 1cm/hr stage change is the result of cumulative water diversion along the 14 miles upstream of the gage. It is incorrect to assume that a 1cm/hr stage change occurred in other upstream areas without completing a detailed hydrologic and hydraulic modeling analysis.
- The field notes from the NMFS biologist note that the juveniles were stranded in relatively large gravel/cobble of 3-6" rocks. It may be that these large cobbles block the ability of the small juvenile fish to swim to deeper water. The microtopography of the particular gravel bar may be a major factor in where juvenile salmonids strand. The field notes indicated the NMFS biologist looked for stranded salmonid juveniles for about an hour but no others were found, making the cobble size a likely cause of the problem.
- In the "Potential Stranding Layer" created by NMFS, none of the 28 miles of the Russian River is shown. It is not clear if the river channel was included in the analysis or if there is a major contradiction between these two evaluations.

Surprised by the lack of supporting documentation for the NMFS Document, we contacted David Hines of NMFS, who admitted being the primary author of the document. As he was the primary author, we requested supporting documentation for the assumptions and conclusions made in the paper. His answer was that he had no supporting documentation for the assumptions and conclusions. Please see **Exhibit G**, which documents our conversation with Mr. Hines. Aware that the SWRCB had posted the NMFS Document on its website as part of its rulemaking file, and that it was therefore intending to rely upon it as justification for the regulation, we had this

paper reviewed by Wagner & Bonsignore, Consulting Engineers, and Douglas Parkinson, a fishery biologist.

Based upon Wagner & Bonsignore's analysis, the NMFS Document provides assumptions and conclusions that are not supported by any evidence in the record (see **Exhibit H**). Specifically:

- based upon the observations: the number of fish assumed to be stranded is 5 per hundred feet, not 10 per hundred feet;
- the authors assume a linear relationship between stage height and the observed fish mortality rate, which is unsupported by any observation;
- the authors assume that 25 percent of the 28 miles of river reach is stranding habitat, but such assumption is not supported by any observation;
- the assumptions made in the NMFS Document were not based on any scientific protocol or discernible basis;
- although 10 fish were found stranded, there is no evidence or context to assume the stranding was the result of a stage change due to frost diversions or some other cause;
- the SWRCB regulation proposes an impossible standard to comply with since it does not consider other possible causes of stranding.

Douglas Parkinson visited the stranding site and numerous other locations on the Russian River for three days and was unable to corroborate any of NMFS' assumptions or conclusions (see **Exhibit I**). Of note:

- the assumption that there was an average stranding density of ten fish per 100 feet appears without merit; and,
- the assumption that 25% of a 28-mile stretch of the Russian River provided habitat features similar to the Hopland stranding site is unsupported and unreliable.

Since none of NMFS' assumptions or conclusions can be verified, it should not be used as evidence of anything in the administrative record, except for the lack of science supporting the need for the regulation and NMFS' inability to convert meters into feet.

The third reason this regulation is not necessary is that the whole need for the regulation has been fabricated. If a regulation was truly necessary, it would not have been necessary for NMFS and the Division of Water Rights to jointly develop a basis for the regulation, while at the same time ignoring SCWA's permit violations. As discussed above, the SWRCB states that the need for the regulation is based upon a letter dated February 19, 2009, from NMFS. The problem with this letter is that it is the product of NMFS ignoring its enforcement duties and instead allowing an existing Section 7 consultation to be completed, and the Division of Water Rights deciding to override an effective collaborative process so that it may expand its jurisdiction.

The following timeline shows that NMFS' early efforts at solving the problem via collaboration were scuttled by select staff from the Division of Water Rights and NMFS in an effort to use the strandings to justify the expansion of their jurisdiction. This was accomplished by keeping evidence unavailable to stakeholders, exaggerating the extent of the issue, and creating contrived regulatory pressure between NMFS and the Division of Water Rights.

This timeline was constructed from information gathered from multiple FOIA requests. This timeline follows the events that surrounded the 2008 occurrence on the main stem of the Russian River near Hopland.

On April 20, 2008, NMFS biologist Tom Daugherty finds steelhead fry stranded near the mouth of McNab Creek and reports his observation to Special Agent (SA) Dan Torquemada:

From: Tom.Daugherty@noaa.gov
Sent: Monday, April 21, 2008 10:12 AM
To: Dan.Torquemada@noaa.gov
Subject: Russian River steelhead fry

Attachments: 100_1657.JPG; 100_1665.JPG

100_1657.JPG (2 MB) 100_1665.JPG (782 KB)

Dan,

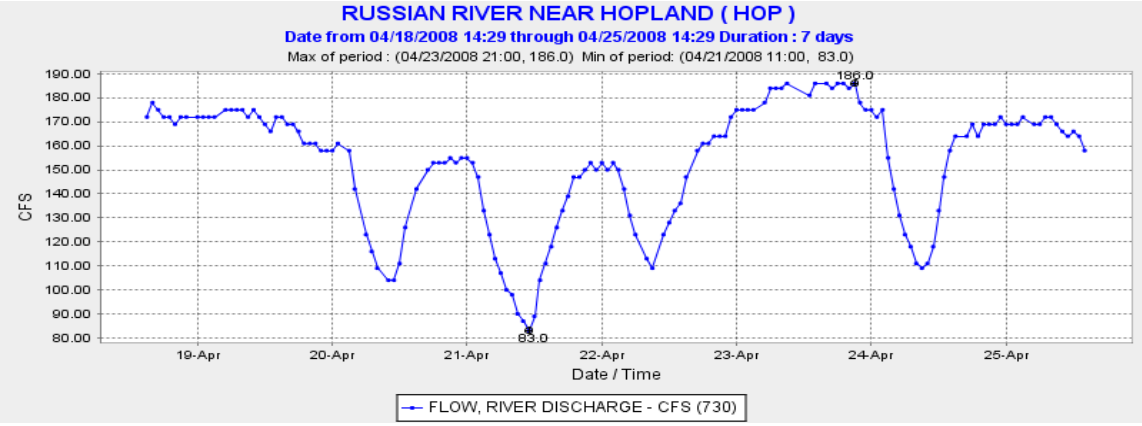
attached are a couple of pics of my observations on 4-20-08. I will put all of my info together and drop it off to you this wednesday if thats ok. td

Although 10 fish were found, there is no real evidence indicating the cause; instead, it is simply assumed to be due to a drop in stream stage. Within one day of the initial observation, SA Torquemada declares the issue to be "one of the biggest abuses of water in our region":

From: Dan Torquemada
Sent: Tuesday, April 22, 2008 3:40 PM
To: Derek Roy
Cc: Don Masters; Martina Sagapolu; Dayna Matthews
Subject: Frost Protection Pumping

Derek,
There was another very significant frost event yesterday that resulted in a fish kill (listed steelhead), this time on the upper Russian River (main stem) near Hopland/Ukiah. This is a very complicated issue, as there are many landowners that pump directly from the Russian River for frost protection, for both vineyards and pear orchards. These events can be sporadic, and in some years, depending on spring precipitation, they don't occur at all. Nonetheless, frost protection pumping continues to be one of the biggest abuses of water in our region, and a major problem for listed fish. The problem can no longer be ignored. I have requested assistance from HCD, and would like you to work with Stacy Li

NMFS does not allow anyone to see the data collected by Mr. Daugherty under the premise that the information is part of an "on-going investigation." In lieu of the actual field data, the output from the USGS gage at Hopland becomes the iconic image representing the issue:



Following the events of April 2008, NOAA and CDFG discuss responsibility:

Derek Roy

From: John Mullin
Sent: Thursday, July 31, 2008 7:55 AM
To: Derek Roy
Subject: Re: take

Isn't SCWA responsible for maintaining adequate/mandated flows? It seems like this could have been prevented by close monitoring of the Hopland gauge. I know it takes 4 hours for a Coyote releases to reach Hopland; but they reacted at least 24 hours late.

Although Sonoma County Water Agency (SCWA) is legally responsible for maintaining stream flows, no regulatory pressure is asserted against SCWA. In 2008, SCWA was working with Bill Hearn at NMFS to complete its decade-long Section 7 Consultation. Rather than investigate the underlying cause of the ESA violation, and appropriately incorporate that violation into the Section 7 Consultation, SA Torquemada effectively quashes any investigation. In an email to Dick Butler, SA Torquemada addresses Bill Hearn's concerns about his enforcement efforts:

Dan Torquemada

From: Dan Torquemada
Sent: Tuesday, December 02, 2008 12:14 PM
To: Dick Butler
Subject: Re: Meeting With SWRCB

will move forward with this project. As discussed in past coordination meetings with you and others, OLE will not intentionally pursue an investigation that will interfere with an ongoing consultation by anyone on your staff.

I hope this information helps. Feel free to call me or come to my office anytime if we need to discuss this further.
Dan

SA Torquemada then forms the "Frost Protection Taskforce (FPT)". The FPT is directed to deal with the issue collaboratively, instead of via enforcement:

Dan Torquemada

From: Dan Torquemada
Sent: Tuesday, December 02, 2008 12:14 PM
To: Dick Butler
Subject: Re: Meeting With SWRCB

Dick,
Here's some background. Seven months ago, following the extensive frost protection and subsequent fish kills on the Russian River, I asked Derek Roy to look into this ongoing problem. He has done a fantastic job, and I am very impressed with both his enthusiasm and organization skills, especially when you consider that he has just started his career with OLE. Unfortunately, I was off work 5 months, and part time the past 2 months due to a serious health issue I am dealing with. Yesterday was my first involvement with the group.

Our agents have been directed by top SWD management to employ a collaborative approach when dealing with this type of problem due to a past investigation in the Northwest that left NOAA with a black eye.

Under the direction of SA Torquemada, SA Derek Roy organizes several FPT meetings in the fall of 2008. By December 2008, the spirit of collaboration begins to foster "on the ground solutions" to the issue:

From: Derek Roy [derek.roy@noaa.gov]
Sent: Monday, December 15, 2008 10:16 AM
To: Tracie Nelson; Wayne Austin Welch; dwilson@dfg.ca.gov; Corinne Gray; Call Nicholas; Bryan McFadin; Sean White; slotad@co.mendocino.ca.us; Dan Torquemada; mking@tu.org; Matthew J Deitch; sriske@dfg.ca.gov; John Mullin; Andrew Baker; jlaugesen@dfg.ca.gov; Tom Daugherty; Jeremy Sarrow; David Hines; David_Koball@B-F.com; carrebrown@pacific.net; Joseph.J.Dillon@noaa.gov; deitch@cemar.org; mbowen@scc.ca.gov; bjohnson@tu.org; Brian.Cluer@NOAA.GOV; William Hearn; Vicky Whitney; Call Nicholas
Subject: Re: Frost Prevention task Force Meeting

0930 at the Santa Rosa Federal Building, 777 Sonoma Ave Santa Rosa, CA, in room 215. We will have our draft of the protocol outlining the reporting requirements for the industry for the group to review. We will also have some good candidates for off stream storage identified. I am also creating a mission statement for the group so we can document our long and short term goals and make sure we stay on track to achieve them. I know we also

However, the scope and attendance of the FPT begin to expand. Notably, Ms. Vicky Whitney of the California State Water Resources Control Board, Division of Water Rights, becomes involved. Shortly after her involvement, and despite the on-the-ground progress of the FPT and OLE directives, the tenor of the FPT changes from collaboration to regulation:

From: William Hearn
Sent: Thursday, February 12, 2009 5:55 PM
To: Dan Torquemada; Dick Butler
Subject: Re: Frost Meeting

Dan Torquemada wrote:
> Bill,
> Sorry you weren't able to stay for the entire meeting yesterday.
> After you left, we had a very good meeting with the other agency
> personnel only. Vicky Whitney got her counsel on the conference line
> (Andy Sawyer), and we had a discussion regarding potential emergency
> regulations for this year. We will be moving forward with an
> enforcement "offshoot" task force and monitoring plan. Whitney has
> offered for her agency to take the lead in this effort, but we are

With this new focus, NOAA Water Rights Specialist David Hines also becomes involved:

From: William Hearn
Sent: Thursday, February 12, 2009 5:55 PM
To: Dan Torquemada; Dick Butler
Subject: Re: Frost Meeting

monitoring. Hopefully, in his new role as water rights specialist, David Hines will also be available to assist with your program.

Ms. Whitney suggests to Mr. Hines that NMFS send the SWRCB a letter requesting that emergency regulations be adopted:

From: David Hines <David.Hines@NOAA.GOV>
To: Whitney, Vicky <VWHITNEY@waterboards.ca.gov>

Sent: 2/18/2009 11:42:43 AM
Subject: Re: Letter

Vicky Whitney wrote:
> Hi David
> I received your voice mail regarding the letter that we discussed NMFS sending us requesting we adopt emergency regulations prohibiting frost protection. I am in Utah

Shortly thereafter, NMFS sends a letter to the SWRCB urging immediate regulatory action.

We are concerned that water diversions, that may otherwise be legal under California water law, will be causing significant salmonid mortality. We, therefore, urge the SWRCB to take immediate action, such as implementing emergency regulations, to protect this important public trust resource from further harm. If you have any questions or comments concerning the contents of this letter, please contact David Hines at (707) 575-6098.

Sincerely,

(for)

Steven A. Edmondson
Northern California Habitat Supervisor

Up until this point, the need for a regulation that would cover 1,778 miles of stream systems and 1,485 square miles in two different counties is based upon two isolated strandings. Recognizing the lack of justification for such a broad regulation, NMFS, CDFG, and SWRCB craft an elaborate multi-agency enforcement plan in an effort to substantiate the need for a regulation:

From: Vicky Whitney
To: David Hines
Subject: Re: Frost Regs and Enforcement Efforts
Date: Wednesday, January 20, 2010 9:49:39 AM

Thanks and thanks for your help. We are still going to need NMFS assistance in developing the statement of reasons that we are required to provide to the Office of Administrative Law. Again, it is basically the problem description. THe more data, the better. I hope that the enforcement effort this spring provides additional justification.

However the hunt for a "smoking gun" was fruitless in 2009 and 2010:

From: David Hines [David.Hines@NOAA.GOV]
Sent: Wednesday, April 07, 2010 11:06 AM
To: Dan Wilson; Thomas Holley; Cluer, Brian; Steve Edmondson; Katherine Washburn; Macedo, Rick; Tracie Nelson
Subject: Frost Survey Log
Attachments: David_Hines.vcf

D. Hines' Frost Survey Log, April 6:

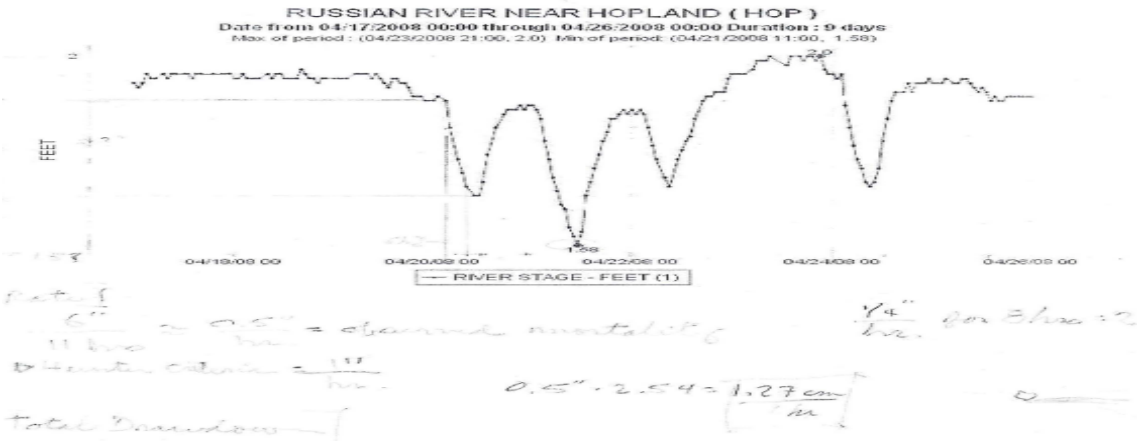
I met Corrine Gray in lower Redwood Creek at 7:30am. On my way in via Hwy 101 and Chalk Hill Road, I saw most vineyards that were set up for it, either spraying with overhead sprinklers or using wind machines.
Corrine said most vineyards in Knights Valley were using their overhead sprinklers. Flows in both Maacama and lower Redwood were fairly high from the recent rains. I thought at first that lower Redwood might have been drawn down a couple of inches, but then could not discern the change from natural flow recession. Stage did not appear to change from 7:30am to 2:00pm. Beginning at 7:30am, we walked several hundred feet of stream and saw no evidence of fish stranding. We returned later in the day and took flow measurements and water depth

From Tracie Nelson at CDFG:

From: David Hines [David.Hines@NOAA.GOV]
Sent: Wednesday, April 07, 2010 11:06 AM
To: Dan Wilson; Thomas Holley; Cluer, Brian; Steve Edmondson; Katherine Washburn; Macedo, Rick; Tracie Nelson
Subject: Frost Survey Log
Attachments: David_Hines.vcf

Valley were frost temps actually reached during this event. I sent an email out that afternoon with greater detail of this effort. Unfortunately, I do not currently have access to this email due to an email account malfunction (temporary). No obvious effects were noted at any of the three sites. No other significant frost events followed in the Ukiah/Hopland area during the period March 15 through May 31.

