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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Cease and Desist Order No. WR 2011-0016 DWR against Thomas Hill, Steven Gomes and Millview County Water District.	Ref. No. 363:JO:262.0(23-03-06) PETITIONER'S REQUEST FOR JUDICIAL NOTICE AND/OR OFFICIAL NOTICE

Respondents hereby request that the State Water Resources Control Board ("**Board**"), in connection with the above-referenced hearing and proceedings, take official notice and/or judicial notice herein, pursuant to Evidence Code §§451, *et seq.*, of the following relevant and material items.

1. The transcript of the meeting of the Water Board held on September 20, 2011, regarding the adoption of a proposed Russian River frost protection regulation. A true and correct copy of the transcript is attached hereto as Exhibit A.

2. Gallery & Barton Comment Letter – Proposed Russian River Frost Protection Regulation of July 5, 2011. A true and correct copy of the comment letter

without attachments is attached hereto as Exhibit B. (The complete letter with attachments can be found at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/comments070511/jesse_barton.pdf.)

Dated: November 14, 2011

CARTER, MOMSEN & KNIGHT, LLP
By: JARED G. CARTER, ESQ.

Attorneys for Petitioners Thomas Hill and Steven L. Gomes

MEETING

STATE OF CALIFORNIA

WATER BOARD

JOE SERNA, JR. BUILDING

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

COASTAL HEARING ROOM, SECOND FLOOR

1001 I STREET

SACRAMENTO, CALIFORNIA

TUESDAY, SEPTEMBER 20, 2011

9:06 A.M.

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EXHIBIT A

APPEARANCES

BOARD MEMBERS

Mr. Charlie Hoppin, Chairperson

Ms. Tam Doduc

Ms. Francis Spivy-Weber

STAFF

Ms. Jonathan Bishop, Chief Deputy Director

Mr. Tom Howard, Executive Director

Mr. Michael Lauffer, Chief Counsel

Ms. Caren Trgovcich, Chief Deputy Director

Mr. John O'Hagan

Ms. Karen Niiya

Mr. David Rose

ALSO PRESENT

Mr. John Aguirre, CA Association of Winegrape Growers

Mr. Bob Anderson, United Winegrowers

Mr. Jesse Barton, Williams Selyem, Russian River Water Users for the Environment, Alan Nelson Munselle Vineyards, Robert Terry Rosatti, Redwood Ranch, Charlie Sawyer

Ms. Kimberly Burr

Mr. Al Cadd, RRPOA

Mr. Brian Cluer, NMFS

Mr. Steve Dunnicliff, County of Mendocino Board, Executive Officer

APPEARANCES CONTINUED

ALSO PRESENT

Mr. Steve Edmondson, NMFS

Mr. Nick Frey, Sonoma County Winegrape Commission

Mr. Stephen Fuller-Rowell, Sonoma County Water Coalition

Mr. Scott Greacen, Friends of the Eel River

Ms. Terry Gross, Mendocino County Board of Supervisors

Mr. Larry Hanson, NCRW

Mr. David Hines, NMFS

Mr. Brian Johnson, Trout Unlimited

Mr. David Keller, Friends of the Eel River

Mr. David Koball, Mendocino County FB

Mr. Alan Levine, Coast Action Group

Mr. Doug McIlroy, Rodney Strong Wine Estates

Mr. Allan Nelson

Mr. Pete Opatz, Sonoma County

Mr. Stephen Passalacque

Mr. Patrick Porgnas

Ms. Maria Potter, North Coast Stream Flow Coalition

Mr. Derek Roy, NOAA/NMFS

Mr. Tim Schmelzer, Wine Institute

Mr. Ed Sheffield, Senator Noreen Evans

Mr. Alfred White, La Ribera Vineyards

Mr. Sean White, RRFC

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PROCEEDINGS

CHAIRPERSON HOPPIN: Good morning, ladies and gentlemen.

Staff, are we ready?

There's a few things I'm going to read and a few things I'm going to say.

Good morning. I'm Charlie Hoppin, Chair of the State Water Resources Control Board. With me today, to my left, Vice Chair Fran Spivy-Weber; to my right, Board Member Tam Doduc.

Also present are Executive Director Tom Howard, Chief Deputy Director Caren Trgovcich, and Chief Counsel Michael Lauffer, and Jonathan Bishop. I don't know why you weren't in the script.

CHIEF DEPUTY DIRECTOR BISHOP: That's okay.

CHAIRPERSON HOPPIN: I didn't do it. And of course, Jeanine Townsend, who keeps me under control.

This hearing is for the consideration of the adoption of a proposed Russian River frost protection regulation and to certify the associated environmental document. In this hearing, the Board will consider public comments in deciding whether to adopt the regulation.

As most of you know, having been here for endless meetings on the Russian River frost protection issue, we have an emergency procedure. If you do hear a horn,

buzzer, something that doesn't sound right, if you would very slowly walk out the back doors, down the steps, and across the street, I would appreciate that very much. If for some reason someone is unable to negotiate the stairs, it would be my pleasure to help you.

First, the staff will make a brief presentation. Then we'll hear comments from interested persons. Oral presentations will be limited to three minutes. But I can assure you if you're in the middle of a thought, there's not going to be a trap door or a buzzer that goes off. We want to hear what you have to say, as always.

If you're wishing to speak, if you would please -- if you've not already done so -- fill out a blue speaker's card and give it to the Clerk of the Board. If you're not sure if you want to speak, fill out the card and then mark "if necessary." When you're called upon, you do not need to come forward. When you do come forward, please identify yourself by name and affiliation so we can have it on the record.

The hearing is being webcasted and recorded, so please speak into the microphone so your presentation is clear. We also have a court reporter with us today.

And last and most importantly to me, all of you that have your electronic umbilical cords, if you would turn them onto some form of silence, I would appreciate

that very much.

We're going to have a brief introduction from staff, but I would like to make a comment to all of you. I don't know how many of these meetings we've had, a lot of them. And I'm glad we had a lot of meetings, because we received a lot of input from all of you. We heard your concerns and feel comfortable we have done a good job of addressing those concerns. While this isn't perfect -- whenever you introduce a regulation to somebody that has not heretofore been regulated in this area, it's not pleasant. It's not something anyone likes. But I think we all know the reason why we're here doing it today.

I know there's been some very expressed concerns about certain parts of language as it relates to reasonable use of water. I think we have some language that clarifies certainly our feelings about that. And I hope it will help take care of all of you that have had concerns.

