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8 September 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Reference: Draft Russian River Frost Protection Regulation

Dear Ms. Townsend:

I have received the revised draft for the proposed Frost Protection Regulation dated 1 September 2011, and the proposed Adoption Resolution which was recently prepared. The Water Board staff has written a 300-plus page Response to Comments.

The development of this regulation has proceeded through drafts of January 2010, March 2011, May 2011 and finally September 2011. At the beginning any diversion for frost protection that the Water Board determined was significant was declared "unreasonable and a violation of water Code Section 100, unless the water is diverted pursuant to a board approved water demand management program (WDMP)." Furthermore, unless the diverter can establish that water diverted for frost protection has a negligible impact on stream flow, that diversion is automatically considered significant.

In consequence of this reasoning, the Water Board was set to require that each diverter develop a WDMP that is acceptable to the Board. There were no specifics and it appeared the Board would grant considerable latitude in the method of diverters establishing a plan.

It was not clear to me, however, that the fundamental legal principles were sound, and I wrote a long letter on 8 March 2010 challenging the thought patterns and logic which the Board used to come up with this regulation. I discussed mostly the concept of unreasonable use versus reasonable use and tied these to the various statutory authorities which were cited, because this notion of unreasonable use was the linchpin on which the entire regulation was developed. Chairman Hoppin had said declaring water for frost protection an unreasonable use was necessary in order to develop regulations.

As material was added to the intermediate drafts and the final draft of the proposed regulation, a number of major changes occurred. One of the supposedly large ones was to recognize that frost protection is a beneficial use of water. I've heard grape growers say this was a good thing and showed a sense of compromise. However, there is a legal distinction between "beneficial" and "reasonable", and in the draft of 1 September 2011, the Board still says, "These diversions are unreasonable unless conducted in accordance with a board-approved water demand management program. . . ."

The latest proposal goes on to refine many sections of the March 2011 and May 2011 drafts to include many things that were not in the original draft regulation of January 2010. For example, the water demand management program now requires a complete inventory of all frost diversion systems, an elaborate and expensive stream stage monitoring program (which includes real-time monitoring and recording at least every 15 minutes), a full assessment of stranding risk, timelines for implementing the WDMP, and annual reporting of various activities. These conditions are complicated, expensive and onerous to landowners. Worst of all, they don't help fish populations to recover. Even if the risk assessment demonstrates there is no hazard to salmonids by a currently operating frost protection diversion program, all the rest of the

provisions must be carried out, all at the landowner's expense.

As I have written before and as my attorney has written for the Comments, it is not at all clear that this proposed regulation will survive challenges. First of all, there is no proof nor even reasonable evidence that these regulations are needed. The National Marine Fisheries Service wrote a letter in February of 2009 which "got the ball rolling." That letter had no scientific basis to conclude any regulation, much less emergency regulation was necessary. In March 2011, NMFS released an unsound and unscientific paper which became the current basis and justification for this regulation. The anecdotal information of actual standings is limited to only a few instances, and these were not proved to be caused by frost protection water usage lowering the stream level. In short, the necessary science to justify these regulations does not exist. Second, there is the strong possibility that the Board has vastly overreached its authority.

The Water Board made it very clear in earlier documents in support of regulation that a voluntary program, no matter how successful it was, would not be accepted. In fact, staff took great pains to criticize as unworkable the excellent and successful Russian River Frost Protection program developed by the Sonoma County and Mendocino County Farm Bureaus, Russian River Flood Control District and the California Land Stewardship Institute. Please refer to the Revised Initial Statement of Reasons for details. This document also dismissed the Sonoma County ordinance; it said the Board did not want to pursue alleged misdeeds against individual diverters. Finally, the document says, "Small businesses could be exempted from the proposed regulation. But that would defeat the purpose of the regulation." The EIR seconds this mind set. The staff and Board's answer to every perceived problem is heavy-handed and expensive regulation.

It's too bad the Board wouldn't accept the voluntary Russian River Frost Protection program to address the perceived problem of fish strandings. Voluntary private-public partnerships are a key feature in the American democracy, and usually work far more effectively than intrusive and excessive rulemaking. And this voluntary plan has worked well and continues to do so. What a shame it will be if this progressive approach must be abandoned. The participants worked hard and in good faith, and now all of us are to be rewarded by punishment and great expense to comply.

The language of this final draft has been modified somewhat, is perhaps a bit less imperious than before and there is a tone of apparent cooperation. However, the sections about the inventory of the frost diversion systems, the stream stage monitoring program and the annual reporting requirements are far in excess of what the original regulation had envisioned. There is still the sentence, "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."

It is clear that the intent of this regulation is essentially identical to the first draft, that its conditions have become ever more restrictive, punitive and onerous. This entire regulation remains as disturbing and frightening to me as it was in the beginning. My comments from 13 January 2010 and 8 March 2010 and those of my attorney are still valid and stand as presented.

Thank you for your attention to this letter.

Very truly yours,

Rudolph Light

Rudolph H. Light

RHL:lep