During the same period of time, NMFS and DFG continue to analyze the gage data:



The analysis shows that the rate of drawdown in Hopland was substantially less than the critical drawdown rates the most stringent publications NMFS could find in their search for scientific literature and justification for the proposed regulation... (Document is from page 518 of FOIA request from NMFS):

Review of Ramping Rates

60 cm/hr: High range of Bradford 1995 study = >30% stranded (day)
>18 cm/hr: No correlation with stranding frequency in reservoirs (Bell 2008)
6 cm/hr: Low range of Bradford 1995 study = <10% stranded (day)
<5 cm/hr: "natural fluctuation in natural rivers" (Hunter 1992 in Bell 2008)
2.4 cm/hr: Threshold to avoid stranding recommended in Hunter (1992)
1.3 cm/hr: Approximate ramping rate observed at the Hopland gage on April 21, 2008
??: 2004, 2005 gage data in Maacama Creek (Deitch 2006)

Other analyses find the flow reductions observed during the frost events of April 2008 (6 to7 cfs/hour) were 75% lower than the ramping rates NMFS authorized in the 2009 Biological Opinion for the same river:

"To protect spawning gravel and juvenile salmonids within the Russian River and Dry Creek, the Corps developed interim guidelines (Corps 1998) for release changes with technical assistance from NMFS and CDFG (Table 3).

Table 3. Maximum ramping rates for CVD and WSD.

Reservoir Outflow	Down Ramping	Up Ramping
0-250 cfs	25 cfs/hour	1000 cfs/hour
250-1,000 cfs	250 cfs/hour	1000 cfs/hour
>1,000 cfs	1,000 cfs/hour	2000 cfs/hour

Moreover, the flow reductions observed during the frost events of April 2008 (6 to7 cfs/hour) were about half (one inch is equal to 2.54 cm) of the ramping rates discussed in the Biological Assessment for the Coyote and Warm Springs Dam:

Table 2-25 Rates of Stage Change Based upon Hunter (1992) and Life History Stages for Salmon and Steelhead in the Russian River

Season	Rates
March 1 to July 1	1 inch/hour
June 1 to November 1	2 inches/hour

Rather than recognize the ramping rates before and during the 2008 occurrence were well below the authorized rates, and well below the standards set by published criteria (and look elsewhere for the cause of the strandings), the SWRCB and NMFS continue to push for regulation. In response, the Upper Russian Stewardship Alliance (URSA) spearheads the development of a compensatory release program, improved gauging and a network of offstream storage reservoirs at a cost of over $5M.

The combination of tools further reduces fluctuation rates and amplitude during frost protection. However, at a November 2009 SWRCB workshop NMFS deems the efforts to be "not commensurate with the scope and magnitude of the problem."

In February 2010, the California State Farm Bureau filed a Freedom of Information Act (FOIA) request for the field data collected by NMFS in an attempt to witness the "scope and magnitude of the problem." The request was again denied under the "on-going investigation" premise.

During the same period, Congressman Mike Thompson also asks NMFS for the data. Congressman Thompson's efforts are also thwarted even though NMFS had previously identified "transparency" as an "area for improvement" (November 2009). FOIA documents hint at the actual reason for the denial:

Subject: Russian River Issues
From: "Tanya.Dobrzynski" <Tanya.Dobrzynski@noaa.gov>
Date: Fri, 12 Feb 2010 16:30:37 -0500
To: Rod Mcinnis <Rod.Mcinnis@noaa.gov>, Chris Yates <Chris.Yates@noaa.gov>, Steve Edmondson <Steve.Edmondson@noaa.gov>

Hi-

I was skiing last week while apparently this issue heated up with Thompson's office. My understanding is Jonathan Birdsong has been pushing for a report of the #s of fish killed in the 2008 and 2009 fish kills due to frost protection measures. .or something like that. I have the actual #s but imagine they could spark some controversy so want to make sure they can be released.

Can we discuss this soon? Birdsong is chomping at the bit for this info. and the call btw Rep. Thompson and Dr. L last week apparently didn't go so well. Do you all have a few minutes after the Klamath briefing today?

Tanya

A year later, the nearly three-year-long "on-going investigation" is closed. Sean White of URSA asks SA Torquemada for the data. At this time, URSA is continuing to coordinate the development of offstream storage and would like to use the data to rank projects. Even though the investigation is officially closed, SA Torquemada is unwilling to share the data and directs Mr. White to file a FOIA request:

On 2/9/2011 10:47 AM, Dan Torquemada wrote:

> Sean,

> We'll need to follow standard Freedom of Information Act Protocol (FOIA).

> To do this, please contact Paula.Rohde@noaa.gov

> Best of luck.

> Dan

Mr. White requests the following:

Date/days/location of all frost-related surveys

Number of days fish not found, locations, date

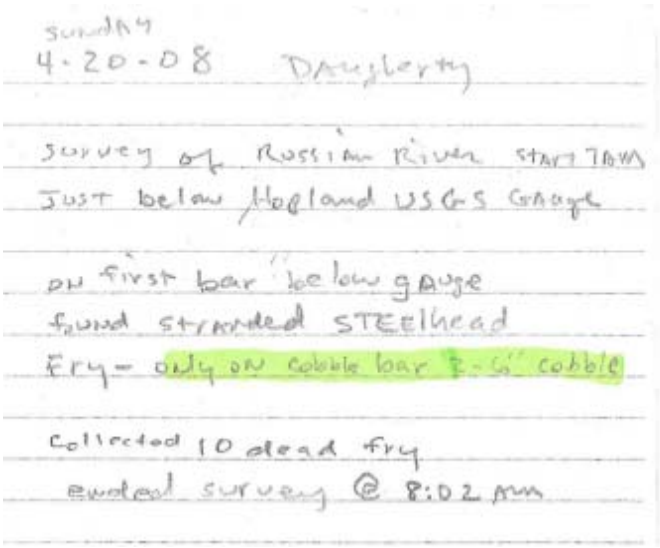
Number of days fish found, locations, life stage, condition, date

Any and all related emails

Any and all related correspondence, reports, memos, notes, or agendas

Any and all related photos or videos

Mr. White's employer, Russian River Flood Control (RRFC) pays $1636.00 in reproduction fees for the FOIA request. RRFC receives over 1500 pages of material including RRFC Board packets, unrelated material, and numerous blank pages. Buried within the materials is a single page of field data from Tom Daugherty of NMFS, and his 2008 survey. The entire effort is based on 10 juvenile fish:


Sunday
4-20-08 Dougherty

Survey of Russian River start Town
just below Hopland USGS Gauge

on first bar below gauge
found stranded STEELhead
Fry- only on cobble bar 3-6" cobble

Collected 10 dead fry
ended survey @ 8:02 AM

It is important to note that Mr. Dougherty specified the cobble size where the fish were stranded. Fish were not found on the more prevalent gravel bars, but in isolated areas where the topography created residual pools:

This photo taken on April 20, 2008, was used to document the "impacts" observed that day by showing the dewatered river margins, but where no fish were found:

This photo was taken on January 26, 2011, following a routine reservoir release change that was approximately 50% of the maximum rate approved by NMFS in the BO. The dewatered margin is larger than the dewatered margin attributed to frost:

Knowing that the FOIA request would reveal that the entire effort was based on a one-time observation of 10 juvenile steelhead, NMFS attempts to magnify the 2008 occurrence by preparing the ***Biological Context of the Spring 2008 De-Watering Event in the Upper Mainstem of the Russian River*** in March of 2011.

This report, drafted by Mr. Hines, ignores the noteworthy differences in the stranding substrate, and turns an undocumented percentage of 50 to 75 meters into 100 feet and 25% of 28 miles. The number of stranded fish is further amplified by multiplying these assumptions by a series of

additional unsupported variables. The output of the dubious calculation exaggerates 10 fish in one spot on one day into 25,872 fish over numerous days and locations:

Table 1. Explicit assumptions used to derive estimates of the total number of salmonids killed in the upper Russian River mainstem during the 2008 frost season.

Event Dates	# of Events	Severity	Severity Index	Fish Density	Reach Length	% stranding habitat	Estimated # of Fish
3/23-4/16	10	Less	0.25	2.5/100ft	28 miles	0.25	9,240
4/20	1	Observed	1	10/100ft	28 miles	0.25	3,696
4/21	1	Most	1.5	15/100ft	28 miles	0.25	5,544
4/22	1	Equal to obs.	1	10/100ft	28 miles	0.25	3,696
4/24	1	Equal to obs.	1	10/100ft	28 miles	0.25	3,696
						Total Fish Kill:	**25,872**

When questioned by Mr. White on the data used to develop the assumptions, Mr. Hines states that there was no data to support the calculations:

Date: Tue, 31 May 2011 15:55:03 -0700
From: David Hines <David.Hines@noaa.gov>
Subject: Re: Hopland report

To: Sean White <rrfc@saber.net>

Sean,

The answer to each of your questions is basically the same: Since there were no data on those variables of interest, we used our best professional judgment to reasonably and conservatively define them. These were clearly stated as assumptions in the report.

David

On 5/18/2011 4:35 PM, Sean White wrote:

> David:
>
> I am interested in the supporting basis for some of the multipliers used to derive 25,872. Based on the information I received from my FOIA request, it appears that the only actual data for this calculation is Tom's single observation of 10 fish.
>
> If that is the case:
>
> How did you determine the relevant impacts of other (severity index) with out validation of the relationship?
>
> How did you determine that the fish density of 10 fish in 100 feet was representative of all 28 miles?
>
> How did you determine that the percentage of stranding habitat was 25% of the 100 feet? There was no ratio or percentage in Tom's note.
>
> How did you determine that this percentage was representative of all 28 miles?
>
> Sorry to be a pain in the neck but 10 to 25k is quite a leap, trying to get a feel for how you got there.
>
> Sean

In other words, "we have no evidence, so we guessed;" and a poor guess at that, based upon our review of the NMFS Document in **Exhibits H** and **I**.

In sum, the need for the regulation has been contrived by: (a) ignoring SCWA permit violations for political reasons, (b) undermining an effective collaborative approach, (c) failing to find any additional basis for the regulation, (d) refusing to turn over public documents to the public, and (e) creating a scientifically indefensible document that purports to show a basis for the regulation.

We recognize that special status fish were lost in April 2008. However, the actual physical evidence, scientific literature, and the 2009 BO strongly suggest the role that frost protection had, if any, in this event was smaller and more isolated than individuals from NMFS and SWRCB have alleged. Since 2008, efforts to remove frost protection from *any* role in either event have been completed through non-regulatory efforts driven by cooperation (see fourth reason immediately below). There is no evidence to support the contention that these two disparate events warrant broad, basin-wide regulation. There is evidence to support that when identified, problems can be resolved through cooperation, as shown by the results of the FPT. The fisheries and the public would be best served if this blind pursuit of a regulation was abandoned, and replaced by the "collaborative approach" originally advanced by the NMFS Southwest Division.

The fourth reason the regulation is not necessary is that significant improvements have been completed that remove frost protection from playing any role in future strandings. Consider the following:[54]

- The April 2008 stranding of ten fish on the Russian River near Hopland was allegedly related to a 0.39in/hr drop in flow (~ 83 cfs) at this location (see **Exhibit C**). Since this time:
    - Frost diversions have been coordinated with the Sonoma County Water Agency (SCWA) and the Russian River Flood Control District. This coordination will allow frost diversions to be considered when releases are made from Coyote Dam.
    - Several diverters who were pumping directly from the Russian River above Hopland in 2008 have built, or are in the process of building, reservoirs that will reduce the instantaneous demand on the Russian River by 91.6 cfs in all future years. We have attached as **Exhibit J** a table summarizing these construction projects and their expected reduction in demand. In addition to the capital costs outlined in the summary, many of these growers had to remove several acres of valuable wine grape vines in order to build the off-stream ponds. This information was originally provided to the SWRCB by the Russian River Frost Program's PowerPoint presentation at the November 18, 2009, SWRCB workshop, but has been supplemented with additional new information.
    - A new USGS gauge has been installed at Talmage, which allows for closer monitoring of Russian River flows during frost events that in turn allows for efficient releases from Coyote Dam thereby minimizing stage changes.
- The April 2008 stranding incident on Felta Creek was allegedly caused by one direct diverter frost protecting four acres of vineyard.
    - The pump used by the diverter has been removed from Felta Creek and

[54] This information has been summarized from the Russian River Frost Program Group's Power Point presentation made to the SWRCB on November 18, 2009. It is incorporated by reference.

replaced with a groundwater well that pumps water into an offstream reservoir.

These efforts have resolved any legitimate concerns SWRCB and NMFS may have had. As evidence, note that there have been no legitimate claims of frost-protection-related strandings on the mainstem of the Russian River below Coyote Dam or Felta Creek since 2008. In fact, attached as **Exhibit K** are declarations from several individuals who live along various tributaries that have never seen stream stage fluctuations due to frost protection activities, but have seen extreme fluctuations due to natural causes, some of which have resulted in naturally-caused strandings on those tributaries.

In addition to these corrective measures, it is important to recognize the 2008 frost event was extreme and rare. The occurrence of both low flows (<200 cfs at Hopland) and frost (<32 degrees) has only occurred in five of the last nineteen years, and for a total of sixteen days during these same five years. Both before and after 2008, there is no evidence to suggest frost-related strandings are occurring elsewhere in the Russian River watershed. However, growers are nevertheless working to manage their diversions and prevent any future conflicts with instream beneficial uses.

The fifth reason this regulation is not necessary is that Sonoma County already has an effective program in place. On February 15, 2011, the Sonoma County Board of Supervisors approved a frost protection ordinance that requires growers to disclose the number and type of water diversions used for frost protection, the acreage they frost protect with water, sources of water, rate of water application and water storage type. Anyone who uses water for frost protection must register with the County. A copy of the registration form is attached as **Exhibit L**. This registration will ensure 100% participation in the program. Once registered with the County, they become part of a monitoring program administered by a non-profit organization, the Russian River Water Conservation Council (RRWCC). The RRWCC is already administering the program for the County, and has already installed several gauges in streams identified by NMFS as "at risk" stream systems. All the information collected will be provided to a Science Advisory Group that will then provide recommendations to the RRWCC to address any frost protection and fishery conflicts. This program is up and running without the need for the incredibly blunt instrument the SWRCB is wielding.

The sixth reason this regulation is not necessary is that in its current form, it is simply unworkable. The methodology and the requirements imposed show that they were drafted by someone with little scientific understanding, and the data collected, if the methods required by the SWRCB are employed, will be worthless.