This isn't going to be perfect, whatever we do. Going forward, this has been laid out as an adaptive process, an ongoing process. So much if we approve this today will fall back on the shoulders of the water demand management groups. And their analysis and their direction to their growers is not going to be something where we're sitting here in this building micro-managing every facet

of your lives. So I think the opportunity is there to do this yourselves. I think that's important.

I can tell you that I've met some nice people during this. I think the one that always strikes me is David Manishi, because David was never afraid to stick his nose in my face and tell me when he thought we were off base. I've had a chance to go the David's home, sit in his shop with a lot of his neighbors that are just everyday people, and look at their vineyards and their manicured -- like they would be manicured on some Hollywood star's estate. Everything is in its place, with very normal people.

And had the pleasure last spring of going over to a landowners association meeting in the grange hall not too far from David's house, and I met a lot of people. Out of the whole group that was there, there was one neighbor that was kind of a pain in the butt because he wanted to talk about duck hunting and duck water and some other water right. But for the most part, they were the kind of people that I like to relate to.

For whatever reason, in America, we hear an awful lot about small family farmers. And we hear about the corporate devils and mega-agriculture and what have you. And I think this process has shown the shortcomings of a lot of those feelings. We have a lot of people that are

small family farmers. We've got people that have taken an inordinate amount of their time. People like Pete Opaz and Doug McIlroy, Cindy Depreez, and Fetzer has allowed David Koball to be participatory in this. These are all very large companies. I've sure they put a lot of their credibility and stock on the line as we've gone through this process. But you know, I've enjoyed seeing people dig into things and work with their neighbors to get something done.

Certainly, Tim Schmelzer from the Wine Institute as well as Peter Keel and others have done an awful lot of work. I think particularly about Tim and Danny Merckly and Rich Matais because they're the messengers to the people that are part of their organizations. That isn't always a pleasant task. They have a job. They have an organization that deals with a lot of things. And all of a sudden, they're talking with their members trying to get them to buy into this. And that's not something we should take for granted. I really appreciate that.

Brian Johnson asserted himself into the middle of a bunch of growers. He came out unscathed. Brian is not the biggest guy in the world, but he is very sure of what he wants to do. And when things would fall apart and wheels would fall off, Brian would go back in for another round. And I quite frankly think if it hadn't have been

for Brian's resolve in this, a lot of this, representing certainly a segment of the environmental community, that we wouldn't be here today at all. We'd still be glaring at each other.

There are a lot of other people that invested a lot of time, like Bob Anderson. But I could go on and on, but if I go on and on, I could forget somebody and they're going to think I did it intentionally.

As we begin this today, I want you all to know that when we had the first of these meetings, I made it clear that I felt that 2- or 3,000 growers individually were never going to get to where I felt we needed to be and that we needed some form of self-governance. I said I don't care whether it's the Farm Bureau, Resource Conservation District, a bunch of people that get together in Dave Manishi's garage. I don't care how that works. We can't govern you. You need to take this on ourselves, and that's what I've seen. It hasn't been a simple process. Mendocino County started off gangbusters. Sean White and Dave Kobald knew more than anybody else. And all of a sudden, there are reasons why that kind of slowed down.

Sonoma County picked up the ball and were very active. They had a little issue with their Board of Supervisors and the wheels kind of fell off after a while.

But people were committed and maintained their resolve and kept going forward on this. And I think that's the only way we make it through a difficult process is for people to be involved, even if it's not pleasant.

So to all of you I mentioned and all of you I didn't mention, I want to thank you. Hopefully, we come out of this today the way I think we should. And we'll see how all that goes.

With that, John O'Hagan will make a short introduction. Hello, John.

MR. O'HAGAN: Good morning, Chair Hoppin and Board Members Doduc and Spivy-Weber.

My name is John O'Hagan, and I will be making the staff presentation on the proposed Russian River frost regulation.

With me today to my right is David Rose, staff counsel; and to my left, Karen Niiya, staff engineer. And I have also in the back Daniel Schultz, environmental scientist; Gerald Horner, staff economist; Tom Peltier, staff geologist; and Aaron Miller, staff engineer.

Since February 2009, the State Water Board has held numerous workshops and working group meetings to hear public comments on the beneficial use of water for frost protection in the Russian River and the conditions of the salmonids.

Based on the comments and information received, the Board directed staff to draft a regulation. During these public meetings, the Board members also provided the following important directions:

The goal of the regulation is to preserve the species;

The regulation should encourage participation;

The regulation needs to be flexible for adaptation;

And the regulation needs to be broad enough to be workable;

Transparency and clarity are important;

More monitoring information is needed and monitoring of the rivers is important;

The regulation must identify how we deal with enforceability.

Board members were sympathetic towards those concerned about the unreasonable use language but said that we had to be clear legally.

On May 20th, 2011, the State Water Board initiated a formal rulemaking process with the proposed regulation. On that date, the draft regulation, Notice of Proposed Rulemaking, Initial Statement of Reason, a draft EIR, and an economic and fiscal impact analysis of the proposed regulation were made available for public

comment. Written comments were due by July 5th, 2011.

Eighty comment letters were received. Staff reviewed and analyzed the comments received, prepared responses, and made the following changes to the May 15th documents. We reorganized the proposed regulation for improved clarity. We added more flexibility by allowing a governing body to include their own scientific experts in the consultation process. We added clarification by defining hydraulically connected groundwater. Staff also prepared a draft resolution that provided the requested clarification for the initial requirements of a water demand management program.

Due to these changes, staff provided another 15-day notice of the revised proposed regulation and supporting documents. Included with this public notice was a response to comment document and a draft Board resolution for the adoption of the proposed regulation and certification of the revised draft EIR. Comments on those changes were due by September 16th.

Twenty-eight comment letters were received. Staff has reviewed and responded to comments directed towards changes to the draft EIR and has provided copies of the staff's responses to the Board members and hearing participants. The copies of the staff responses are in the back of the room and will be posted on our internet

site.

The comments received pursuant to the September 1 notice relative to the draft regulations and rulemaking documents include six supporting adoption of the regulation; six commenting that the proposed regulations do not go far enough to protect salmonids; and 16 opposing the proposed regulations concerned with the science supporting the necessity of the regulation, the legal basis for the regulation and its application to all diversions of water in the watershed, the unreasonable use language, and the inclusion of hydraulically connected groundwater, and the burden of proof required to be exempted from the regulation.

Most of these comments do not specifically address the revisions made to the proposed regulations on supporting -- or supporting documents as directed by the September 1 notice. Staff believes these comments have already been responded to in the response to comment document.

