



**To: Chairman Charles Hoppins and Board Members:**

From: Patrick Porgans, Concerned Member of the Public

**Re: Notice of Opportunity for Public Comment – DRAFT Russian River Frost Protection Regulations – DRAFT Text of Proposed Regulation; Amendment to Division 3 of Title 23 of the California Code of Regulations, which, adds the following section: 1 862 Russian River, Special.**

**Attention: Jeanine Townsend, Clerk to the Board: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)**

**Fax Number (916) 341-5620, SWRCB, P.O. Box 100, Sacramento, CA 95812-2000**

My name is Patrick Porgans my input in this so-called proceeding is as a concerned member of the public, with a belief that it is my civic responsibility to ensure the sustainability of the public trust resources for ourselves and future generations.

As a matter of record, comments submitted heretofore, by Patrick Porgans & Associates (P&A), attest to the concerns, suggestion and/or objections to the proposed frost regulations. As was pointed out in P&A's 18 November 2009 Frost Protection Workshop, and subsequent testimony, which included written comments, concerns, objections and recommendations to the proposed adoption of frost protection regulations within the Russian River watershed. At that time, P&A submitted the following written comments to the board, and for the record, which stated: ***"The board is the primary entity that has the mandate to protect all beneficial uses and users of water. Therefore, we remind the board, that it, not NMFS, has the authority over water rights and the mandate to ensure that the water needs required to sustain public trust resources are met."***

Managing water use for frost protection – while not impacting salmonids – will require a level of coordination at the basin scale, not yet demonstrated.

The scope of the frost protection threat rest solely within the regulatory and statutory purview of the board, and, is obviously beyond the vested-interests (Sonoma County Board of Supervisors, Wine Country growers, and/or the nongovernmental organizations (NGOs), such as Trout Unlimited authority. The record will also attest to the fact that many of those same entities are "responsible" for the deplorable conditions and declining fisheries within the watershed. Most, if not all, of whom have been recipients of enormous amounts of public funds, to ensure that this type of protracted delays, shifting the 'responsibility" back to the perpetrators, make-it complicated, buy time, adopt "new" regulations

and make new laws, when the laws that are already on the books to protect the waters of the state and the aquatic life therein are essentially ignored, watered-down, revised or placated.

Let us not forget that as far back as 1988, government funded anadromous fish doubling populations for the Russian River were implemented, which, if the officials' numbers are accurate, the populations are worse now than ever. This decline in fisheries within the watershed have and continue to cost the public tens-of-millions of dollars, while the fish and other water rights users' rights have been ignored by this board and/or selectively "enforced".

**Comments Regarding the Draft:**

The proposed draft frost protection regulation, as written, is disingenuous, somewhat misleading, and, subservient to the growers in Wine Country, many of whom, along with this board, and other government agencies, are the primary cause for the deplorable conditions of the trust resources within the watershed.

The language therein is so watered down and convoluted that it simply provides the growers, government officials, and the fund-raising NGOs more time to dehydrate the watershed dry. For example, on page one, paragraph one, it states: *Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frost. ... During a frost, however, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonids due to stranding.*

**Response:** Surely the board is aware of the Endangered Species Act violations that caused the "take" of thousands of listed andromous fish in the Russian River, due to the fact that water demand during several alleged frost warning events did in fact cause the death of listed species; a fact that was established by NOAA's Office of Law Enforcement, upon completing its several year investigation. The ultimate disposition of the civil violations, are presently undergoing some backdoor settlement negotiations.

**Water Demand Management Program (WDMP):**

On page two, paragraph two, the draft states: *"The purpose of the WDMP is to assess the extent to which diversions for frost protections affect stream stage and manage diversions to prevent (struck out ensure that) cumulative diversions for frost protection from causing a reduction in stream stage that cause stranding mortality. The WDMP, and any revisions thereto, shall be administered by an individual or governing body (governing body) capable of ensuring that the requirements of the program are met."*

**Response:** The WDMP shall be administered by an individual or governing body capable of ensuring that the requirements of the program are met. REALLY! Here again, this is déjà vu, just like the board's Bay-Delta Water Right Decision 1641 proceedings, the Grassland's Bypass Project, wherein the board shifted a significant amount of its responsibility unto many of those same entities that are responsible for the decline of the Bay-Delta Estuary to obtain voluntary compliance. This orchestrated designation of some

other, yet-to-be identified “governing body” to prevent standing mortality and resulting from cumulative diversions is paramount to putting the “fox-guards” in the henhouse. The board’s Bay-Delta Plan is indicative of its cavalier, hap-hazardous, wild-west mentality; this board has to be compelled back into reality.