Some of these methods are described on pages 6 and 7 of the Statement of Reasons. These pages describe the method to be used when preparing the stream stage monitoring program. Generally, this method depends upon the placement of stream flow gauges in numerous locations where NMFS determines a potential for stranding could occur. This approach requires site specific transects at potential stranding locations and stream flow gauging. While the Statement of Reasons and the regulation discuss establishing a stream stage monitoring program, the site specific transect approach will require that the gauge be at the transect site. Otherwise the stream stage stations will need to be rated for discharge as are most stream flow gauging sites. This additional work will easily increase the costs of the gauging by 100%. Furthermore, it is highly

unlikely that these locations will have the features required to produce reliable high quality stream flow datasets.

The required criteria for stream flow monitoring stations as specified by the US Geologic Survey include (see **Exhibit M**):

- The general course of the stream is straight for about 300 ft. upstream and downstream from the stream gauging site
- The total flow is confined to one channel at all stages, and no flow bypasses the site as subsurface flow
- The streambed is not subject to scour and deposition and is free of aquatic growth
- Banks are permanent, high enough to contain floods, and free of brush
- A pool is present upstream from the control at extremely low stages to ensure recording a stage at extremely low flow and to avoid high velocities near stream gauging station intakes during periods of high flow
- The stream gauging site is far enough upstream from the confluence with another stream to escape from any variable influence the other stream may have on the stage at the stream gauging location
- A satisfactory reach for measuring discharge at all stages is available within reasonable proximity of the stream gauging station (it is not necessary that the low and high flows be measured at the same stream cross-section)
- The site is readily accessible for ease in installation and operation of the stream gauging station

Most important of these criteria is to avoid placing gauges where there are significant losses of surface flow to groundwater, which occurs in all of the alluvial reaches of the tributaries and the river. The physical requirements for gauging sites apply whether a pressure transducer or stilling well is used. The description on page 82 of the EIR regarding how a gauging site is chosen is incorrect and inconsistent with all of these published protocols.

The EIR description of the stream flow gauging was not written by a person familiar with standard methods used in the hydrologic sciences or with the various types of equipment used. The single biggest factor in the accuracy of a gauge is the location chosen in the stream. There are numerous locations which will not produce a reliable dataset which meets QA/QC requirements. On page 83, the EIR states, “It is estimated that a total of 71 stream gages may need to be installed.” It is not clear where these locations are and if they can be used as gauging sites. Without proper QA/QC measures, including proper location of gauges, the data acquired cannot be used for regulatory purposes.

This method also fails to recognize variations in stream flow processes between different types of channels and due to variations in rainfall, geology and land use in tributary watersheds. For example, on page 20 of the Draft EIR, a description of runoff processes is offered:

> *The bulk of precipitation typically falls during several storms each year. There is a small lag between rainfall and runoff once ground conditions become more saturated in November, reflecting low soil and surface rock permeability and a limited capacity for subsurface storage...This relationship between rainfall and ground conditions results in streams with relatively “flashy” storm runoff hydrographs.*

This is the only description of runoff processes in the EIR and only applies to confined canyon channels of tributaries, not all tributary channels. It is also interesting that the flashy characteristics of the hydrograph are noted as these natural abrupt changes in stream stage are likely to strand or wash out juvenile salmonids.

A description of stream flow processes in the alluvial reaches of tributaries is omitted and differs substantially from the description in the EIR. In the large alluvial valleys of the watershed, runoff infiltrates until the groundwater table rises sufficiently to produce surface flow. Alluvial tributary reaches may experience changes of surface flow to subsurface and back numerous times over the rainy season. Additionally, the stage of the mainstem Russian River channel in the alluvial valleys (Ukiah, Alexander, Russian) largely defines the top of the groundwater table and affects stage in the alluvial reaches of the tributary streams.

The Draft EIR simply states:

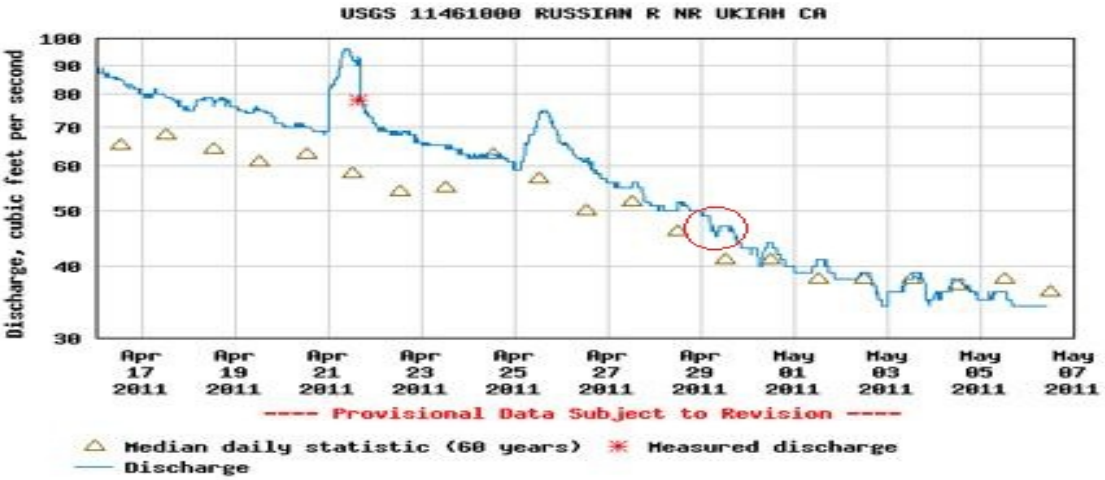
> In the valleys groundwater occurs in the alluvial deposits. The summer baseflow is maintained by groundwater discharge along reaches where the water table is higher than the adjacent stream. In the larger valley drainages, such as the Russian River, groundwater discharge is large enough to sustain perennial flow.

This description is erroneous and not based on any data or study of actual conditions. The Russian River, prior to the Potter Valley diversion and Coyote Dam, did not have perennial flow. Due to the well-documented channel entrenchment along the Russian River (page 38 EIR), the bottom elevation has dropped 18-20 ft creating a "French drain" effect to lower the groundwater table and dewater the tributaries. Each tributary undergoes losses of surface flow to groundwater (losing reach) and gains surface flow from groundwater (gaining reach) throughout the rainy season, depending on the timing and intensity of rainfall, geology of the tributary watershed, the operation of the Coyote and Warm Springs Dams and the stage of the Russian River. Large well fields and direct diversions also affect stream flow.

In these alluvial reaches, the method of defining transects and stream stage to avoid stranding does not include surface and groundwater interactions or river stage, all essential features affecting stream stage. It is very likely that even if all vineyard use of water for frost control could be stopped, stream flow could still be interrupted and fish stranded due to these pre-existing conditions. The regulation and EIR need to recognize that the Russian River system has geomorphic features and non-agricultural water uses which also affect stream flow and that changes to frost water uses will not ensure the idealistic flow regime described in the EIR.

We would be remiss if we did not address the "stranding" that occurred on April 29 of this year. Before we go any further, it is troubling to note that rather than conduct an investigation, NMFS chose to have the "stranding" published in the local newspaper (see **Exhibit N**). This is probably because you need actual evidence to conduct an investigation. Nevertheless, the "stranding" occurred on the west fork of the Russian River near Redwood Valley in Mendocino County. NMFS claimed in the news story that the stranding was the result of frost protection occurring in the valley. Specifically, SA Torquemada is quoted in the May 6th Santa Rosa Press Democrat as saying: "This incident illustrates that voluntary efforts have not prevented frost diversion-related fish kills and confirms the need to regulate water use...."

However, the facts of the situation show that the fish were stranded as the normal result of the streambed drying from the lack of rainfall. The USGS gauge directly below the "kill" shows no significant drop in flows or elevations from frost diversions. The graph does, however, document flows receding from 90 cfs to 50 cfs in the preceding week from cessation of rain and the onset of warm weather:



Note that the "drop" in flow is barely perceptible, and is nevertheless eclipsed by the consistent and rapid decline in river flow overall as a result of the lack of precipitation and the natural drying up of the stream bed.

In summation, this regulation is not necessary because:

- The real cause of the drop in streamflow was SCWA's failure to meet its water right permit terms. If SCWA had simply met its instream flow requirements, we would not be here today.
- There is no evidence supporting the need for the regulation.
- Any evidence purporting to justify the need for the regulation has either been fabricated or grossly exaggerated.
- Any contributing role that frost protection may have played in the stream stage drop in 2008 has been remedied.
- Sonoma County already has an effective frost registration program in place that will monitor the situation.
- The regulation, in its current form, is unworkable.

12. This Regulation is Overbroad

Assuming the SWRCB still insists on adopting this regulation, changes should be made to more narrowly target the ills it seeks to correct. The May 19, 2011, version of the regulation provides, in relevant part, as follows:

> (a) After March 14, 2012, any diversion of water from the Russian River stream system, including the pumping of hydraulically connected groundwater, for purposes of frost protection between March 15 and May 15 shall be unreasonable and a violation of Water Code section 100, unless the water is diverted pursuant to a board approved water demand management program…

On its face, it appears as though "any diversion of water" would include diversions to and withdrawals from storage, as long as the water was initially diverted from the Russian River

stream system. We fail to see why those who have reservoirs capable of supplying an adequate supply of water should be subject to this regulation. Withdrawals from storage have no impact on stream flow or stage and should be exempt from this regulation. In order to clarify this in the regulation, a phrase exempting withdrawals from storage should be included in the regulation.

It is unclear why "hydraulically connected groundwater" is being included in the regulation. Aside from the legal problems associated with this position (discussed below), there is no evidence, empirical or otherwise, that diversions from wells were the cause of the two alleged fish strandings. Generally speaking, pumping groundwater naturally results in the creation of a cone of depression over time around a well that ultimately reaches equilibrium. The time required to reach such equilibrium depends upon pumping capacity and strata permeability. Therefore, the effects of pumping groundwater, even from wells situated closely to a surface water body, are significantly less than what would be encountered from a direct diversion.

Including groundwater within the reach of the regulation riddles implementation of the regulation with problems and is based on poor, or nonexistent, science. For example, the vast majority of groundwater wells are located in the large alluvial valleys along the Russian River and several of the larger tributary creeks. As described in a number of reports by the US Geological Survey and by the Ca. Dept. of Water Resources (see **Exhibit M**), the groundwater in these large alluvial deposits is recharged primarily by storm runoff from surrounding slopes and through alluvial fans and surface channels where water percolates into alluvial material. The quantity of water stored in this alluvial material can be enormous. **Exhibit O** summarizes this information. For example, the Alexander Valley southern groundwater basin has 200 ft. of alluvium and a storage capacity of 762,000 acre-feet. With a storage capacity of 762,000 acre-feet, there is little point in dragging wells in this basin into the regulation.

Of course, the regulation makes the statement that all of the groundwater in the drainage is "hydrologically connected" to streams. This term is not defined particularly in regard to the temporal nature of the connection between groundwater and stream flow. Percolating groundwater in these large aquifers may be stored for months to years before reaching a surface stream channel. The term is vague and no one will be able to prove that a well is not extracting hydraulically connected groundwater unless both a spatial definition and timeframe are added to the regulation.

Page 9 of the Statement of Reasons states that groundwater moves laterally from alluvial deposits to the stream channel deposits and then is discharged to the stream baseflow. This document further states that wells in the alluvium intercept groundwater that would otherwise discharge to the stream. This is a generalized and simplistic description of groundwater movement that is not accurate. Groundwater moves along hydraulic gradients formed by topographic variations and to a far lesser degree localized gradients formed by pumping. Therefore, it is incorrect to characterize all groundwater wells in alluvium as depleting streams of flow with no evidence that the groundwater basin levels are declining or measurements or studies showing groundwater depletion effects on stream flow. Studies completed by Dr. Matthew Deitch for the Russian River Property Owners Association demonstrated no change in stream flow in either the Russian River in the Alexander Valley or two local creeks during groundwater pumping for frost control (see **Exhibit P**).

The Stetson maps are identified as a source of information for determining stream depletion areas. These maps do not depict groundwater basins but instead show surface geology. They

were created by tracing areas of geologic maps onto 1:24,000 quad sheets. Some of the sources the geologic maps used were 1:250,000 scale, leading to potentially enormous error. The maps simply show alluvial deposits and there is an assumption that wells in these areas affect stream flow. The technical reports which accompany these maps, "*Approach to Delineate Subterranean Streams and Determining Potential Stream flow Depletion Areas: Policy For Maintaining Instream Flows in Northern California Coastal Streams, February 28, 2008,*" states that stream depletion can be overestimated when:

- The stream does not fully penetrate the aquifer (it can lead to errors >100%);
- There is recharge other than from the stream;
- The water level in the aquifer falls below the bottom of the streambed.

All of these conditions occur in most of the Russian River alluvial groundwater basins. Additionally, this report states, "*Stream depletion resulting from pumping is not necessarily instantaneous*." The stated purpose of the regulation is to avoid instantaneous changes in stream stage. Therefore, it is clear that regulating all wells in alluvial deposits is unnecessary to avoid salmonid stranding.

Similar to groundwater, the SWRCB has not explained why it is necessary to include any portion of the mainstem of the Russian River below Coyote Dam in the regulation. The SWRCB has already exempted the Russian River above Coyote Dam, but there is no reason to keep the mainstem below the dam within the regulation when diversions have been removed and the existing flows are regulated by the Sonoma County Water Agency (SCWA), unless of course the SWRCB is not interested in enforcing permit terms. As discussed below, SCWA is legally obligated to maintain certain flows in the river during the critical frost protection period. The same holds true for Dry Creek below Warm Springs Dam. Both of these river/stream systems are highly regulated, which makes them legally obligated to meet the requirements of all lawful users of water and instream beneficial uses.

The only evidence the SWRCB does have justifies a greatly narrowed scope for the regulation. Page 57 of the draft EIR, and Table 4-5 of Appendix D of the draft EIR (Economic and Fiscal Impacts of the Proposed Russian River Frost Regulation), both refer to a NMFS GIS layer called "Potential Stranding Sites" that depicts the watercourses most likely to experience stranding events during frost protection activities. Although the SWRCB has this information available, it refuses to narrow the scope of the regulation to target just those areas NMFS has identified where potential strandings are likely to occur. The SWRCB provides no explanation why the regulation must span 1,778 miles of stream systems, or 1,485 square miles in two different counties, and conservatively cost an estimated $10 million dollars over three years, when NMFS has provided a document that narrows the scope of the regulation to just those areas that may need attention. It appears that the only thing the SWRCB has used the "Potential Stranding Sites" GIS layer for is to reduce the estimated economic impact of the regulation, which is inconsistent with the text of the regulation that requires the entire watershed to be regulated.

Because of these issues, the regulation should be rejected. If the SWRCB wanted to develop an appropriate regulation, it would have to address at least the following: (a) exclude withdrawals from storage, (b) exclude "hydraulically connected groundwater," (c) exclude the main stem Russian River below Coyote Dam, (d) exclude Dry Creek below Warm Springs Dam, and (e) limit the regulation only to areas where factual investigation has revealed an actual problem with frost diversions. By doing so, the SWRCB can significantly diminish the economic impacts and management burdens of this regulation without impairing its effectiveness.