Should the Board adopt the proposed regulations consistent with the draft resolution, staff will prepare written responses to the remaining comments to be finalized by the Executive Director for submittal to the Office of Administrative Law as part of the final Statement of Reason.

Before closing, it is important to note that staff continues to recognize the progress made by local groups in both Sonoma and Mendocino Counties. These programs continue in the watershed, as staff believes these programs could be submitted under the proposed regulation as a water demand management program with some modification. These local programs have many of the criteria required for a water demand management program and their existing leadership shows the ability to implement successful programs.

I would like time at the end of this hearing -- or at the Board meeting to make staff's final recommendations. This concludes my presentation. Thank you.

CHAIRPERSON HOPPIN: Thank you, John.

Any of you that have not submitted your blue speaker cards, if you could do so, I would appreciate it.

For your information, when we complete hearing from all of you on your concerns, we will take a break with staff to go over these issues that have been raised today to make sure that they are properly addressed. I don't know how long that will take. Probably 15 or 20 minutes. Whatever amount of time it takes, we will adjourn to make sure we have a fair analysis of the comments we have heard today.

If Steve Edmondson would come forward, please.

MR. EDMONDSON: Good morning, Mr. Chairman.

CHAIRPERSON HOPPIN: The green light, Steve.

MR. EDMONDSON: How much time do I have?

CHAIRPERSON HOPPIN: I'm not cutting you off on time. There is a button there. You need to turn on your speaker so we all hear you. I know you know what you want to say. I want to know what you want to say.

MR. EDMONDSON: Good morning. Okay.

CHAIRPERSON HOPPIN: Generally speaking, the more highly educated, the more difficult time you have turning on the switch. It's a good sign.

MR. EDMONDSON: I won't necessarily agree with that, but I'll accept the comment. Thank you.

Well, good morning, Chairman Hoppin and members of the Board. And thank you for having me this morning and allowing me time to speak.

I'm Steve Edmonson, Southwest Regional Manager for the National Marine Fisheries Service.

I would like to begin by clarifying our agency's role in the process. I will then reiterate our agency's position on the issue of high demand water use frost regulation, and will follow with a call for cooperation with the various interests in the context of frost regulation. Finally, I will describe the latest

developments in creating the framework for NMFS classifications of water demand management planning groups pursuant to the State regulation.

First, to clarify our role. NMFS is responsible for protection and recovery of the nation's living marine resources and the habitats upon which they depend pursuant to Federal Endangered Species Act and other federal laws. Our agency has been empowered to collaborate with State agencies and other agencies and organizations to develop and implement programs and regulations of our own and to administer federal laws as necessary to ensure the survival and recovery of threatened and endangered species.

And most germane to this process is Section 6 of the Endangered Species Act, which provides that federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation regulated species.

The preferred approach of our agency has always been and remains to seek collaborative solutions and use the full spectrum of our authorities and resources to achieve our conservation goals. Examples of collaboration on this issue include leadership of the Frost Protection Task Force, continued outreach and negotiations with industry, government, NGO representatives, technical

assistance to all parties. Examples of regulation include our active support of Sonoma County frost ordinance, a cooperation with the Board and Board staff in the development of this proposed regulation, and examples of enforcement are limited to the Felta Creek case.

Second, our position remains one of support for the proposed regulation. Management of frost protection activities most appropriately dealt with through regulation is proposed by the State Water Resources Control Board. There are three principle reasons for this. First, the Board is the only organization with the legal authority and responsibility to regulate water use in the state of California. NMFS is directed by the Endangered Species Act --

CHAIRPERSON HOPPIN: Steve, the last statement you made, there is a gentleman that's real active in some water issues I'd like to have you make that comment to at some point. If you can hold that line for a minute, I'd appreciate it.

MR. EDMONDSON: I'll put a sticky on it.

NMFS is directed by the ESA to cooperate with State and local agencies to resolve water resource issues in concert and conservation of endangered species. We interpret this to mean that it's our job to support the Board in its actions in order to ensure adequate flows of

the survival and recovery of salmonids is remained or restored.

Unfortunately, collaboration alone is not sufficient. As detailed in earlier testimony, full participation and transparency are needed to address the issue comprehensively. Enforcement of the ESA alone is not sufficient or practical. Without regulation, the burden would fall on NMFS enforcement to incentivize cooperation. This option is not practical because enforcement is not designed to address cumulative effects issues. Each case represents a large investment of staff resources. And as evidenced by earlier testimony, enforcement of the ESA is not preferable, nor does it foster collaboration and support for conservation goals.

Third, while we are aware of opposition to this regulation, we feel it important for all parties to strive for a mutually acceptable solution that includes regulatory oversight in order to best serve both individual and social needs.

Finally, if adopted, the frost regulation will call for consultations between NMFS, California Department of Fish and Game, and the Water Development Management Plans to site-specifically determine protective flows for salmonids during frost season. As is the case with our aspects of complying with the anticipated regulation, we

envision a phased approach to these consultations in order to adapt as necessary and fully vet the procedures.

For frost season 2012, we propose to limit our consultation to a few high-risk locations. Risk will be determined by evaluation of diversion inventory data compared with stream flow availability. Tributaries with low supply and demand ratio where salmonids are present will be considered a high risk for stranding of juvenile salmonids.

With those top few sites, we will ask water development management plans to survey stranding surfaces in the gauged reach. The gauged location will become the compliance point for all upstream points of diversion.

The stage at some stranding surfaces become exposed, for example, where the risk of stranding increases appreciably, will determine a flow below which limits to diversions will be imposed. Within that range of flows, cumulative diversions should not exceed a given percentage of stream flows.

Specifics of the methods are being described in a paper currently being drafted and will be available for review by the end of the calendar year.

And that's the script that David typed up for me to read. And he doesn't like for me to go off script, because it makes him nervous. But I will anyway, because

I like to see him squirm.

I wanted to add in, I guess, my personal feelings on this, if I may.

First, I want to remind folks what we have going for us here and to congratulate the Board, Board staff, the growers, the NGOs, the local governments for how much we've achieved. I think that's kind of lost in all this process.

I've been involved with water resource issues for about 35 years and with several different federal agencies. And one thing I can say for certain, having worked all over the country, is that the environmental ethic and sense of stewardship is definitely stronger in Sonoma and Mendocino Counties than anywhere I've ever worked. As witness of that, consider the short period of time that we've been working on this issue how much we've achieved in terms of a county ordinance in Sonoma County, unprecedented pond construction in Mendocino County and elsewhere and the unending and untenable numbers of meetings that we've had with growers, NGOs, government agencies. It's truly impressive. And I can say with certainty wouldn't have occurred anywhere else in the country.