On page six, paragraph (d), it states: The governing body may develop and submit to the Deputy Director for Water Rights’ approval criteria ....

**Response:** Use of the wordage “may” implies that it is up to the governing body; such discretion is problematic.

On page seven, paragraph (e), it states: *“Compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River stream system for the purpose of frost protection. The diversion of water in violation of this section, including the failure to implement the corrective actions included in any corrective action plan developed by the governing body, is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be subject to enforcement by the board.”*

**Response:** Here again, a consultant firm retained by the board produced a report that indicated that there are an alleged 1,771 existing unauthorized (illegal) diversions in the Russian River watershed, which was documented back in 2008. The board opted to take staff assigned to that task, in the middle of that investigation, and reassigned them to seek out potential unauthorized diversions taking place in the Delta. Presently, I am awaiting a reply from the Division of Water Rights as to the disposition of those unauthorized diversions. In the case where the board’s sister agency, the Department of Water Resources, and the federal Bureau of Reclamation, illegally diverted and/or stored an estimated 500,000 acre-feet of water from the Delta, back in the early 1990s, with an estimated value of more than \$29 million, the board opted not to take an enforcement action; coincidentally, during that same period the board was adopting “new” laws and plans to protect the Delta water uses and users, while it failed to enforce the existing laws, which, it said were not strong enough.

The conduct of the board and the conditions of the waters of the state, and the aquatic resources dependent upon the board are indicative of its ongoing dereliction of duty.

Please enter my comments into the record, and provide me with confirmation that they have been received. Should the board have any questions regarding the comments, they will have the “opportunity” to ask me questions during its upcoming scheduled frost protection regulation meeting.

**Recommendation:**

1. Before the board adopts any new regulations, in particular the proposed frost protection regulation, it should first enforce existing regulations and laws within its purview; i.e., issue an order to have all of the existing illegal diverters within the Russian River watershed to cease and desist.

2. No new off-stream storage ponds should be allowed in any area that has the potential of stranding or killing fish.
3. All of the wine grape acreage that was knowingly planted in areas within the watershed that were highly susceptible to frost damage, should not be afforded the same level of protection.
4. Initiate proceedings to ascertain how much water is within the Russian River watershed, the reasonable demands that can be accommodated for the purpose of wine-grape production, under varying hydrological conditions.
5. According to USDA data, almost 60,000 acres of wine grapes have been planted in Sonoma County; the total fruit and nut acreage for the county is around 63,000 acres, according to the County Agricultural Commissioner's 2010 crop/acreage report. In fact, during the 2008 and 2009 "take" (killing of fish due to water diversions for frost protection) there was a "glut" in the wine grape production.
6. Allowing additional 20-acre storage ponds, within the watershed, although in theory a seemingly viable means to augment losses associated with stranding mortalities, however, it also has a real potential of exacerbating the problem. This type of scenario would be especially true when the area experiences a mild winter and limited runoff within the watershed in the March through May period. P&A's years of experience in the watershed, during such events, the vintners resorted to extracting or obtaining water from any source that is available. In unison with board staff, we have even documented numerous occasions where upstream diverters resorted to having water from downstream sources trucked back up into the headwaters to irrigate wine grapes. Let us not lose sight of the simple fact that wine is not a food, it is classified as an alcoholic beverage, which has been known to contain carcinogens.
7. As for the monitoring of diversions, the language as written provides too much discretion on the behalf of the yet-to-be identified "governing body". It will take years, if not decades, at the pace the board, vintners, and the NGOs are going, which is obviously part of the plan.
8. In light of the existing water demands placed on the Russian River and the tributary streams and the new law allowing for 20-acre ponds, will surely increase demands on the watershed, raising additional uncertainty as to just how much water will be available for diversions, under changing hydrological conditions. Therefore, it is suggested, that the board consider classifying the entire watershed as fully appropriated, and, if anyone contest such a decision, then, it should be their responsibility to request formal water right adjudication for the watershed, if such an action is appropriate.

**Conclusion:** It has been written that it is very important for the government to give the public the impression that they are protecting the public's trust resources, especially, when it is not doing so. Under that scenario, the board has succeeded masterfully.

Please enter my comments into the record, and advise me that the comments have been received; comments are being sent via e-mail, fax, and U.S. mail. If the board has any questions regarding the content of this communication, you “may” ask me when I appear before the board on this matter.

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