13. The Regulation is Too Narrow

The draft regulation does not address other diversions from the Russian River stream system that impact stream stage, and therefore salmonid habitat, even though it is asserting its jurisdiction to prevent "take." This is an abuse of discretion because it fails to account for other elements of causation. Under the Endangered Species Act, any action that was a "substantial factor" in bringing about a take is subject to enforcement. For example, in *United States v. Glenn-Colusa Irrigation District* (E.D. Cal. 1992) 788 F.Supp. 1126, the court considered whether a fish screen or the pumping of water through that screen was responsible for a take when the pumping of water impinged endangered fish on the screen. Glenn-Colusa argued that the screen, which was owned and operated by the Department of Fish and Game, was responsible for the take because the screen was the direct cause of the killing of the fish. The court considered this argument "absurd for it is the pumping that creates the take,"[55] and that it "is irrelevant whether the taking is direct or indirect."[56] As long as something is a "substantial factor in bringing about the injury" causation will be found.[57]

And a "substantial factor in bringing about the injury" involves other water users on the system. These other diversions include domestic, municipal, and industrial users, as well as nighttime diversions that are unrelated to frost protection. Due to pricing tiers available from most electricity providers, there is a cost break associated with electricity use during "off-peak" hours—typically after 9:00pm in March and April. In order to take advantage of the price break, many large electricity customers wait until after 9:00pm to consume large amounts of electricity. Water diversions in the Russian River watershed are no different. We see no reason why diversions unrelated to frost protection must necessarily occur at night, when water demand is already quite high for frost protection purposes and water supply is limited. "When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield."[58] Thus, water diversions unrelated to frost protection should be minimized at night in order to allow more frost protection. Water diversions unrelated to frost protection should occur during the day, which maximizes the number of uses of the limited supply.

Therefore, if the SWRCB truly desires to improve habitat conditions for fish in the Russian River, and not rest the entire problem at the doorstep of the agricultural community (which cannot compensate for the lack of flows caused by SCWA), then the regulation should be amended to include all diversions from the Russian River water system, including municipal and residential wells, and it should discourage nighttime diversions unrelated to frost protection.

14. The Proposed Regulation is Not Supported by the Findings or the Evidence

We incorporate in this section all of the arguments made in the other sections,[59] but we do wish to address several additional claims the SWRCB makes that are not supported by the findings or the evidence. The first is the SWRCB's declaration that all frost protection diversion within the Russian River watershed is "unreasonable." Such a broad declaration is unnecessary and

[55] *Id* at 1133.
[56] *Id*. at footnote 13, citing *Palila v. Hawaii Dept. of Land & Natural Resources*, 639 F.2d 495 (9th Cir.1981).
[57] *Id*. at 1134.
[58] *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 40 P.2d 486, at 368.
[59] Including, but not limited to, the issues with NMFS's GIS layer and the inclusion of groundwater in the regulation.

unsupported because it starts with a presumption of illegality with no justification. In light of the fact that only two fish strandings have been alleged, the first being caused by SCWA's failure to meet its instream flow requirements (if the stranding is even related to a drop in stage), and the other due to a single landowner allegedly dewatering a very small tributary, the SWRCB has not explained why these two isolated incidents justify the universal declaration that perhaps well over a thousand diversions of water from the Russian River stream system within 1,485 square miles are unreasonable.[60]

We would expect the SWRCB to only want to regulate those who could contribute to the perceived problem. As discussed above in the section "This Regulation is Overbroad," this can be accomplished by narrowing the geographic scope and types of water being regulated. If the SWRCB fails to narrow the scope of this regulation to just those who can be reasonably expected to contribute to the perceived problem, the SWRCB's decision is subject to review by the courts as an abuse of discretion.

An abuse of discretion is established if the decision is arbitrary, capricious, or entirely lacking in evidentiary support.[61] Among the elements of the proposed regulation lacking in evidentiary support is the inclusion of all the tributaries within the scope of the regulation and the inclusion of "hydraulically connected groundwater."

The SWRCB has no evidence justifying the inclusion of all the tributaries within the scope of the regulation. The SWRCB does refer to a study performed by Matthew J. Deitch, G. Mathias Kondolf, and Adina M. Merenlender that studied the effects of direct diversions on stream flows, but that study is much narrower in its focus than the SWRCB's regulation. While the study did examine streamflow in several tributaries, its results cannot be applied on a watershed level as the SWRCB is attempting to do with the regulation. One of the authors, Mr. Deitch, says as much when he learned of the SWRCB's reliance on his study as the basis for the regulation:

> It is important to recognize that these effects may not happen everywhere water is used for frost protection, and may not happen every time water is used for frost protection. As such, it is important that regulations do not apply a broad brush to prohibit use of water for frost protection. Rather, any actions should seek to maintain beneficial uses for agriculture as well as ensuring the preservation of streamflow…(See **Exhibit R**).

Thus, one of the authors of the very study the SWRCB is using to justify the scope of the regulation is cautioning the SWRCB that the study should not be applied to the entire watershed without site-specific analysis. The SWRCB has had this letter since April 6, 2011, yet it continues to rely on the study to support a proposition the study does not advance.

When applying the "arbitrary and capricious" standard to a decision of a public agency, the court will look to ensure the agency has adequately considered all relevant factors and has demonstrated a rational connection between those factors, the choices made, and the purposes behind the enabling statutes.[62] In this situation, the SWRCB is grossly overreaching its discretion

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[60] **Exhibit Q** shows the e-WRIMS search results for water rights in the Russian River Valley. While the search reveals 1,971 hits, some of these rights are revoked and not all allow frost protection. However, this search does not include Statements of Water Diversion and Use, of which there are an unknown number in the Russian River Valley.

[61] 1 Cal. Civil Writ Practice (Cont.Ed.Bar 4rd ed. 2009) §2.32, p. 27.

[62] *Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 4 Cal.Rptr.3d 536

in that it is attempting to regulate conduct that has no "rational" or demonstrated connection to the isolated stranding events.

15. The SWRCB Has Not Proceeded in the Manner Required by Law

Similar to section 14, we incorporate all of the arguments from other sections into this section, but wish to address several additional actions the SWRCB has taken that are inconsistent with the law. The first is that the SWRCB has failed to provide frost water users in the Russian River watershed due process of law before it denies them a constitutionally protected property right. If the SWRCB wants to actually bring all the frost water users in the Russian River watershed under its authority, it must give proper notice and provide a hearing.

By its terms, the regulation is going to apply to all appropriative water rights, all groundwater rights, and all riparian water rights. These rights are real property. "Under California law, rights to use of underground waters, whether flowing, stored or percolating, by the overlying owner or appropriator are analogous and equal to riparian rights against subsequent claimants, and are part and parcel of the land, and as such are 'real property.'"[63] "The right to water to be used for irrigation is a right in real property."[64]

As property rights, they are subject to protection by the Due Process Clause of the State and Federal Constitutions (Cal. Const., art. I, § 7, U.S. Const., 5th Amend.). "We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing." The "hearing required by the Due Process Clause must be 'meaningful,' and 'appropriate to the nature of the case.'" [65] At the very least, the hearing should provide opportunity to "present in a deliberate, regular, and orderly manner issues of fact and law."[66] As elaborated by the U.S. Supreme Court, when discussing the type of hearing due process demands in an administrative context, the Court held that "identification of the specific dictates of due process generally requires consideration of three distinct factors:

- First, the private interest that will be affected by the official action;
- second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
- finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[67]

With reference to the first factor, the property interest the SWRCB regulation will affect is real property that will adversely affect water users' income, business opportunities and livelihoods. With reference to the second, the risk of an erroneous deprivation is manifest as the SWRCB has failed to address the legal flaws with its approach and appears to loaf along irrespective of the arguments raised in opposition of its action. And with reference to the final factor, the SWRCB has an interest and duty to prevent waste and unreasonable use of water, but that duty does not dispose of its obligation to exercise this authority with responsibility.

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[63] *Rank v. Krug*, S.D. Cal. 1950, 90 F.Supp. 773.
[64] *Schimmel v. Martin* (1923) 190 Cal. 429, 213 P. 33.
[65] *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458, 121 Cal.Rptr. 585.
[66] *H. Moffatt Co. v. Hecke* (1924) 68 Cal.App. 352, 28 P. 546.
[67] *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 (bulleting added).

Part of this legal obligation is to notify every person within the Russian River watershed who owns a property right that could be affected by the regulation, and hold a proper hearing at which the parties may present evidence and question the SWRCB's scientific and legal justification for the regulation. Everything to date has been extremely informal and the parties that are aware have not been given any opportunity to dispute and question the credibility of the SWRCB evidence in an orderly, efficient, effective, and binding matter. The "hearing" the SWRCB proposes for September 20, 2011, is a "hearing" in name only. There is no provision for testimony or cross-examination—only the ability to comment for three minutes. By limiting the "hearing" to three-minute comments, the SWRCB is engaging in behavior that muzzles meaningful discussion of the issues, and allows it to rely on "evidence" that escapes public scrutiny, regardless of the reliability of that evidence, and ignore evidence it simply does not like. This behavior violates the constitutional rights of every water right holder in the Russian River watershed.

In addition to constitutional support, there is ample statutory support for the fact that the SWRCB must provide a formal notice and hearing to re-write the post-1914 water rights of frost water users in the Russian River watershed. For example, Water Code section 1394(b) requires the SWRCB to provide "notice to the parties and a hearing" if it desires to "amend, revise, supplement, or delete terms and conditions in a permit." Under Water Code section 1410(b)(2), the SWRCB can only revoke a permit after giving notice of the proposed revocation "in writing, mailed in a sealed, prepaid postage and certified letter to the permittee." Only if the permittee "fails to request a hearing" may the SWRCB revoke that permit without a hearing. Under Water Code section 1675(b), the SWRCB can only revoke a license after "due notice to the licensee and after a hearing."

Furthermore, if the SWRCB wants to actually investigate the use of water in the Russian River watershed and determine if there is an unreasonable use of water occurring, then a procedure is already in place in the California Code of Regulations. Division 5 of Title 23, Sections 4000 et seq. provide the procedure the SWRCB needs to follow when it wants to prevent the waste, unreasonable use, or diversion of water. Notably, section 4002(b) provides that only after a hearing is held may the SWRCB "issue its order requiring prevention or termination of the misuse."

If the SWRCB is required by statute and regulation to grant permit and license holders notice and a hearing before those permits or licenses can be modified or revoked, then the SWRCB is violating both statutory and constitutional law by not providing notice and a hearing when trying to adopt this regulation.

It is important to note that the SWRCB did at one time recognize the need to obtain jurisdiction over water right holders by providing notice and a hearing. It is significant that this recognition is part of the same basis that SWRCB cites for "regulatory precedent" in its *Draft* Initial Statement of Reasons. In its Statement of Reasons, the SWRCB relies on Section 735, Title 23, of the California Code of Regulations. Section 735 was originally section 659 and subsequently numbered section 735. The SWRCB adopted section 659 in 1974 to address frost protection activities in the Napa River watershed.

Section 659 as it was originally adopted provides:

> Because of 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 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 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 [sic] prior rights. Regardless of the source of water, the Board will retain jurisdiction to revise the terms and conditions of all permits issues for frost protection should future conditions warrant.

What makes section 659 different from the proposed Russian River regulation is that in order to enforce this regulation against riparian water users, the SWRCB initiated an action for injunctive and declaratory relief seeking to enjoin certain wine grape growers from drawing water directly from the Napa River and applying that water to their wine grapes for frost protection purposes. The case is *State Water Resources Control Board v. Forni* (1976) 54 Cal.App. 3d 743, 126 Cal.Rptr. 851. While losing at the trial court level, the SWRCB appealed and ultimately prevailed on the appeal. The opinion of the Court of Appeal is instructive on how the SWRCB obtained jurisdiction.

> Properly construed, section 659 amounts to nothing more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary. Indeed, the initiation of the present action furnishes the best proof that the appellant did not consider the regulation and the policy declaration therein binding as to respondent riparian owners, and submitted the issue for judicial determination. (*Id*. at 752.)

Therefore, the SWRCB did recognize, at least in 1974, that it cannot by declaration deny water right holders due process of law without notice and a hearing. In order to obtain jurisdiction, the SWRCB filed an action in a court, which court then provided a hearing. Without this jurisdiction, section 659 was nothing more than a "policy statement" that was unenforceable against riparian owners. Thus, if the SWRCB wishes to impose the Russian River regulation against any water rights, it will need to commence a hearing.

A second example of the SWRCB not proceeding in the manner required by law, which is related to the right to a hearing discussed above, involves its delegation of authority to the Water Demand Management Program (WDMP). Under the proposed regulation, the SWRCB obligates the WDMP "[i]n developing the corrective action plan, the governing body shall consider the relative priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage."[68] If a diverter is unable to comply with the corrective action plan, then that diverter shall "cease diverting water for frost protection."[69]

We recognize the SWRCB is attempting to require the WDMP to enforce water right priorities in order to adhere to the holding in *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 48 Cal.Rptr.3d 468, in which case the court considered

[68] Draft regulation, subsection (c)(4).
[69] Id.

whether the SWRCB could lawfully impose Term 91 on a water right permit with a 1927 priority, without imposing the same permit term on other water users that held water rights junior to the 1927 priority. The court held the SWRCB could not do this because it was essentially prohibiting El Dorado Irrigation District (EID) from diverting water when Term 91 was in effect (to maintain Delta water quality), but allowing other junior users to divert the same water. The court held:

> In summary, we agree with the trial court that the Board abused its discretion when it included term No. 91 in El Dorado's permit without including that term in the licenses and permits of junior appropriators, because imposition of term No. 91 in these circumstances subverted the rule of priority without adequate justification. (*Id* at 972, 496).

Of course, the SWRCB, in proposing to adopt this regulation, is attempting to enforce state law that all water use must be "reasonable." However, the *EID* court also addressed this question and succinctly stated that "when the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail. Every effort, however, must be made to respect and enforce the rule of priority."[70] Thus, when there is inadequate water available to meet all of the beneficial uses, the rights of the junior "appropriator must yield to the rights of the riparian or overlying owner."[71]

The problem with requiring the WDMP to "enforce the rule of priority" when developing and imposing corrective actions is that the SWRCB is asking that the program essentially adjudicate the Russian River watershed. There is simply no other way to "consider" the relative priorities of all the different water users within the watershed and arrange them into a hierarchy under which the most junior of the water rights is forced to undertake the corrective action or cease diverting water.

"Considering" all the different rights to the system will be a monumental task. For example, assume the WDMP identifies a need for corrective action on a stream system. On that stream system are a total of eleven diverters: four claims of riparian rights, three claims of pre-1914 appropriative rights, two claims of post-1914 water rights, and two groundwater wells.

Of the three riparian right claims:

- one diverter's property is not contiguous to the stream
- one diverter irrigates several different legal parcels with water from the stream but only one of which is contiguous to that stream
- one diverter irrigates property that is contiguous to the stream, but this diverter also uses a portion of the water for domestic purposes

Of the two pre-1914 appropriative water right claims:

- one diverter has proof that his diversion structure was built prior to 1914, but cannot provide proof of continuous beneficial use
- one diverter has no proof of when his diversion structure was built, but does have sworn statements from prior owners that allege it was built in 1913

Of the two post-1914 appropriative water rights:

- One has a storage reservoir above several of the other diverters. This diverter

[70] *Id* at 966, 490.
[71] *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 99 Cal.Rptr.2d 294.

releases water from that reservoir which flows past these diverters for use on his vineyard. This diverter claims that no natural surface water exists in the system after March and that all the downstream diverters divert his foreign water
- One uses water from the system for domestic purposes. This right has a priority of 1975.

Of the two groundwater wells:
- One well is within 50 feet of the stream.
- One well is within 500 feet of the stream.

Of this mix of water rights, how is the WDMP going to decide who gets to divert and who doesn't? Who has to undertake expensive corrective measures, while others get to continue to divert? Does the SWRCB expect the diverter who is asked to pay for expensive corrective measures to simply accept it when that diverter believes his rights are superior to others on the system? The WDMP is not equipped to deal with the judicial nature of a determination of rights. The only mechanism to resolve this dispute is an adjudication.

Adjudications can be handled one of two ways. First is an adjudication under Chapter 1, of Part 3 of the Water Code (Water Code §§ 2000 et seq.). Under Chapter 1, any person may bring a suit in any court of competent jurisdiction for a determination of rights to water. Second is an adjudication under Chapter 3 of Part 3 of the Water Code (Water Code §§ 2500 et seq.). Under Chapter 3, upon any petition signed by one or more claimants to water of any stream system, the SWRCB may enter an order granting the petition and commence making the determination.