Folks in these counties don't agree with the premise that it's a tradeoff, that you can't have both

healthy environment and productive agriculture. And although there is a small and vocal objection to regulation, I feel strongly that people in Sonoma and Mendocino County expect to have both a healthy environment and a productive agriculture community. And these regulations are a big step in that direction.

So I applaud the Board and everybody in this room. And again take a step back and realize how much we've accomplished and all the good we've done in a short period of time.

CHAIRPERSON HOPPIN: Steve, I have a couple of questions for you, and I think they're very important to everybody in the room.

As we go forward on this, I think because of the way we have positioned ourselves, we realize this is an ongoing process. We're not starting out with something perfect. There is a lot of information gathering that's going to need to be done. It certainly will evolve. We are going to find the strong points and the weak points and what we think we know today and I'm comfortable we will improve on those.

I would hope that your agency as well as Fish and Game will be mindful of the fact that there probably will still be a take someplace under some circumstance. And as long as that's being properly responded to, you know, I

hope that both the State and federal fish agencies will look at something realizing that it's probably not perfect and where the sincerity of the agriculturalists are along the way. That's very important to me.

I think there's one thing I wasn't aware of -- a lot of things I wasn't aware of. But as we went through this process, particularly in the tributaries, there is an indication for natural stranding of fish that has nothing to do with agriculture practices. You know, you deal with daily fluctuations of stream flow for a lot of reasons, including temperature, and you know, simulation by plants, evapotranspiration. I'm sure there's going to be people that are going to have this whole program under a magnifying glass and would like to characterize something that had nothing to do with agriculture as, see, we told you, because they probably don't want agriculture to exist in the valley anyhow.

So I hope that your agency will be vigilant going forward to cover the backs of people that are doing the right thing. We have people that aren't, and it's very clear that we intend to take enforcement action. But those that are doing their level best to make this better, it's not going to happen with the snap of a finger. And I hope there will be some understanding of that going forward.

MR. EDMONDSON: Very well said, Mr. Chairman. I agree completely. And I think that we take it for granted this is going to be an iterative process. It's going to be continually refined. And we're going to have to work with folks.

It's also going to be very site-specific. I know folks that want to have one number or a silver bullet they can apply to all operations. And I suspect that it's going to be very site-specific with each operation, each trip. And it's going to take a while to work it out. I agree completely with what you said. I appreciate it.

CHAIRPERSON HOPPIN: Thank you very much. Any questions? Thank you.

Brian Cluer, Ph.D. and hydrologist. It's a good thing that microphone is already turned on.

MR. CLUER: Do I have to push buttons?

CHAIRPERSON HOPPIN: No. You're all right.

MR. CLUER: I'm probably overeducated to push buttons. But I am a pilot, so I do some of that in my spare time.

Good morning, Mr. Chairman and Board and staff. My name is Brian Cluer. I have a Ph.D. in hydrology and over 20 years experience in the federal government and various aspects of water use, designing experiments and regulating flows downstream of the federal facilities and

working with NMFS now for 11 years on various aspects of groundwater.

The comment I'd like to make today is NMFS wrote a memo a while back of which David Hines was the primary author, but it's still a NMFS product because it was reviewed by myself and another Ph.D. Dr. Bill Hern, and Steve Edmondson and others in our division. And it was an estimate of fish stranded on the main stem of the Russian River on one bar. So the actual data we had to work with was ten fish on one bar.

And what David did in that calculation, that estimate of the potential magnitude of that event, has caused quite a lot of controversy. I'd like to try to clarify that, because David has tried several times and the controversy keeps swirling.

So from a more removed perspective as a reviewer and giving David counsel on this subject, what David did was a very transparent calculation of the number of fish that may have died along the main stem in that water withdrawal event. So it's an extrapolation, an admitted extrapolation. And David said that very clearly. In the table that he showed in his calculations -- which is about as transparent as you can get -- you can push the numbers in the calculator yourself and get the same result. That's why he laid it out that way. Does come up with a

specific number down to accuracy of a single fish. And that I think has been taken out of context showing -- or making the claim that you can't be that specific. And we wholeheartedly agree you can't be that specific. And in discussion, David couched that specific number very appropriately. He rounded it to the nearest thousand I believe, and he also discussed possible minimum and maximum numbers that that calculation could be bounded by error so to speak.

So we were requested to produce that memo and that calculation. It's not something that we just put out there on our own. And I think we did a good job of it.

Thank you.

CHAIRPERSON HOPPIN: Thank you very much.

I want to make one comment. Ed Sheffield is here from Senator Noreen Evans' office.

Ed, if you don't mind, I've got two more speakers from the federal fish agencies and then we'll let you go ahead. I know you've got work to do back over at the Capitol, or I hope you do.

Derek Roy.

MR. ROY: Good morning. My name is Derek Roy, special agent with NOAA Fisheries.

I just wanted to make a comment about what you made mention of versus the natural stranding versus take.

My authority comes under the Section 9 of the Endangered Species Act. And I just wanted to mention that we have responded to numerous reports of stranded fish over the course of this process. And what we do is we just gather the facts associated with those strandings. And we turn those facts over to our biologist, our hydrologist to make a determination of whether it was natural stranding versus the take.

Obviously, natural stranding and take are two very different things. I just want to make mention of that, that we do go through the process, investigate it, and we find the facts, generate the facts, and then use our expert biologists and hydrologists to make that determination.

CHAIRPERSON HOPPIN: I think we're all aware, David, that we have different groups of people. Some see stranded fish and are very concerned and very legitimately concerned. Others are looking for something for another reason. And you know, it's important that, you know, you deal with those in a matter of fact way on both sides of the issues. So thank you for clarifying that.

MR. ROY: Absolutely.

Also, we don't -- a lot of times the information we get about stranded fish comes from the general public, because there is such a vast area where these things could

occur. We do respond to them in that way. Thank you.

CHAIRPERSON HOPPIN: Thank you.

David Hines.

MR. HINES: Good morning, Mr. Chairman and members of the Board.

My name is David Hines. I'm the Water Policy Coordinator for the National Marine Fisheries Service.

I just want to make some brief comments essentially reiterating what you were saying, Mr. Hoppin, about the need for an iterative process moving forward.

As Steve mentioned, we understand and appreciate that things aren't going to get up to speed and in perfect condition right off the bat. In fact, I met recently with Bob Anderson, Doug McIlroy, and Pete Opaz to discuss the Sonoma County efforts. And they've done a tremendous job with inventorying and preparing for these anticipated -- this anticipated regulation. And they are looking for a phased approach, which we are supportive of. And in fact, the flow criteria that we have under development now I think warrants a phased approach as well because it will be a very important component of this process. And it does need to be vetted and tested and revised as necessary. So we totally understand that this is not going to happen right off the bat.

CHAIRPERSON HOPPIN: David, something that your

agency can certainly help us with as we go forward, I know there's been various telemetry provided. And there's going to be a need for more -- certainly the Congressman from that area and Senator Finestein has expressed concern and interest about all of this and expressed a willingness to help find federal funds to help augment some of the needs for gauging and telemetry.

I would appreciate it as we go forward if we all work together on that, because if not, it comes out of your back pocket or out of growers' back pockets. And the more assistance we can find, I think the sooner things will get up to speed and the more equitable it might be.

MR. HINES: We'll be happy to lend our voice to that effort as well.

And I think you raised the issue of efficiency that we may find in coordinating our efforts. We have 15 gauges that we have out in the field and we're monitoring. And we're trying to get those up to snuff in terms of protocols and scientific rigor.

To date, we've been sort of operating outside this science panel that's part of the proposed solution. We've been asking growers or whoever when I get the chance we want to be integrated into that and contribute our resources to a monitoring program.

CHAIRPERSON HOPPIN: I know in conversations with

Pete and Doug as they started going down this road, they found there was existing gauges that they weren't aware of in coordinating those efforts. So there isn't an overlap or a redundancy is important. Certainly doing our level best to make sure we don't do that with other agencies. And the more coordination we can have there is to the benefit of the environment. But it's to the benefit of those that are trying to gather this information and learn. So I would appreciate that.

MR. HINES: Absolutely. And the two individuals you mentioned have been very active in trying to facilitate that coordination. Last year, we had a meeting and John O'Hagan was there, among many others, to strategize about where do we need to put gauges and who's got the resources to do it. And Doug and Pete were extraordinarily helpful in that.

CHAIRPERSON HOPPIN: Thank you very much.

Ed Sheffield.

MR. SHEFFIELD: Thank you, Chairman Hoppin and Board and staff.

My name is Ed Sheffield. I'm the District Director for Senator Noreen Evans. I'm here today to read a statement from the Senator.

"Dear Chairman Hoppin,

"Thank you for the opportunity to comment on

new frost protection regulations proposed for the Russian River watershed by the State Board.

"As you may know, I represent Sonoma and Mendocino Counties in the State Senate, the two counties that will be affected by the new rules. Having worked to secure funding for salmonid restoration in both counties, as a supporter of our commercial and recreational fishermen, and as the Chair of this State Select Committee on wines and the wine caucus, I have a deep interest in seeing that the issue of frost protection is treated correctly.

"Frost protection of wine grapes is a beneficial use of water. But I recognize that the instantaneous high water demand can result in rapid decrease in stream water levels, which can result in the stranding of threatened and endangered salmon.

"To coordinate stream monitoring and frost protection activities to protect both grape crops and salmon will not be easy, but I believe our growers are up to it. Some time ago, growers along the Napa River faced similar challenges, and they responded with a successful program that protects both grapes and fish. In both Sonoma

and Mendocino Counties, individual growers have stepped up to the plate with alternative frost protection projects and off-stream storage, while working groups have convened to come up with cooperative projects and new policies.

"In Sonoma County, thanks to proactive work by growers and county government, important data has been collected which will give growers a head start in developing the water demand management plans that the new rules would require.

"It seems to be stressed, however, that the Russian River watershed is a vast and complex watershed and that new programs will need to be perfected over time through adaptive management. The State Board and the State Department of Fish and Game and the National Marine Fisheries Services should take a non-cumulative approach when mistakes are made by growers who are participating in the program in good faith. Solving this problem will require a cooperative attitude from those on both sides of the stream.

"Reducing demand on streams in spring months will require the construction of many new off-stream storage ponds. And here, the State elected officials are doing their part. I'm

hopeful that AB 964, Chesbro-Huffman, recently passed by the Legislature, will be signed by the Governor to streamline small pond permit applications. Instead of years to get approvals, the new legislation could result in permit approvals in a matter of weeks.

"Finally, I want to assure everyone involved in what has been a very contentious issue that I will carefully be monitoring the implementation of regulations adopted by the State Board. If these regulatory requirements are phased in, I plan to meet with growers, environmentalists, and regulatory agencies to determine if the program is working, how it can be improved, and to assist in the breaking up of regulatory log jams, if necessary.

"It has been more than two-and-a-half years since the State Board was requested by NMFS to develop regulations. Decisions will be made today that have long-lasting term and effects on our natural resources and our local economies. Let's work together to get it right.

"Sincerely, Norene Evans, Senator, 2nd District."

Thank you.

CHAIRPERSON HOPPIN: Thank you. If you would make sure your boss knows how to get ahold with me, I think she would like to participate in that. It seems like she's done her homework.

Before I call the next speaker, Mr. Merkley, you were late coming in this morning and I gave you a sincere compliment and you weren't here to hear it. So I know occasionally I give you a little bit of a ration, and I didn't today and you weren't here to hear it. So I'm kind of disappointed.

MR. MERKLEY: Sorry I was late.

BOARD MEMBER DODUC: You notice, Danny, he didn't offer to repeat it.

BOARD MEMBER SPIVY-WEBER: You snooze, you lose.

CHAIRPERSON HOPPIN: Patrick, I understand you have something you need to get to right away. So I'm going to call you next, even though you're really last.

MR. PORGNAS: Thank you.

CHAIRPERSON HOPPIN: You're welcome. I knew you'd appreciate that.

MR. PORGNAS: Thank you so much.

It says in scriptures the first will be last and the last will be first. So thank you so much.

At any rate, I'm not even going to read anything to you today. I'm going to come and tell you just the way

I feel about the whole situation based on the facts, of course.

My name is Patrick Porgnas, and I've been coming before this Board for 40 years. Some of you probably weren't even in high school at the time.

At any rate, what I'm saying to you today is this: This piece of frost regulations, you missed the mark again. It's not about frost protection. It's about anadromous fisheries protection and about the protection of the waters of the state. It's that simple.

Coming in here and saying that this unidentified entity is going to be the one that's going to oversee or whatever it is to collect the information to ensure that there's going to be compliance is similar to what you did with 1641. And you see what happened there in the delta. It's a catastrophe. Same thing you did with the grasslands bypass project. This is the same script. Although, I have to say, you're getting better at it. With Tom here, I have no doubt that it's going to get to be where the public has very little to say about anything meaningful or where this Board is going to take any of the public's input and use it for some purpose that would benefit the public. It's not going to happen.