Regardless of the mechanism used, both mechanisms constitute authority to conduct a judicial or quasi-judicial determination of rights under the law. The SWRCB cannot simply delegate its judicial authority to determine the relative priority of rights of a stream system to a water demand management program.

"An administrative board cannot legally confer…authority that under the law may be exercised only by the board."[72] While "merely administrative and ministerial functions may be delegated…there is no authority to delegate acts discretionary or quasi-judicial in nature."[73] Yet the delegation of "acts discretionary or quasi-judicial in nature" is precisely what the SWRCB is doing by requiring the WDMP to consider water right priorities when developing corrective actions. The WDMP is not equipped to deal with the complex legal determinations necessary to resolve my hypothetical (but likely to be similar to very real situations) scenario outlined above. By passing this obligation on to the WDMP, the SWRCB is hoping to punt the difficult questions, and the liability, onto a group that is ill-equipped and legally inappropriate to handle the situation. This, the SWRCB cannot do.

A third example of the SWRCB not proceeding in the manner required by law involves its denial of our request for an extension to comment on the most recent form of the regulation and its supporting documentation. While an administrative agency may have wide discretion in granting or denying continuances, that discretion is not unlimited. Among the factors a judge will consider in examining an administrative agency's denial for an extension include whether there have been continuances in the past, whether the request was made prior to or on the day of the

[72] *Schecter v. County of Los Angeles* (1968) 65 Cal.Rptr 739, 742.
[73] *Id.*

hearing, and any factual showing of prejudice that resulted from the denial of the continuance.[74]

In our situation, the SWRCB posted a draft EIR, a new regulation, an Initial Statement of Reasons, and a Notice of Proposed Rulemaking on May 20, 2011. Each one of these documents included numerous studies, references, facts, and figures that we had never seen before and some were not even readable by any known program (SWRCB Water33.sde). The deadline to submit comments was set for noon on July 5, 2011, which meets the minimum legal standard of 45 days. On June 1, 2011, we requested a 45-day extension of time to comment on this material. On June 6, 2001, the SWRCB denied our request, stating that "prior drafts of the regulation, initial statement of reasons, and portions of the Notice of the Proposed Rulemaking had been previously released on March 23, 2011. With a comment period ending on July 5, 2011, this provides a total 105-day review period for a significant portion of the information…" This statement is utterly ridiculous. The differences between the "prior drafts" and the current drafts are substantial. And in addition, there was significant new additional material. This statement of bad faith is amplified by the SWRCB choosing July 5 as the deadline. The day after a national holiday during which every business, including the SWRCB, will be closed, and just a few days after the deadline for all appropriative water right users (and many Statement holders) to report their annual water use to the SWRCB. The date appears to be intentionally chosen to reduce the public's ability to provide comprehensive comments to the SWRCB's regulation. The irony of this action is not lost on us, as such an action sounds like the behavior of the King of England before we declared our independence from Great Britain.

The final example of the SWRCB not proceeding in the manner required by law is that because there is no evidence justifying the regulation, it is not a legitimate exercise of the police power, and therefore amounts to a denial of due process of law.[75] Similarly, this regulation will effectively take people's vested property rights by denying use of water during one of the most important times of the season, and therefore most valuable times of the season, available under that right, which is a taking of private property without just compensation, regardless of whether it is considered a categorical or regulatory taking.[76]

In summary, the SWRCB has not proceeded in the manner required by law because it has: (a) denied vested property right holders due process of law by failing to provide adequate notice and hold a hearing; (b) improperly delegated its authority to resolve disputes between different water right priorities; (c) failed to grant an extension to the public comment period; and (d) failed to meet its burden to exercise police power, which has resulted in a denial of due process and/or a taking of private property without just compensation.

16. Underestimates the Costs That Will Be Associated with Implementation of the Regulation

The regulation as currently proposed will impose staggering costs upon grape growers, which will have consequential indirect financial impacts within the entire State of California, especially within Mendocino and Sonoma counties. These costs are not adequately disclosed in any of the

[74] Cal. Administrative Mandamus (Cont.Ed.Bar 3rd ed. 2011) §6.92, pp.229-230.
[75] *Lingle v. Chevron U.S.A.* (2005) 544 U.S. 528.
[76] *Brown v. Legal Foundation of Wash*. (2003) 538 U.S. 216, *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, *Tulare Lake Basin Water Storage District v. United States* (2001) 49 Fed.Cl. 313, *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, *Armstrong v. United States* (1960) 364 U.S. 40.

SWRCB documents. Briefly, the SWRCB documents underestimate the costs of some elements of the regulation, ignore the costs of other elements, or include estimates based on unjustified assumptions. Each of these problems are outlined below.

Attached as **Exhibit S** is an economic study prepared by Prof. Robert Eyler of Sonoma State University. This study shows that even if the regulation were to result in a minimal 10% crop loss, it could cost the California economy more than $2 billion annually, including $143 million in lost tax revenue to local governments and Sacramento, $113 million in decreased land values and more than 8,000 jobs in Sonoma and Mendocino counties. These losses are realistic yet *very conservative* because it is important to recognize several facts about this regulation.

First, the SWRCB regulation will operate as a complete prohibition on water use for frost protection until a water demand management program is developed, approved, and implemented. These steps will take several months to complete, perhaps even years. Therefore, in the meantime, vineyard owners will be unable to use water to protect their crops and would be expected to suffer extreme wine grape losses until alternative forms of frost protection could be acquired.

Second, assuming the regulation is implemented within a reasonable time, not every vineyard owner will be able to comply with its terms for either financial or practical reasons. For example, according to the SWRCB's own analysis, this regulation is expected to cost a typical 160-acre vineyard from $9,600 to $352,000 in order to initially comply with its mandates. It will cost an additional $3,000 to $36,200 per year to keep that 160-acre vineyard in compliance. It is expected to cost a typical 40-acre vineyard from $2,400 to $87,880 in order to initially comply with its mandates. It will cost an additional $750 to $9,000 per year to keep that 40-acre vineyard in compliance (see **Exhibit A**). Many small family farms will not be able to absorb this cost, so they will be forced to shift to another crop if they can afford to or sell the land (see **Exhibit B**). These costs associated with grape production loss are completely ignored in the SWRCB documents, as they are not discussed anywhere. The SWRCB documents simply assume everyone will be able to afford the above costs, which is shocking.

Third, there may be cases where water can no longer be used for frost protection. In these cases, the farmer must find an alternative form of frost protection (e.g. wind, heaters, etc.). If no alternative form of frost protection is feasible, either because it is too expensive or because alternative forms are not effective (e.g. in Mendocino County where frost events are particularly extreme and where no inversion layer typically exists), then that farmer could lose his entire crop.

Based just on these three facts, the proposed regulation will have significant economic consequences for California. While the SWRCB is required under Government Code section 11346.5 to identify and describe these costs, the costs the SWRCB *has disclosed* as part of the Notice of Proposed Rulemaking significantly underestimate those costs.

STD Form 399 and the attached Economic and Fiscal Impacts of the Proposed Russian River Frost Regulation ("Form 399") is attached as Appendix D to the SWRCB draft EIR. We assume Form 399 is meant to fulfill the SWRCB's obligation to identify and describe costs of the regulation as it very helpfully categorizes and then quantifies anticipated costs of the regulation. We had Form 399 reviewed by Prof. Robert Eyler, whose review revealed that Form 399 has underestimated the financial cost of the regulation in several key areas. First, the capital costs of

implementing "corrective actions" under the regulation are likely underestimated. Second, Form 399 uses outdated multipliers that underestimate the economic impact on industry and employment, and does in fact underestimate employment losses by between 15% and 56%. Third, the methodology used to determine a "typical" business is flawed and likely underestimates the number and scope of businesses to be affected by the regulation. A copy of Prof. Eyler's report is attached as **Exhibit T**.

In addition to Prof. Eyler's concerns, we have several related issues with Form 399. Similar to the regulation, Form 399 outlines the elements of the Water Demand Management Program and then attempts to predict a cost associated with each element. For ease in reference, I will set out each element of the WDMP in the same way that Form 399 does.

Section 4.1 - Frost Diversion System Inventory

Under the Frost Diversion System Inventory, Form 399 uses the $64 Sonoma County Frost Protection Ordinance registration fee as the basis for determining the cost to develop the inventory. However, the inventory also requires each and every individual diverter to monitor and record their rate of diversion, hours of operation, and volume of water diverted during each frost event of the year. Form 399 does not consider these costs at all.

It is true that the recent changes to the Water Code require individual diverters to monitor and record water diverted and used on a monthly basis, but the requirements of the proposed regulation go above and beyond demanding monthly totals. The proposed regulation wants each individual frost event monitored and recorded, not a monthly total. This additional layer of measurement will result in substantial additional costs that have not been considered in the analysis.

In order to monitor each and every frost protection diversion and meet the requirements of the regulation, additional meters must be installed at each diversion location. Based upon quotations we received for this same work (**Exhibit U**), we estimate the cost to be approximately $8,800 per diversion. Based upon a survey conducted by the Sonoma County Farm Bureau, there are 418 diversions in the Russian River watershed in Sonoma County. We currently have no information on the number of diversions in Mendocino County. However, due to the similar number of acres frost protected by water in Mendocino County (16,400) and Sonoma County (15,581) it is reasonable to assume there are a similar number of diversions in Mendocino County.[77] Based upon 836 diversions, we have a total cost of $7,356,800.00.

Section 4.2 - Stream Stage Monitoring Program

Under the Stream Stage Monitoring Program, Form 399 does list and disclose the possible costs associated with the installation and operation of 71 stream stage monitoring gauges. However, there are two problems with these costs. One, the costs are from Washington State, which has different permitting requirements, and two, the costs are ten years old.[78] We believe a more accurate estimate is found in our **Exhibit V**. Each telemetry capable meter is estimated to cost between $14,000 and $16,000 per diversion, and with the estimated permitting costs of $3,000 per diversion, this element of the monitoring and reporting program will cost an additional

[77] See footnote 13.
[78] See Table 4-3, footnote 1, Economic Impacts of the Proposed Russian River Frost Regulation, May 2, 2011, Appendix D to the SWRCB draft EIR.

$1,278,000 (71 gauges using $18,000 as an average) to implement. In addition, it will cost an additional $8,000 to $12,000 to maintain each diversion on a regular basis. This adds a yearly cost of $710,000 (71 gauges using $10,000 as an average) to the monitoring and reporting program.

In addition to underestimating the gauge costs, Form 399 does not include costs associated with determining "the stream stage that should be maintained at each gage to prevent stranding mortality." We contacted an environmental consulting firm that can provide this service (Analytical Environmental Services or "AES") and asked them for a bid. Based upon their review of the proposed regulation requirement, they anticipate a total cost of approximately $52,560.00 per site. Using Form 399's estimate of 71 gauges (see Table 4-2 of Form 399), we expect the costs to be $3,731,760.00 (see Tasks 1-7 of **Exhibit W**).

Section 4.3 - Risk Assessment

Based on the inventory and stream stage information collected from the monitoring program, the risk assessment is supposed to evaluate the potential for frost diversions to cause stranding mortality. The risk assessment shall be evaluated and updated annually. The annual preparation of the risk assessment "was estimated by Water Board staff at $50,000." Similar to the above section we had AES provide a bid for this work, and the SWRCB was only off by a factor of 10. At a price of $7,120.00 per site, multiplied by 71 sites, we have a total price of $505,520.00 to prepare the SWRCB's annual risk assessment (see Task 8 of **Exhibit W**).

Section 4.4 - Corrective Actions

a. Areas that may require corrective actions.

In Section 4.4 of Form 399, the SWRCB estimates the number of acres that would need corrective action (Table 4-5), and then estimates number and collective capacity of existing storage facilities. In order to determine the number of acres that would need corrective action, Form 399 utilizes the NMFS GIS layer of "Potential Stranding Sites." This GIS layer represents NMFS estimations of the most "at risk" locations for stranding. The problem with this approach is that it grossly underestimates the number of acres that will be affected by this regulation. The regulation will apply to the entire Russian River watershed, not just the NMFS "Potential Stranding Sites," so it is unjustified to reduce the costs in this way. All this does is unjustifiably underestimate the costs of the regulation.

b. Existing Water Storage Facilities

After determining the number of acres needing "corrective action," existing reservoir capacity and additional cost are subsequently estimated as part of an effort to determine the amount of additional storage capacity needed to satisfy frost protection demand in excess of existing capacity.[79] Conceptually, this approach is overly general as it does not consider factors that would limit a grower's access to an existing pond. The biggest potential factor is the fact that the grower may not own the pond and would need to obtain access agreements with other landowners. While Section 4.4 does apply a reduction factor to the estimated existing capacity available in each county (0.85 for

[79] Note that Table 4-6, which summarizes estimated existing reservoir capacity on a watershed basis within each county, is not referenced anywhere in the text of Appendix D.

Mendocino County and 0.75 for Sonoma County), the basis for this adjustment is unclear. Section 4.4 states that the capacity adjustment was based on "approximations of known wastewater treatment ponds and residential density in specific areas of the watershed" while Footnote 2 to Table 4-6 states "Not all water storage facilities are available for frost protection due to other ownership and other dedicated uses." No other supporting information is disclosed to support the assumed reduction factors, which means that the amount of existing capacity available is likely overestimated and the extent of additional capacity required is underestimated.

Further, the reduction factors assume an either/or condition, i.e. a grower will either have access to an existing pond or he won't. In instances where such access is possible, the cost of acquiring access to another landowner's pond has not been considered in Form 399.

Section 4.4 has other issues that require modification and/or further disclosure:

1. Table 4-5 summarizes "measured crop acreages and areas protected by existing frost control methods" in Mendocino County and Sonoma County, respectively, on a watershed basis. However, while reference documents are cited, a map showing the boundaries of "measured crop acreages" within each watershed is not included in any of the EIR documents. These maps should be included so that the information in Form 399 can be understood and corroborated.

2. For Sonoma County, Table 4-5 wrongly extrapolates County-wide information provided in Table 3-7 to individual watersheds. There is no basis to assume that the "Method of Frost Protection" percentages provided in Table 3-7 for Sonoma County as a whole are applicable to the individual watersheds listed in Table 4-5. The use of this extrapolation provides an unverified and likely misleading summary of the distribution of existing methods of frost protection in Sonoma County. The SWRCB should provide information to support the use of the Table 3-7 percentages on a watershed basis in Table 4-5, or delete the watershed breakdown values in Table 4-5.

c. Constructing additional off-stream water storage

One significant factor overlooked in Section 4.4 (page 20) is the assumption that additional off-stream water storage facilities can even be built in light of the SWRCB's new North Coast Instream Flow Policy (NCIFP). Based upon analysis provided by Rudolph Light, the new policy effectively eliminates ponds built within watersheds equal to or less than 1 square mile in size. For ponds between 1 and 15 square miles, a person would only be able to divert for a few days each year, which would eliminate all but the smallest of ponds (see **Exhibit X**). Section 4.4 does not consider this new policy and instead assumes that all one has to do is file an application and a permit for a new pond will be provided. Under the new instream flow policy, new ponds in the Russian River watershed will be extremely difficult to build and practically no new ponds will be built that will be of sufficient size to last through a frost season.

Section 4.4 of Form 399 states that after allowing for a 50 percent USDA-NRCS AWEP cost share, the unit cost for construction of a pond of less than 50 acre-feet would be

$2,625 for an unlined pond and $3,622 for a lined pond. The costs to build new reservoirs are significantly underestimated.

Table 4-8 indicates the cost of a 30 acre-foot off-stream pond to be $157,500, which equates to unit cost of about $5,250 per acre-foot of storage. A second line item in Table 4-8 adds $20,000 for an assumed 1,000-foot length of transmission pipeline. The "Total Capital Costs/pond" for pond and pipeline is $177,500. Based on this "total" cost, the unit cost per acre-foot of reservoir storage would be about $5,900 per acre-foot. Table 4-8 assumes that half of the capital cost will be covered by a NRCS AWEP cost share, and therefore the "cost to grower" would only be $88,750. This amount is subsequently added to various costs associated with regulatory permitting to arrive at a "Total grower costs/pond" of $202,409. This value is a substantial portion of the basis used to derive annual costs to growers later in Table 4-8.