I've been up in the Russian Rivers watershed for years. I put in instruments. I have radio telemetry,

satellite equipment. We've been monitoring on one of the trips 24/7 so we could watch what Goldman Sachs and the boys were doing up there stranding fish and killing them. We all can debate how many fish were killed. Let's look at the record. The Russian River decline in the fisheries is evident, whether it was 2500 fish, 2,000 fish, it doesn't matter, Mr. Chairman.

This plan that you guys are coming up with is going to buy a lot of time. It's going to put the thing back in the hands of the people that created the problem. If that's what you want, that's what we're willing to go for, that's okay with me from that point of view. I can't sue you because I can't find an attorney that will do it. I can't get the Attorney General to sue you because he represents you.

So what I have here is a situation where I really have to say that with all due respect for the Board members and the staff, most of them. But lastly I have to say --

CHAIRPERSON HOPPIN: How do you say you have due respect for the Board or the staff when you make a remark like you did about Tom Howard who's --

MR. PORGNAS: Very simply. Because I have experience with Board member staffs. There is a few of you up there that I really like. And I think you have

tried to do everything that you could, but there's two to three.

You're not going to make any decision against the wine country, because wine county is a country all by itself. If you did, ultimately, you'd have to much pressure, you'd have to be removed.

So anyway, Mr. Howard I know personally over the last 40 years. I know Mr. Howard over the last 40 years. And if he's pleased with himself for the position he's in, then all I can say is God have mercy on him. And you don't know enough about it to understand what I'm talking about. He does.

So lastly, let me say this. You've accomplished just about everything in failing to do your job. I can't do anything about it because I don't have any more money to fight you. Excuse me. To help you.

All I know is this: This particular move you're making is the death nail for the fish. If we have to rely on them for the information, for you to enforce the law, that's not going to happen. Your track record is self-evident. You're not going to do anything other than what the powers that be permit you to do.

Now excuse me, Mr. Chairman, all due respect. And forgive me for being blunt. But as far as I'm concerned, if I had the time and the money, I'd do

everything to shut this Board down once and for all. You're not doing a good job. Future generations are going to suffer from your actions not just up there on the Russian River, down in the San Joaquin Valley, in the delta. You've done a great bang-up job to please the vested interest.

Very best to all of you. And I hope -- I just hope I don't have to see you again. Because every time I come here, I get sick at looking at everybody here. They're all in it together.

Thank you for allowing me to speak. I'm sorry if I was a little aggressive today. If you ask me a question that's -- what do you call it -- an oxymoron, I can't answer it, because the last thing I want to be is a moron. Thank you.

CHAIRPERSON HOPPIN: It's always entertaining, Patrick.

MR. PORGNAS: Appreciate that.

CHAIRPERSON HOPPIN: Terry Gross.

MS. GROSS: Good morning, Board members. My name is Terry Gross. I'm Deputy County Counsel at Mendocino County.

Our Board is meeting today. Otherwise, for sure, you would see some of them here.

Difficult to be called so early in the program,

because you haven't seen me before because I was recently thrown into this issue. But you don't have to be around the record for very long to see that there are problems with these regulations. And if your staff -- your legal staff has not pointed out that there's a severe lack of substantial evidence in the record to support these regulations and that these regulations are vulnerable to challenge, then we're in trouble. Because nobody wants litigation. I don't have authority today from my Board to represent that we are going to challenge these regulations in the court. But nobody wants to take the energy that's been demonstrated here regarding this issue that I can see from pouring over the documents for the last two years and waste that.

And I don't think, Chairman Hoppin, that anyone here is interested in perfection. I heard you say this is not perfection. Working for a Board that also is involved in this legislative pursuits -- legislation, ordinances, no, they're never perfect.

But the concern here, the real concern of our constituents in Mendocino County is the factual record and the legal necessity justifying these regulations. We're talking, of course, the Board's concern is multi-faceted. But we're talking about an important legitimate sector of our economy in Mendocino County. We're talking about

additional costs on that sector of our economy.

And from what I've heard, there's a respect on some level for the collaborative efforts that are so well documented. And yet, there is a movement forward with regulations that maybe I just missed it in the record says don't honor and don't report or express the data that's been generated. And frankly, it looks to me -- again, humbly, I'm the new-comer -- that these regulations are generated from two incidents in 2008. Nobody can dispute that extrapolation in terms of defining danger scientifically is a legitimate scientific process. I'm certainly not going to dispute that. I'm a lawyer.

But then we have to look at the sample that was taken. And I don't think you have to be a scientist to look at the sample that was taken and just scratch one's head. Our Board members have been involved, as you know, with this process for as long as it's been going on. And they've been here and they've been on the ground in our county making an enormous good faith effort to deal with the problem. And I don't see in the record either the factual or legal necessity for these regulations at this time.

And I'm here on behalf of the Board to urge you to do what they do when this problem comes up when there is a conflict in the record, when there are gaps, which is

put this aside. Put this aside. Send it back to staff and let's take a hard look at what's been going on in Mendocino County and Sonoma County for the last couple of years. Put this aside. That's what I'm urging you this morning on behalf of Mendocino County Board of Supervisors.

CHAIRPERSON HOPPIN: Thank you, Ms. Gross.

Sean White.

MR. WHITE: Good morning, Chair Hoppin, members of the Board.

Well, I would largely just like to echo the comments that you just heard. For me, the most troubling aspect of this whole endeavor is just the facts and the actions and the outcomes have just never been in alignment. And it's bothered me from the beginning, and I'm sure it will bother me after today. But in the end, I don't see any of that changing. So I'm not going to make it here twice.

Really, the final technical question I have along the lines of the imperfection that we're all going to be saddled with as soon as this is over is what's going to happen to whoever is running one of these water demand management programs if NOAA or Fish and Game is not as tolerable as they've indicated in regards to imperfection. Who's going to be liable for that take and who is going to

have to pay the bill? Because that's the one thing I don't see really spelled out anywhere. I'm sure somebody in our neighborhood is going to be looking at our agency to do it. And I'm not sure that I would recommend to my Board we would accept that liability.

That's it.

CHAIRPERSON HOPPIN: Thank you, Sean.

Al White.

MR. WHITE: My name is Alfred White. I'm a vitaculturalist for La Ribera Vineyards.

I don't know if you have a copy of this, which I handed in, but there was some question about whether you could actually see something that I had. And also this, which is in the submissions that you have. But it's buried down in there. So if you're lucky enough to have both of those, it will help you understand what I'm saying.