The methodology presented in Table 4-8 has a number of shortcomings that result in underestimating the true cost of constructing and operating off-stream storage ponds for frost protection, as follows:

1. The estimate does not appear to include any costs associated with engineering design or geotechnical investigation. The estimate also does not appear to include engineering inspection and testing services during construction. Collectively, professional services associated with design, construction and contract management can be a substantial percentage of the construction cost, perhaps 15 to 30 percent depending upon level of project complexity and other factors. If these costs have not been included in the estimated construction cost in Table 4-8, they should be added and the capital and annual costs recomputed.

2. Notwithstanding any changes to the estimated cost that might result from item 1 above, the use of a unit construction cost of $5,250 is unrealistically low, especially if a pond liner is required. Examples:

   Fetzer Sundial Pond – A lined pond constructed in 2009, storage capacity = 32.9 acre-feet. Per Dave Koball of Fetzer, total capital cost was about $386,000, which equates to a unit cost of about $11,700 per acre-foot. This is more than double what Table 4-8 assumes.[80]

   Fetzer Los Cerros Pond – An unlined pond constructed in 2009, storage capacity = 19.4 acre-feet. Per Dave Koball of Fetzer, total capital cost was about $149,000, which equates to a unit cost of about $7,700 per acre-foot. While this is closer to the value used in Table 4-8, Mr. Koball indicated that the pond leaks significantly and that a bid of $60,000 has been received for a liner. Assuming that the actual cost of the liner is the same as the bid, total capital cost will rise to about $209,000 and the unit cost will rise to about $10,800 per acre-foot.[81]

   La Ribera (Al White) – Mr. White reported that the cost of his 50 acre-foot pond project was about $500,000 (this cost included plumbing modifications for filling

[80] Emails to P. Whealen and Nick Bonsignore of Wagner & Bonsignore, June 16, 2011.
[81] Ibid.

and withdrawing water from the pond).[82] The unit cost is therefore about $10,000 per acre-foot of storage which greatly exceeds the aforementioned amount of $5,900/acre-foot derived from Table 4-8's "Total Capital Costs/pond" estimate.

Beckstoffer – Rich Schaefers of Beckstoffer reported that the cost of this 68 acre-foot lined pond in 2009 was about $389,000.[83] The unit cost is therefore about $5,700 per acre-foot. While this value is close to the unit cost stated in Section 4.4, it should be noted that this is for a pond having a capacity that is greater than 50 acre-feet. While each pond project has its own unique conditions, the unit cost of a reservoir project generally decreases as the pond capacity increases. As discussed in item 3 below, the cost of a new pump station for this pond greatly increased the unit cost per acre-foot for the project as a whole.

3. Table 4-8 allows a cost of $20,000 for a pipeline, presumably for the purpose of conveying water from the source stream to the reservoir. However, Table 4-8 omits the cost of a new pumping station at the reservoir that would be needed to pump water out of the reservoir for frost protection. Additional costs will potentially be incurred for reconfiguring mainline piping systems for the new pump station. For example, for the Fetzer projects identified in item 2 above, about $168,000 was expended at the Sundial Pond for new pumps and appurtenant facilities, and about $69,000 was expended at the Los Cerros Pond for new pumps, mainline piping and appurtenant facilities.

   For the Beckstoffer project identified in item 2 above, the cost for pumps was about $220,000. When this cost is added to the pond construction cost the total is cost is $609,000, resulting in a unit cost for the project of about $8,960 per acre-foot.

   Table 4-8 should be revised to include the cost of new pumping facilities that will be needed at new ponds for the withdrawal and application of water for frost protection. Table 4-8 also excludes the cost of fencing around these ponds; a fence is typically used around plastic-lined ponds for safety and to exclude wildlife that can damage the pond liner.

4. The assumption of a 50 percent NRCS AWEP cost share is not a "given," however, Table 4-8 assumes that it will apply. There are several conditions to qualify for the limited AWEP funds (see **Exhibit Y**):
   - Growers must meet certain economic qualifications to qualify for these funds. Of the projects mentioned in item 2 above, the Fetzer and Beckstoffer projects did not qualify.
   - Based upon our conversation with Carol Mandel of the NRCS, the AWEP cost share program has, at most, two years left.
   - The money available is not unlimited. The program is competitive and the NRCS office ranks the projects based on estimated water savings. Only some projects are funded each year.
   - Due to price increases, the program only offers a fixed amount of money, not a 50% cost share as discussed in Table 4.8. This fixed rate translates into only a 30% to 40% cost share. Even at this level, many applicants cannot afford to

[82] Email to Paula Whealen, June 15, 2011.
[83] Personal communication with Nick Bonsignore, June 21, 2011.

construct the pond. In fact, several applicants who were awarded funding last year still could not afford to build the pond.

- In order for an applicant to be considered for funding, they must have a permit from the SWRCB or some other legal basis authorizing the storage of water. Based on the SWRCB's own Water Code section 1259.2 report, it takes the SWRCB anywhere from 2-5 years to issue a permit on a water right application in Sonoma or Mendocino counties (which we think is still *extremely* optimistic)(see **Exhibit Z**). Thus, by the time anyone undertakes corrective action under this regulation and applies for a permit to store water, the NRCS AWEP funding program will be over. This means that Table 4.8 in Form 399 should be rewritten and it should not consider any cost share from NRCS.

In sum, the costs to build a reservoir are grossly underestimated in Form 399. Table 4.8 does not include engineering and design costs, costs for a new pumping station, and inappropriately assumes a 50% cost share from NRCS.

d. Installing Wind Machines

While Form 399 (page 22) does accurately report the costs one could expect to pay to install wind machines, it incorrectly assumes fans will work in Mendocino County and it excludes heater costs. All of the costs associated with installing wind machines in Mendocino County should include the cost of heaters, otherwise, the cost is significantly underestimated.

It is important to note that Mendocino County experiences more frost events, on average, than Sonoma County, and the frost events it does experience are generally much colder. See attached **Exhibit AA,** which is a GIS-based frost risk assessment for the Russian River Valley. This analysis was prepared by a student, but was presented by NOAA Fisheries during a SWRCB frost protection workshop held on July 14, 2009. Note the much greater number of frost events at and above Hopland each year. Because of the more frequent and colder temperatures, it has been stated with conviction that fans simply do not work in Mendocino County without a significant number of heaters. Furthermore, some heater costs should be included in the Sonoma estimates because as Form 399 does state, fans do not work in all situations.

e. Drilling Water Wells

Form 399 does not include the costs associated with determining whether a well is hydraulically connected to the Russian River. Because this cost should be included in any analysis, we obtained an estimate from Todd Engineers, an engineering firm that specializes in hydrogeology. The estimate to determine whether a well is hydraulically connected to the Russian River is $15,000.00. Please see **Exhibit BB**.

f. Coordinated Water Diversions

Form 399 says cost of coordinating diversions would be negligible, but no basis for that estimation is provided. Extensive planning and communication would be required to coordinate diversions in real time across the Russian River watershed.

g. Adoption of Best Management Practices

The BMPs are a-f above and therefore we incorporate our above comments by reference.

Section 4.5 - Annual Report
Staff estimates the cost to develop the annual report at $20,000 annually, but provides no information supporting the estimate. This section should be revised to disclose how this value was determined.

Section 4.6 - Direct Cost of the Proposed Regulation (related to Section 5.4 Benefits of Regulation)
This section asserts the economic equivalence of costs and benefits associated with the proposed regulation, but information is lacking to support this conclusion.

Item C.3 of Form 399 asks for a dollar figure response on the "total statewide benefits from this regulation over its lifetime." The response to Item C.3 refers to Section 5.3, however Section 5.3 does not address economic benefits. Item D.2 of Form 399 asks for dollar figures for the benefits associated with the proposed regulation and alternatives. The response to Item D.2 refers to Section 5.4 of Form 399, which *subjectively* and *qualitatively* describes the benefits of the proposed regulation, but does not *quantify* the economic benefits of the regulation. In addition to benefiting salmonids, Section 5.4 speculates that the proposed regulation "could lead to an increase in recreational and commercial fishing" which would benefit "people who work in the commercial fishing industry and the rural communities that provide goods and services to recreational anglers," however, no dollar values are assigned to these benefits in Section 5.4 or elsewhere in the document. Section 5.4 concludes by stating that there is "intrinsic value" to preserving salmonid species.

In Section 4.6 it is stated that the direct cost of the proposed regulation to Mendocino and Sonoma County growers "represents a reduction in income to growers but an increase in economic activity to firms providing services and products for frost protection therefore there is no net loss in aggregate welfare. The cost to growers of meeting the requirements of the proposed regulation is roughly equal to the regional economic benefits realized by those expenditures." While the cost of the regulation will be borne locally, there is no information provided to conclude that the "firms providing services and products for frost protection" are local, therefore it cannot be concluded from the information provided that there is no net loss to the aggregate welfare, at least in the local context.

Furthermore, any increase in economic activity due to the purchase of services and products will be temporary, and the on-going costs to the growers will continue long after the temporary bump in economic activity. The loss in tax revenue to the counties will also be permanent (see pages 49-51 of **Exhibit S)**. Therefore, one cannot reasonably conclude there is "no net loss in aggregate welfare."

In sum, Form 399 significantly underestimates costs by:

- assuming that everyone subject to the regulation will be able to afford corrective measures, when in fact many will suffer significant crop loss every frost season,
- using outdated multipliers in its analysis,

- underestimating employment losses,
- failing to include the costs of meter systems the regulation will require,
- using outdated and nonlocal estimates for meters it does include in the cost analysis,
- failing to include the costs associated with determining the stream stage necessary to prevent stranding,
- failing to include the costs associated with performing an annual risk assessment,
- unjustifiably reducing the number of acres that will be affected by the regulation,
- assuming most reservoirs are eligible to be used for frost protection,
- assuming additional reservoirs can even be built in light of the SWRCB North Coast Instream Flow Policy,
- underestimating reservoir construction costs,
- failing to include pump station costs as part of reservoir construction costs,
- assuming that USDA-NRCS grants are unlimited, apply to everyone and provide a 50% cost share,
- assuming wind machines can be used effectively in Mendocino County, and
- failing to include the costs associated with determining whether a groundwater well is "hydraulically connected" to the Russian River stream system.

Finally, there is nothing in Form 399 that quantifies benefits economically, and therefore the assertions of no net loss in aggregate welfare and the equality of expenditures and benefits are not supported in this document.

17. Is Unable to Meet the Findings That Will Be Necessary for the Regulation to Survive Legal Challenge

Government Code section 11350 provides:

> (a) Any interested person may obtain a judicial declaration as to the validity of any regulation…by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure….The regulation…may be declared invalid for a substantial failure to comply with this chapter….

Government Code section 11346.5(a) provides:

> (7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with the businesses in other states, it shall include the following information in the notice of proposed action:
>
> > (A) Identification of the types of businesses that would be affected.
> > (B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.
> > (C) The following statement: "The [SWRCB] has made an initial determination that the [adoption] of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The [SWRCB] (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:
> > > (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
> > > (ii) Consolidation or simplification of compliance and reporting requirements for

businesses.
(iii) The use of performance standards rather than prescriptive standards.
(iv) Exemption or partial exemption from the regulatory requirements for businesses.

***

(9) A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

***

(13) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

Put differently, in order to survive a legal challenge, this regulation, among other things, must: (a) disclose the fact that this regulation will have a significant, statewide adverse economic impact directly affecting business, (b) disclose that this impact will impair California businesses' ability to compete with businesses in other states, (c) disclose all the businesses that will be affected by the regulation (e.g. wineries, growers, management companies, labor, hotels, restaurants, etc.), (d) disclose all of the monitoring and reporting the SWRCB will be imposing on the grape growers, and (e) disclose all the costs that a private person or business would incur in complying with this regulation.

The SWRCB appears to have disclosed (a) and (b), but not (c), (d), or (e). Based upon what has been written above, the SWRCB needs to go back and disclose the real impact on businesses, disclose more of the monitoring obligations and costs, and disclose more accurate estimates of the costs individuals and businesses can expect to pay under this regulation.

Even though it has made some disclosures, the SWRCB must still consider alternatives (see (13) directly above) that reduce or exempt the monitoring and reporting impacts on businesses and private persons. As has been outlined on the previous pages, there are many alternatives that can reduce these costs:

1. The most prudent approach in light of all the evidence would be for the SWRCB to back away from the regulation and allow the counties and the local growers to manage the watershed. With the Endangered Species Act looming in the background, there is no incentive for a frost water user to create or maintain a conflict with a special status species. The Federal ESA enforcement proceeding on Felta Creek is incentive enough to work together and avoid any conflicts. As discussed above, Sonoma County already has a program in place and if the SWRCB would let it proceed, a similar program could be developed in Mendocino County if necessary. Neither county is interested in this regulation and the impacts it will create.
2. If the regulation must stay, there would be significant cost savings by exempting growers on:
    a. Dry Creek below Warm Springs Dam because it is highly regulated due to releases from Lake Sonoma and there has been no evidence to suggest diversions on this creek impair salmonid habitat.
    b. The mainstem below Coyote Dam because it too is highly regulated from releases from Lake Mendocino and there has been no evidence to suggest diversions below the dam currently impair salmonid habitat.
3. There would be similar cost savings by exempting those who pump from wells—

underflow or percolating. Groundwater pumping attenuates any possible direct impact on river flows or stage by supplying the water from the underground aquifer.

4. If the SWRCB is concerned that diverting directly from the main stem or Dry Creek may still create a drop in river stage, it could exempt growers on the main stem Russian River and Dry Creek who *also* pump from wells. This adds an extra layer of protection.

In addition to the changes already mentioned in the "This Regulation is Overbroad" section, there are some additional changes that can be made to limit the effects of this regulation without impairing its effectiveness.

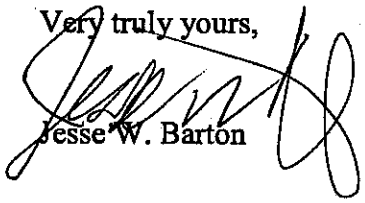
5. Extend the deadline date to March 14, 2013. Based upon **Exhibit V**, obtaining the necessary permits to install the stream gauges takes a minimum of one year.
6. Enroll all water diverters, including domestic and municipal, into the program.

Conclusion

We recognize the importance of this matter; however, the SWRCB has not provided an adequate legal basis for the regulation; it has not adequately disclosed, examined, or mitigated the environmental impacts that will result from the regulation; and it has not proceeded procedurally or substantively in conformance with the law. A principle reason the SWRCB has been unable to meet these burdens is because the proposed regulation is simply not necessary. The problems identified in 2008 have been addressed and significant steps have been undertaken to ensure adequate protection of instream beneficial uses. Yet this regulation runs the risk of encompassing and eliminating a wide variety of activities that will not help salmonids, which will impose substantial unnecessary costs, while at the same time ignoring actions that could assist salmonids. We recommend that the SWRCB consider, in full, the comments and suggestions made in this letter and let us know if you have any questions.

What is most distressing about the proposed regulation is the lack of good science, facts, and analysis of economic impacts surrounding it. It is important to the State of California that the SWRCB get the science, economics, and the scale right before it imposes such an enormous and unnecessary burden on the lives and livelihoods of so many citizens.

Very truly yours,



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July 5, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street. 24th Floor
Sacramento, CA 95814

Re: Proposed Russian River Frost Protection Regulation

Dear Ms. Townsend:

Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 76,500 agricultural and associate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau respectfully submits these comments on the Proposed Russian River Frost Protection Regulation ("proposed regulation") and Draft Environmental Impact Report ("DEIR") for the State Water Resources Control Board's consideration.[1] Since many of the points raised in this letter are also relevant to the Economic and Fiscal Impact Report and Initial Statement of Reasons, Farm Bureau requests the State Water Resources Control Board ("SWRCB" or "Board") consider these comments in regard to those documents as well.[2]

After three years of working to learn about and resolve the problems alleged in the National Marine Fisheries Service ("NMFS") February 19, 2009 letter to the SWRCB, the proposed regulation comes as a great disappointment. Based solely on anecdotal facts

[1] Farm Bureau is also a signatory to the letter submitted by Williams Selyem et al., which is fully incorporated herein by this reference.
[2] In the interest of readability, this letter refers to the DEIR, Economic and Fiscal Impact Report, Initial Statement of Reason, Fact Sheet, and related notices collectively as "supporting documents."

and simplistic assumptions, the proposed approach utterly ignores physical solutions already voluntarily put in place in favor of a regulation that would have the Board conditionally invalidate all water rights used for frost protection in the Russian River watershed.[3] While Farm Bureau remains committed to supporting efforts that make real world improvements to benefit fish and farmers, the proposed regulation is unnecessary, unjustified, and exceeds the SWRCB's authority. As the following comments explain, there are better alternatives which have not been analyzed, the facts do not support the proposed regulation, and the proposed regulation exceeds the SWRCB's authority and is contrary to due process.

Possible Alternative that Should Be Analyzed

While Farm Bureau is strongly opposed to the proposed regulation for the reasons detailed in this and other comment letters, there may be an appropriate alternative that would help support continued improvements for fishery resources while avoiding many of the significant problems with the proposed regulation.

One alternative the SWRCB should review and consider is actually a relatively simple, but fundamental, modification of the proposed regulation. Currently, the proposed regulation is a prohibition which declares that all diversions for frost protection are unreasonable and thus prohibited unless certain conditions are met. As described below, this amounts to an unjustified conditional extinguishment of certain water rights. To resolve this problem, the SWRCB should consider restructuring the proposed regulation from a declaration of what is not reasonable, to a statement of what is reasonable.[4] Like the regulation adopted for the Napa River, this type of regulation would be a policy statement, leaving determinations of reasonableness for the proper judicial or quasi-judicial proceeding.[5] While the supporting documents argue that the proposed regulation (with its blanket declaration of unreasonableness) is preferred because it would be too difficult to enforce anything else, such a desire for administrative convenience does not justify an abrogation of due process.

Such a policy statement would be factually and legally more supportable. Instead of making basin-wide declarations and forcing water users to prove their innocence by compliance with as yet unknown standards, a policy statement about what is reasonable would provide water users with information about how to achieve important

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[3] In the interest of readability, the term "Russian River watershed" is used to refer to the area covered by the regulation, which we recognize does not include the watershed above Warm Springs and Coyote Valley dams.

[4] *E.g.*, "Any diversion for frost protection from the Russian River watershed that is diverted in accordance with a board approved WDMP is reasonable."

[5] See *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752 holding that, "Properly construed, section 659 amounts to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."

improvements for the benefit of salmonids, without an unjustified regulatory declaration of unreasonableness.

NMFS Letter Not the Origin of Proposed Regulation

The DEIR, Notice of Proposed Rulemaking, and other supporting documents all point to a February 19, 2009 letter from NMFS to the SWRCB ("NMFS letter") as both the genesis of, and primary justification for, the proposed regulation. However, neither characterization is correct. In reality, as demonstrated by documents Farm Bureau received pursuant to a FOIA request, SWRCB staff actually requested, and even helped draft, the letter supposedly originating from NMFS. [6] Consequently, the supporting documents should be corrected to clarify that NMFS February 19, 2009 letter was requested by and drafted in part by SWRCB staff.

The Proposed Regulation is Not a Necessary Response to the NMFS Letter

Without explanation or support, the proposed regulation and supporting documents give the impression that the SWRCB is obligated to respond to the NMFS February 19, 2009 letter by adopting some form of prohibitive regulation. This is not true. In fact, responding to the NMFS letter with the proposed regulation is imprudent and, as indicated herein, inconsistent with the law.

While the Endangered Species Act ("ESA") prohibits individuals from "taking" listed species, it does not impose upon every regulatory body an affirmative obligation to regulate every possible action of every person that could potentially violate the ESA. The ESA is a self-executing, self-standing law, complete within itself for the specific purposes that law addresses. The Board has no obligation to assume (or impose on others) a responsibility the ESA does not itself impose.

While it is true that the SWRCB's own statutory charge obligates it to consider and protect instream and public trust resources on balance with all other uses, this obligation from the California Legislature does not amount to a delegation of omnibus responsibility for enforcement of the ESA. Such an assumption of responsibility is certainly not required, and in fact runs afoul of the Board's broader obligations to manage water for the general welfare by balancing various uses. The Board's zeal in the field of species protection does not permit it to abdicate these broader responsibilities in an effort to accomplish what is in effect enforcement of the ESA.

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[6] The documents received pursuant to Farm Bureau's FOIA and PRA requests are included on several CDs with this letter. Since these documents provide important information related to the origin, development, and factual justification of the proposed regulation, it is important the SWRCB consider them in regards to the proposed regulation. Consequently, Farm Bureau requests these documents be made part of the record for the proposed regulation.

Harm to Salmonids is Not Per Se Unreasonable

One of the many novel and unsupported assumptions underlying the proposed regulation is that any diversion or method of diversion that may harm salmonids or result in stranding mortality is *per se* an "unreasonable" method of diversion.[7] Effectively, this assumption would establish that any possible impact to a listed species means that a water user's water use is *per se* "unreasonable"—at least unless and until the water user has proven their innocence by submitting to an unknown battery of costly regulatory controls on the legal exercise of any otherwise legal water right. Such novel interpretation of the "reasonable use doctrine" has no basis in existing law.[8]

Under existing law, there are a number of specific and independent statutes requiring protection of species, including most prominently the ESA and California Endangered Species Act ("CESA"). However, the existence of these laws does not provide a basis for the proposition that because a water user may violate such a law in the future, a particular water use may currently be deemed unreasonable. This inappropriately attempts to merge the reasonable use doctrine with the ESA and CESA. Such a merger not only does not make sense, it is also unprecedented and inconsistent with existing law.

It should be evident that a water user with a reasonable method of diversion might violate the ESA by the unauthorized "take" of a listed species. This does not mean the use is unreasonable, it just means that the water user violated the ESA. In other words, the SWRCB's public trust obligations are in no way synonymous with or defined by the ESA or CESA.

The Proposed Regulation Fails to Balance Uses

In reasonable use determinations the Board or court must consider all of the facts and balance all beneficial uses. Here, the SWRCB has conducted no substantive factual inquiry and has made no attempt to balance beneficial uses. Rather, based upon anecdotal facts and unjustified extrapolation, the proposed regulation makes a universal declaration of "unreasonableness" throughout the watershed. Such an approach is an abrogation of the SWRCB's responsibility to balance uses.

Nonetheless, relying on this vacuum of information, the proposed regulation directs all water users to participate in an as yet undefined SWRCB-approved Water Demand Management Program ("WDMP") (regardless of whether these users have any impact or not), for the purpose of establishing whatever standards are necessary to entirely eliminate any possible risk of stranding mortality (regardless of the relative causes or inevitability of such stranding). If one does not participate in such a program, the

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[7] The two standards "may harm salmonids" and "may result in stranding mortality" are used somewhat interchangeably in the supporting documents and thus are both mentioned here.

[8] A review of the authority cited in the DEIR for this rule, *Environmental Defense Fund v. East Bay Municipal Utility District* (1980) 26 Cal. 3d 183, does not reveal any support for the assertion that conflict with species is *per se* unreasonable.

regulation imposes an absolute prohibition on any diversion of water for frost protection. While simple and ably targeted at achieving a single overriding objective, such an approach can hardly be called a proper "balancing" of uses; rather, it establishes the Board's goal of "preventing stranding" as *the* primary use and object of all water management throughout the watershed, to which all other uses must cede.

This unequal treatment is made evident by the fact that the obligation to "prevent stranding"—or in other words completely eliminate any risk of stranding whatsoever—sets an impossibly high standard. To ensure with 100% certainty that not a single fish could possibly be stranded due to any diversion or extraction of water for frost protection, it would likely require that diversions have absolutely no effect on stream stage. This could well mean that in many cases no water could be diverted. Taken to its absurd conclusion, this could even mean that the proposed regulation might impose on water users the obligation to augment flows to prevent any natural stranding that may occur during this period (since the objectives of the proposed regulation do not clearly distinguish between natural or diversion related stranding).[9] Of course, there is nothing balanced or "reasonable" about such an approach, but this is nonetheless how the proposed regulation is drafted.

To better appreciate how the proposed regulation does not properly balance uses, it may be useful to suggest what a balanced approach might look like: One scenario might be where the SWRCB, after considering whether certain diversions actually posed a threat of stranding, determined that a reasonable balancing of uses required an 80% probability that fish would not be stranded due to diversions for frost protection.[10] Such an approach would afford a reasonable degree of safety for the fishery resources, without giving one use absolute preference. Without such flexibility, the obligation to attain 100% certainty is likely unattainable, unworkable, and unreasonable.[11]

Of course, it is impossible to know from the information presented with the proposed regulation what actual obligations the standards of a Board-approved WDMP might require, but then it is equally impossible to know from the information presented whether there is in fact any widespread risk of stranding in the watershed. This reinforces the point made below that the SWRCB cannot support a declaration of unreasonableness without conducting a thorough factual investigation in the context of a formal evidentiary hearing.

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[9] The Williams Selyem *et al.* letter and the 2000 Biological Assessment for the Operation of Warm Springs and Coyote Valley Dams (hereinafter "2000 Biological Assessment" – a document within the SWRCB's records) provide evidence that, particularly in the spring as flows recede, stream stages drop and stranding occurs naturally. Furthermore, it is worth noting that the proposed regulation does not clearly distinguish between natural or diversion related stranding in describing the objectives of the regulation.

[10] The "80%" figure is for example only.

[11] For example, the degree to which diversions must be limited or changed to go from 50% to 80% certainty of preventing stranding may be relatively low. The degree of modification required to go from 80% to 95% is likely much greater. And the degree to which water users must limit or modify diversions in order to achieve 100% certainty no stranding will occur is exponentially greater.

To clarify, upon completing the proper factual investigation in an appropriate process, the SWRCB might indeed conclude a particular diversion or method of diversion is unreasonable in light of all the facts (including its effect on species). However, the SWRCB may not cut corners and arrive at such a result prematurely and improperly by means of a regulation that circumvents due process and avoids all of the necessary factual antecedents for a determination of "reasonableness." The proposed regulation impermissibly places its entire emphasis on the theoretical potential to pose some threat to species without any consideration of the relative burden to the water right holders or any actual benefit to the species.

There is Not Adequate Evidence to Support the Proposed Regulation

According to the supporting documents, the proposed regulation relies almost entirely upon two pieces of evidence to support the conclusion that all surface-water diversions and groundwater extractions throughout the Russian River watershed are unreasonable because they may harm or strand salmonids. These two pieces of evidence are the February 19, 2009 letter from NMFS and a paper by Deitch *et al.* titled, "Hydrologic Impacts of Small-Scale Instream Diversions for Frost and Heat Protection in the California Wine Country." However, reliance upon these two pieces of evidence is misplaced and inadequate to justify the proposed regulation.

In regards to the NMFS letter, and as described more fully in the numerous presentations and comments to the Board, voluntary efforts have fully resolved any contributions diversions for frost protection may have had on the strandings described in that letter.[12] Regarding the Deitch, *et al.* paper, Farm Bureau understands that Dr. Deitch sent a letter to the SWRCB disabusing the Board of the presumption that the study on Maacama Creek could be assumed to reflect conditions throughout the Russian River watershed, which clarifies that the Maacama Creek study does not justify a basin-wide regulation.

Notwithstanding the fact that neither the NMFS letter nor the Deitch *et al.* article can be used to justify a basin-wide declaration of unreasonableness, the supporting documents attempt to justify such a declaration by combining these anecdotal observations with some generic statements about viticulture and theoretical descriptions of frost protection methods to conclude that existing diversions for frost protection are unreasonable. Based upon these sparse facts and assumptions, the proposed regulation concludes that what has been actually observed and documented in two isolated and relative minor instances is in fact a problem endemic to the entire watershed. Such wild extrapolation, however, is improper and does not provide sufficient justification for the proposed regulation.

[12] The physical and managerial improvements that eliminated the potential diversions for frost protection that contributed to stranding are also described in the Williams Selyem *et al.* letter.

There is No Evidence to Support Inclusion of Groundwater Extraction

Another unsupported component of the proposed regulation is that it would apply to all groundwater extractions within the basin. However, there is no evidence in the record to demonstrate that groundwater extractions have the sort of instantaneous effect on stream flow that a direct diversion might have. In fact, there is evidence to the contrary that groundwater extractions, even if hydraulically connected, have a buffered effect on streamflow.[13] Furthermore, since the only evidence of stranding is allegedly connected to direct diversions, there is therefore absolutely no justification for extending the regulation to groundwater. This expansion is particularly unjustified in light of the SWRCB's obligation to review the facts and circumstances of each case when making a reasonable use determination.

The SWRCB Must Recognize and Analyze Natural Stream Stage Variation and Natural Stranding

Yet another factor the SWRCB must consider, and yet has not, is that significant and sometimes rapid stream stage changes occur routinely from a variety of causes, including naturally, *other than* frost protection. As evidenced by reviewing streamflow records for any number of north coast streams on the California Department of Water Resources website and the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam, reductions in stream stage similar to those seen during the 2008 March-May frost season occur routinely.

In fact, it is precisely because streamflows vary naturally that it is possible to develop standards like the "Hunter criteria" which provide acceptable stream stage change rates for reservoir operations and other anthropogenic activities.[14] The proposed regulation and supporting documents do not indicate whether this science has been considered, why it has been rejected, or what standards should be used in place of the "Hunter criteria." Absent such information, it is not clear how the SWCB will address natural stream stage changes and instances of natural stranding.

No Evidence Hypothetical Frost Protection Practices are Problematic

The DEIR makes a number of general statements about frost protection practices that are apparently intended to demonstrate that there is widespread inefficiency in frost water practices. (DEIR p. 13) The problem is that these are all hypothetical statements. There is no evidence to show that these theoretical situations actually exist at all, let alone in

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[13] See Williams Selyem *et al.* letter.

[14] The Hunter (1992) criteria indicate that a stream stage change of 1inch per hour is acceptable. This is the criteria required for the operation of Warm Springs Dam and Coyote Valley Dam. Also, the FOIA documents received by Farm Bureau and others indicate that the SWRCB and NMFS were aware of these criteria. (Also see the Williams Selyem *et al.* letter.) This information along with information indicating that natural variations in the Russian River exceed these criteria is available in the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam.

locations and to such a degree that it would pose any actual threat of stranding. Absent this supporting information, the Board may not rely upon merely hypothetical statements to justify the proposed regulation.

Objective of Regulation is Ambiguous and Prospective

The proposed regulation and supporting documents do not clearly describe the objective of the proposed regulation or establish any clear standards for the achievement of that objective. To judge by the proposed regulation, the apparent purpose is to "prevent stranding mortality." However, in the Draft Statement of Reasons the purpose of the WDMP is to ensure that cumulative diversions will not result in a reduction in stream stage that is "harmful to salmonids." While it appears that in most instances the phrase "harmful to salmonids" was struck in favor of the slightly clearer objective to "prevent stranding mortality," there remains confusion in the supporting documents as to which standard would be actually used.