CHIEF COUNSEL LAUFFER: Just can I clarify for the record, quickly. So because you may be able to point the Board members to the specific documents they actually have a copy, unless you have additional copies.

MR. WHITE: I did hand additional copies --

CHIEF COUNSEL LAUFFER: So it appears you have four pictures of stranding events.

MR. WHITE: Yes. From page 176.

CHIEF COUNSEL LAUFFER: It's from 176.

MR. WHITE: Jesse Martin submission.

CHIEF COUNSEL LAUFFER: So the Board members should be able to find it in the submittals.

MR. WHITE: Page 173.

CHIEF COUNSEL LAUFFER: In addition, I think Ms. Townsend has additional color copies that she was provided by Mr. White.

MR. WHITE: Thank you.

So we have an emergency regulation that is designed to prevent significant harm to the salmonids, but we haven't really looked at the question of significance; what is it; how do we determine what's significant.

So we could look to the -- for guidance to the document -- the biological context document that David Hines prepared where the ten fish became 25,000, more or less. And when we ask about how that was performed, we received an e-mail from David where he said, "I modeled the analysis on ESA Section 7 jeopardy analysis but did not conduct it in its entirety. I limited the work to Steps 1 through 6."

If you look at the framework, you'll see at Step 6 you assess the risk to the individual. And when you have a dead fish, it's pretty clear there is a risk. So that is fine.

However, if you look at Steps 7, 8 and 9, that's where you actually determine whether it's significant, whether it has any impact on the species, whether it matters at all. Those steps were not done. We're left to guess about that.

And now that we're on our own to answer that question, I would ask that we look at what we know, what we think about salmon. We realize that a salmon will lay about 4,000 eggs. From those 4,000 eggs, about 800 will hatch to fry. From that 800, about 200 will make it to the smolt stage to go out to the ocean. From that 200, about ten will grow to be adults, survive to adulthood. From those ten, about two will return to the stream. So these are extremely valuable fish. Within these two fish is the future of the species.

So we would expect that we would want to see those fish have as safe and secure return and reproduction as we could give them.

Now, when you consider how NMFS, Fish and Game, supporting agencies, NGOs, they're all very concerned about that fish. They say you shouldn't eat it. So I think that's a good idea.

However, they don't have a problem with that fish being pulled from the stream by fisherman, grabbed by the gills, hauled up for a picture or two, flopped down on the

gravel, maybe poke its eye on a rock or a stick, get the hook out, and throwing it back in the water to try to make it to spawn. And maybe there's two or three more fish and trying to catch them, too.

Now, if that's not a problem, how is this the emergency? And if this is an emergency, how is that not a problem?

If we look at the other side, and you consider the fry that are in the river -- and that's where if you look at that other photograph of the killing fields, you're looking at fish slaughter on a pretty significant scale. This is natural de-watering you're looking at, but there's quite a few fish. And if you were to apply the formulas that David Hines used for that ten fish that became 25,000, you would probably be looking at maybe 200,000, two million. I don't know. The numbers would be huge. Because this isn't something that occurs during the extreme events with the extreme year with the extreme drought.

This is something that occurs every year as the streams naturally de-water. It may occur multiple times. Because if you get a rain and this dry patch gets re-watered, fish are again allowed to go there. And as that water falls away, some of these fish will be stranded.

So you would think that the same agencies that are considering this to be the emergency would be clearing the cubicles every spring. Everyone would be out on the ground gathering fish and making sure that they're in the water. But they're fine with it. It's not a problem. If that's not a problem, how is this the emergency? And if this is an emergency, how is that not a crisis of epic proportions for the species?

So when we look at the distorted view of significance that we have when we look at how urgent this regulation is, at the same time how insignificant these other very significant events are, we have to believe that it's being driven by something other than the concern for the fish. I don't know what that is. But I don't think it's the health of the fishery.

There will be a significant impact from these regulations. And that significant impact will be on agriculture, and it will be a negative one, and will flow through into the fishery because it will divert resources and motivations that agriculture has heretofore been spending trying to improve its interaction with the fishery to having to fight this regulatory overreach. So when you execute this, just don't kid yourself it's about the fish.

Thank you.

CHAIRPERSON HOPPIN: Thank you for your comments, Tom.

Allan Nelson.

MR. NELSON: Good morning, Board.

I just got a couple points here I want to make.

My wife and I were born in Dry Creek Valley and we live there today. Over the years, we bought a few small pieces of property and we farm them today --

CHAIRPERSON HOPPIN: Could you center up on that microphone?

MR. NELSON: Is that better there?

CHAIRPERSON HOPPIN: Yes.

MR. NELSON: Anyway, we were born there, live there today. Bought a few small parcels of property there and we farm them today.

The problem that I have is this term that's "beneficial use" or "unreasonable use" of water for frost protection is -- for lack of a better word -- I guess a broad brush method and I just don't think it's right.

I think more time to look at the streams, large and small, and take a little more time to come up with maybe a little better regulation if need be is just a better idea.

And last week I spent considerable time talking with neighbors and friends, about 50 operators, and most

all of them -- the fact is, every one of them can't buy this unreasonable use. It's tough for us to accept.

In closing, Dry Creek Valley has treated me pretty good. And I would hope that in time that we're not going to be over-regulated to the point of making it very difficult to make a few bucks there on the land. Thank you.

CHAIRPERSON HOPPIN: Thank you, Allan.

I would hope that before we leave here today we will have given you our best cut at language that you probably -- I know my staff is tired of dealing with me on it and can't wait until we're done.

John Aguirre.

MR. AGUIRRE: Chairman Hoppin, Vice Chair Spivy-Weber, Board Member Doduc, thank you very much.

My name is John Aguirre, and I'm here today on behalf of California Association of Wine Grape Growers.

I want to commend the Board and staff for hearing the concerns of wine grape growers within the Russian River Watershed and endeavoring to balance the competing interests of the diverse stakeholder community.

Wine grape growers take tremendous pride in providing economic and social benefits to California's communities, while at the same time promoting positive environmental outcomes. Together, CAWG and the Wine

Institute have been at the forefront of efforts to promote sustainable wine growing. And we believe successful profitable wine growing and healthy ecosystems are compatible goals.

Together, with the Wine Institute, we submitted written comments on the September 1 revised draft of the Russian River frost regulation resolution. And I want to commend Tim Schmelzer and the Wine Institute for his efforts.

We believe successful implementation of the proposed water demand management program will be hastened in an atmosphere of trust and cooperation.