The proposed regulation is also unclear in regard to the standard or standards which will be employed to achieve the objective of "preventing stranding mortality" or "preventing harm to salmonids." The most significant problem this poses is that the SWRCB has apparently rejected the existing science (namely the Hunter criteria from the 2000 Biological Assessment for the Operation of Warm Springs Dam and Coyote Valley Dam and elsewhere), without any clear indication of the standard that will replace it (or, for that matter, *why* some different standard is needed, if such is the case). It is likely that the reason no such standard has been set is because there has been no appropriate factual inquiry. In addition to the due process problems such a failure presents (described below), this presents the practical problem of requiring compliance to achieve an objective without any idea of what measure will be used to determine whether that objective has been achieved.[15]

This vagueness means that the five components of the WDMP do not provide enough detail: to analyze the project under CEQA, to justify the need for the regulation under Government Code section 11350, to support a declaration by the Board that diversions for frost protection are unreasonable, to provide to the regulated community adequate knowledge of what must be done to comply with the regulation, or to comply with due process.

The Proposed Regulation is Inconsistent with the Reasonable Use Doctrine

The most troubling aspect of the proposed regulation is the manner in which the SWRCB is proposing to exercise its authorities under the reasonable use doctrine. In the name of

[15] Adding to the uncertainty regarding what standard or objectives are expected, the Fact Sheet, in answer to the question "Why are frost protection regulations necessary on the Russian River?" answers that it is because frost diversions "can lower stream levels to the point fish become stranded." This is strange because it is not clear that the alleged problem was a "point," but rather was a "rate of change." Clarification is needed here.

administrative convenience, the proposed regulation radically breaks with all past precedent relating to the reasonable use doctrine and its application to water rights and water use in California.

A determination as to whether a particular diversion or method of diversion is reasonable or unreasonable is a judicial function. This becomes clear when one considers that: 1) both courts and the SWRCB have concurrent jurisdiction over reasonable use determinations (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 451); 2) "courts, including *Joslin* [*v. Marin Municipal Water District* (1967) 67 Cal. 2d 132] have uniformly determined that reasonableness is a question of fact requiring case-by-case consideration of the circumstances in each case. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 567";[16] and 3) a declaration of unreasonableness affects a constitutionally protected property right by limiting, conditioning, or even extinguishing the underlying water rights (*Imperial Irrigation District v State Water Resources Control Board* (1990) 225 Cal. App. 3d 548, 562).

It is also telling that in *State Water Resources Control Board v. Forni* (1976) 54 Cal. App. 3d 743 ("*Forni*")—a case upon which the SWRCB relies heavily—a regulation similar to the proposed rule was upheld *not* as an actual declaration of reasonableness, but rather as a mere policy statement which left the ultimate adjudication of reasonableness to the judiciary.[17] Thus, the *Forni* case, *Imperial Irrigation District v State Water Resources Control Board* (1990) 225 Cal. App. 3d 548, and a long and venerable line of earlier cases leave no doubt but that determining reasonableness is a judicial function that may be done by courts or the SWRCB, but only through a judicial or quasi-judicial process on a case-by-case basis.

In fact, the proper approach is outlined at California Code of Regulations title 23, § 4000 *et seq.* in the Board's own regulations relating to the "Prevention of Waste, Unreasonable Use or Diversion of Water." Although the SWRCB may not be obligated to precisely follow these regulations, any procedure followed by the Board must preserve the basic due process guarantees that are reflected in these regulations. In other words, even if the SWRCB need not follow the precise letter of its own regulations, it must provide some comparable process to ensure the same substantive protections of due process.

The mere fact that the proposed regulation is to be generally and prospectively applied does not mean that the SWRCB is therefore enabled to transform into a quasi-legislative function what is necessarily a quasi-judicial function. Nonetheless, the Board apparently seeks to accomplish just such a transformation in the name of administrative convenience.[18] However, "administrative efficiency at the expense of due process is not

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[16] California Water II, page 48.
[17] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 752.
[18] Draft Initial Statement of Reasons, p. 3 stating that: "Without a comprehensive regulation, the State Water Resources Control Board would have to address diversions piecemeal, or in a complex and time-consuming adjudicative proceeding, as described below."

permissible."[19] Simply put, the SWRCB cannot follow a regulatory process to do what must be done through an adjudicatory process.

The Proposed Regulation is Inconsistent with Due Process

The SWRCB's authority to implement the reasonable use doctrine is both more powerful and more limited than its general regulatory authority. As the Board is well aware, there is legally no right to use water "unreasonably." Consequently, by declaring *all* diversions for frost protection "unreasonable," the proposed regulation would have the extraordinary effect of eliminating *all* water rights for frost protection unless and until the water users demonstrate compliance with certain as yet undefined procedural obligations.

This means that regardless of whether such diversions are "unreasonable" *in fact*, the proposed regulation would nonetheless impair vested water rights by declaring all diversions for frost protection "unreasonable" as a matter of administrative convenience. Thus, the proposed regulation would essentially create a new and unprecedented category of procedural unreasonableness. In so doing, the proposed regulation enters into direct conflict with fundamental due process requirements guaranteed under the United States and California Constitutions, and protected by the Civil Rights Act at 42 U.S.C. section 1983.

If adopted, the proposed regulation will be contrary to the Constitution and inconsistent with due process because: it would impair a constitutionally protected property right; it would impose a procedural obligation on legal water users through a regulatory (quasi-legislative) process even though the obligation here is properly an evidentiary one to be met by the Board through an adjudicatory (quasi-judicial) process; it lacks adequate factual support; it fails to provide clear standards for compliance; it applies indiscriminately to all diversions for frost protection whether or not there is any demonstrable risk of actual harm to salmonids; and it amends water rights without following the proper water rights procedures.

***Distinguishing the Napa River Regulations and* Forni**

The supporting documents point to the Napa River as an example of "regulatory precedent." However, as detailed below, this reference is misleading and any reliance is misplaced. An in-depth analysis of the Napa River situation, particularly the regulation and the First Appellate District case of *State Water Resources Control Board v. Forni*,[20] reveals that the proposed regulation shares nothing more than a superficial similarity with the Napa River example.

This superficial similarity does include a similar problem, that of "high instantaneous demand for water for frost protection by numerous vineyardists;"[21] and like the proposed

[19] *Manufactured Home Communities, Inc. v County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 715.
[20] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743.
[21] Cal. Code of Regs., tit. 23, § 735.

regulation, the Napa River regulations did declare certain "diversions of water" for frost protection between March 15 and May 15 to be "unreasonable in violation of Water Code section 100." However, the similarity ends with these simple and incomplete facts.

The difference between the Napa River regulation and the proposed regulation is that under the Napa River regulation the SWRCB properly left to an adjudicatory process the ultimate factual determination as to which individual diversions would be actually ruled unreasonable.[22] Thus, before the Board could in fact apply its rule to any diversion in the watershed, the Board correctly recognized that it first had to obtain a *judicial or adjudicatory determination* as to the "reasonableness" of each diversion in the watershed.

This is demonstrated by reviewing the legal question at issue in *Forni*—whether Water Code section 275, authorizing the SWRCB to "take *all appropriate proceedings* or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state," meant the Board's complaint "state[d] sufficient facts to constitute a cause of action for injunctive and/or declaratory relief."[23] Of course, the "appropriate proceeding" bearing on the question of unreasonable use is a formal proceeding before the Board or a court that would actually adjudicate the issue of reasonableness—*not* a quasi-legislative rulemaking process.

As sharply underscored by the *Forni* court, the question of "unreasonable use," as applied to an individual water right, cannot be determined in any way *other* than through a judicial or quasi-judicial administrative inquiry into the factual specifics of each case:

> [W]e wish to make it *unmistakably clear* that *all we hold today* is that appellant's complaint states valid causes of action for either injunctive or declaratory relief or both [court's ruling reversing the grant of summary judgment below], and that *the question of reasonable use or reasonable method of use of water constitutes a factual issue which cannot be properly resolved by a motion for judgment on the pleadings.* (Emphasis added.)[24]

"Properly construed," as the *Forni* court clearly stated in discussing the purpose and legal effect of the Board's Napa Valley rule at issue in that case, "section 659 amounts to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary."[25]

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[22] See *ibid* ("*all diversions of water* from the stream system between March 15 and May 15 *determined to be significant by the board or a court of competent jurisdiction* shall be considered *unreasonable* and a violation of *Water Code Section 100 unless controlled by a watermaster administering a board or court approved distribution program*").
[23] *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743, 751.
[24] *Id.* at 754.
[25] *Id.* at 753

In addition to these fundamental legal and procedural distinctions, the Napa situation of the 1970s and the present-day Russian River situation can be factually distinguished as well.

First of all, the facts of the former case suggest that instantaneous demand for frost protection in the Napa Valley was at times actually "drying up the river."[26] By contrast, in the Russian River Valley drawdown from instantaneous demand for frost protection at the time of the only partially documented incident of fish stranding in 2008 involves a rate of decline of less than 1.5 centimeters per hour—and at no time is there any evidence to suggest that flows in the Russian River as a consequence of frost protection ever come anywhere even close to "drying up."

Second, in the Napa Valley the effect of instantaneous demand was an obvious infringement on vested water rights; certain diverters in the watershed were at times completely deprived of their water supply.[27] Thus, in Napa, the precise magnitude and location of such impacts were obvious, as was the cause. All of this was known and clearly documented as the result of an extensive adjudicatory proceeding.
In contrast, the proposed regulation is based solely on outdated (see discussion regarding improvements already made) anecdotal observations and unjustified extrapolations. There is very little, if any, factual information to document the precise nature or magnitude of any adverse impacts, or to establish any causal link between stranding and frost protection.

Even if such a declaration *were* factually justified, however, the ultimate determination as to which, if any, of all the hundreds of diversions in the Russian River watershed are "unreasonable," and which are "reasonable," is necessarily an adjudicatory determination that can only be reached by means of an appropriate proceeding before the Board or a court.

Thus, contrary to the assertion in the Board's rulemaking, neither the Napa River regulations nor the *Forni* case provide support for the Board's current approach. For that matter, neither does any other water right proceeding of the Board or any decision yet issued by the courts.

Procedural Unreasonableness

The proposed regulation would, for the first time, create a category of "procedural unreasonableness." Reasonable use determinations have in the past always required a case-by-case, factual analysis of the particular physical conditions involved in each situation. In a normal proceeding, the end result is a fact-specific determination as to

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[26] See, *e.g.*, *Forni* at 747. See, also, Cal. Code Regs., tit. 23, § 735 and "Judgment Granting Permanent Injunction," dated Dec. 29, 1976, *People of the State of California ex rel. v. Forni*, No. 31785, Superior Court of the State of California, County of Napa at 5.
[27] See *ibid.*

whether a particular diversion or method of diversion is in fact physically unreasonable in light of all of the relevant facts.

In contrast, the proposed regulation suggests that a use can be deemed unreasonable without any evidence of an actual physical conflict, but rather merely because that diversion is not operated "in accordance with a board approved water demand management program (WDMP)." The WDMP is then obliged to perform a number of strictly procedural tasks including determining whether or not the diversion actually has any physical "potential … to cause stranding mortality." If so, the WDMP is supposed to then identify corrective actions "that will prevent stranding mortality,"[28] or "cease diverting water for frost protection." While perhaps elegant in its simplicity, this approach is fatally flawed in that it completely ignores the fact that Constitutional obligation to use water reasonably is a physical obligation, depending on the facts in each case, and not a procedural requirement.

Unpacking how the proposed regulation would function, one could anticipate a number of legal anomalies concerning the supposed "reasonableness" or "unreasonableness" of any of the hundreds of affected diversions. For example, there might a water user extracting groundwater for frost protection that poses no risk of stranding salmonids. Even assuming *arguendo* that harming a salmonid is by definition "unreasonable," this person would be doing nothing factually or physically "unreasonable." But, under the proposed regulation, if that person fails to participate in a WDMP, the person's water use would be deemed a *per se* "unreasonable" use and that person would have no right to use water. Thus, under the Board's rule the unusual circumstance will inevitably arise that any number of water users' diversions might be physically and factually reasonable, but procedurally unreasonable.

A similar situation would arise in the case of a water user that might formerly have diverted water for frost protection in a manner that might have posed a risk of harm to salmonids, but who then made some change (or changes) that adequately and appropriately reduced this risk. Notwithstanding the fact that the water user physically removed any potential for conflict, that water user would nonetheless lose his or her water right for unreasonableness if he or she failed to continue to participate in a WDMP. The water users' right to use water would be artificially limited, constrained, or regulated away in a complete absence of any factual basis or evidentiary support for doing so.

The point of these hypothetical scenarios is to demonstrate that the proposed regulation simply may not rely on the reasonable use doctrine in the manner suggested in the proposed regulation. The situation simply does not justify the creation of a new category of "procedural unreasonableness," even if such an approach were legal. In point of fact, the Board's proposed approach is not merely unjustified and itself "unreasonable," it is contrary to the law.

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[28] It is not clear from the regulation whether the obligation to "prevent stranding mortality" is limited in any way or if the obligation includes preventing any natural occurrences of stranding that may happen as well.

SWRCB's Authority over Pre-1914, Riparian, and Groundwater Rights Is Limited

While it is clear the SWRCB has some authority over pre-1914, riparian, and groundwater rights, this authority is not coextensive with the Board's authority over post-1914 appropriative water rights. While the SWRCB may alter or modify post-1914 appropriative rights through various mechanisms provided for in the Water Code, this same regulatory authority does not extend to the pre-1914, riparian, and groundwater rights. Rather, the SWRCB's authority over those water rights is more limited. While in the exercise of certain quasi-judicial functions, the SWRCB, like the courts, may make certain determinations regarding pre-1914, riparian, and groundwater rights (including, specifically, a determination that a particular diversion, method of diversion, or method of use is "unreasonable" in light of the particular facts of each case), the SWRCB does not have the same authority to exercise quasi-legislative authority over pre-1914, riparian, and groundwater rights that it might be empowered to do in regards to post-1914 appropriative rights.

Permitted and Licensed Rights May Not be Amended by Proposed Regulation

Although the SWRCB does have its most expansive authority over post-1914 appropriative water rights, this authority is by no means unlimited. The proposed regulation purports to amend every license and permit issued in the area subject to the proposed regulation without any due process, including the statutorily required proceedings for amending a water right which require notice, a hearing, presentation of evidence, cross-examination, and other procedural safeguards. Here, the Board is in effect proposing to amend hundreds of individual water rights licenses and permits without providing any of the statutory due process protections it must provide for such a purpose.

The Proposed Regulations Ignore Water Rights Priorities

In addition to its failure to balance competing uses, the proposed regulation fails to appropriately consider water right priorities. In declaring all diversions "unreasonable" without distinction, the Board's rule makes absolutely no attempt to allocate any responsibility for mitigating the effects of water diversions among different classes of water users. Thus, riparians are treated the same as appropriators, and senior appropriators the same as junior ones. Like the novel attempt to designate all uses of water "unreasonable" without any appropriate due process protections or consideration of the facts, this complete disdain for water rights priorities represents a radical departure from all prior precedent and, we believe, is inconsistent with the law.

The Proposed Regulation Improperly Shifts the Burden of Proof

It is a longstanding presumption that a use is reasonable, particularly if it is a typical use in the area, and that the burden is on the party challenging the use to demonstrate

unreasonableness. (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 547-548.) Here, the Board's proposed regulation reverses this burden of proof, establishing an assumption that all diversions for frost protection are *per se* "unreasonable," and shifting to the water users the burden of proving otherwise. Even stranger is that even if subsequently proven innocent, the water user is still apparently obligated to participate in the WDMP or risk prosecution.

Conclusion

Farm Bureau appreciates the opportunity to comment on the proposed regulation. While we are critical of the approach the proposed regulation suggests, we have proposed a reasonable alternative and look forward to continuing to work with the SWRCB and others to continue to actually improve conditions for fish. If you have any questions, please do not hesitate to contact me directly at (916) 561-5667 or jrice@cfbf.com. Thank you.

Very truly yours,

Jack L.Rice
Associate Counsel

JLR:dkc

Attachments: (These DVDs have been tested, but if they do not work, please contact Jack Rice and additional copies will be provided immediately.)
- PRA Response from Department of Fish and Game (2 discs)
- PRA Response from State Water Resources Control Board (1 disc)
- FOIA Response from National Oceanic and Atmospheric Administration (4 discs)