Toward that end, I want to focus on the proposed regulation's reliance on the reasonable use doctrine to compel changes in grower behavior. We see this as problematic. The proposed language would render all diversions of Russian River frost protection unreasonable unless such diversions are conducted in accordance with the Board approved water demand management program.

In our written comments, we proposed instead more specific and focused language, which states that, "A diversion of water that is harmful to salmonids is an unreasonable method of diversion and use and a violation of Water Code Section 100. The diversion could have been managed to avoid harm."

For the past several years, many wine grape growers have been clinging to economic survival and only now are beginning to see prices for wine grapes strengthened. When you couple the industry's recent economic challenges with the highly widely held view among growers that an aggressive regulatory response is not merited by science, you can understand why there are significant reservations about mandates that mean higher cost and may impair the ability of growers to protect their crops. We believe the more focused language that we proposed would hasten industry acceptance and compliance and better ensure environmental outcomes that we all see.

And I just want to remind the Board earlier this year when Delta Water Master Craig Wilson issued his report on the reasonable use doctrine that really started to alienate growers from a widely shared view that we all hold, and that is we want to use water efficiently.

And so I encourage the Board where possible to use focused limited language with respect to the reasonable use doctrine. Thank you very much.

CHAIRPERSON HOPPIN: Thank you, John.

Jesse Barton.

MR. BARTON: Good morning, Chairman Hoppins, members of the Board.

My name is Jesse Barton, and I'm here on behalf

of the Williams Selyem, Russian River Water Users for the Environment, Alan Nelson Munselle Vineyards, Robert Terry Rosetti, Redwood Ranch and Charlie Sawyer.

There is really only one item I'd like to address this morning, which is set out in a letter that we sent in yesterday.

But briefly, what we'd like to point out is that the National Marine Fisheries Service issued a biological opinion to the Sonoma County Water Agency in 2008 that recommends ramping rates of less than one inch per hour when the agency modifies releases from its dams. In contrast, the rates experienced during the big kill in April of 2008 were approximately one-third of one inch per hour.

We fail to see why the State Water Board is pursuing a regulation based upon events that would have been authorized under the biological opinion if they had been conducted by the Sonoma County Water Agency. If the agency had conducted that, it would have been covered under its take permit. But for some reason, when frost trail water users do it, we're subject for a fish kill and prosecution.

So those are the only points I'd like to make. Thank you.

CHAIRPERSON HOPPIN: Thank you, Jesse.

Maria Potter.

MS. POTTER: Good morning. I'm here representing the North Coast Stream Flow Coalition today, although I've been following this issue for quite some time.

The North Coast Stream Flow Coalition represents more than 18 organizations working to ensure viable fish habitats. Specifically, we advocate for abundant fresh water for streams and watersheds as well as policies that support this goal.

We recognize that the State of California has taken some important steps in this direction recently and is currently crafting emergency legislation supporting coho fisheries recovery efforts.

California Water Code Section 1243 states that the State Water Resources Control Board should maintain, "amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." The streams are the bottom line.

I want to remind this Board of another principle and everyone in this room, because it's a principle that we can all apply, individually and as farmers and as government agencies. It's the precautionary principle. And I'm hoping that you'll consider this in light of your consideration about whether to adopt this regulation. This is a text book definition. It's the environmental

equivalent of the Hippocratic oath.

First, do no harm. The precautionary principle exhorts us to avoid practices that could lead to irrevocable harm or serious environmental degradation in the absence of scientific certainties about whether such harm will occur.

If an ongoing practice is suspect, then it should be suspended unless or until it is shown not to be harmful. Beyond this, it also calls on people to search for alternatives to potentially damaging practices.

It's taken from Conservation Biology, Martha Grimm, et al.

I think that this regulation is an important step in the right direction, but I have some concerns about what it's relying on, mainly the water demand management program. It relies heavily apparently on data that is uncertain. There are many unknowns that exist. How many ponds exist in streams. How much water is extracted and at what rate. Whether these diversions are legal or not.

The State might be good at structuring compliance protocol. However it's crafted around amorphous unknowns, it's unlikely to be effective. However, I do feel that water demand management program is a very important fact-finding step, but I'm not convinced it will save the small fry or the smolt.

I have a question specifically about the inventory of frost diversion systems outlined in here. It says the inventory -- and this is number one on page 3 of a September 1st draft. The inventory, except for diversion data, shall be completed within three months after Board approval of a WDMP. I'm curious what that exception is all about, exempting the diversion data. Is it that the diversion data is unknown or you need time to compile that? Either way, I'm grateful that this Board is taking some steps in the right direction.

CHAIRPERSON HOPPIN: Do you want to take a stab at answering this lady's question there? I know everybody has a finger, because they're all pointing at somebody else.

MR. ROSE: I haven't been involved in this from the start. But it's my understanding that the diversion data submitted later is simply because that's not going to be available in the time line for immediate submittal. So in the proposed resolution, I'm not sure if you've seen that. There is more of a time line for how things would be submitted. So I think that the diversion data will be submitted in the first annual report due September 1st, 2012. We thought that was reasonable that people would have enough time to get it together in that time line.

Does that answer your question?

MS. POTTER: Yeah. Thank you for your time.

CHAIRPERSON HOPPIN: Thank you, Maria.

Alan.

MR. LEVINE: Alan Levine for Coast Action Group in Point Arena, California.

You're lucky enough today to be dealing with a whole room of unhappy people, me being one.

And I have a specific bone to pick with you, Charlie, because I heard the statement about people misusing information about stranding to put farmers out of business. I know of nobody, no environmentalist or anybody that cares about fish that's willing to misuse information or has any antagonistic feeling against agriculture. In fact, me being a retired agriculturalist and knows what it's like to do the work and not make that much money chasing cows and sheep around and putting 5,000 bails of hay in my barn every year. Maybe you'd like to come help me.

CHAIRPERSON HOPPIN: I wasn't looking at you when I made that statement, Alan.

MR. LEVINE: That's not true, and you should not characterize anybody in this room or associated with this process as being interested in putting agriculture out of business. It's wrong. And you wrote a letter about that, too. And we had a discussion about that and you

apologized. It's wrong to say that.

CHAIRPERSON HOPPIN: Well, I appreciate your comments and I will take note of them.

MR. LEVINE: Okay. So back to what was said by Steven before. Another minor issue with you. There are collaborative groups. If they work things out, that might be a positive step. There are issues, but you are the ultimate authority. The State Board is the ultimate authority. You made that clear. The State Board response to comments made that clear, and you have to accept that responsibility to make sure that this process works.

And there are issues that are fairly daunting to get over. One of the issues is the issue of unreasonable use that was in a similar situation in the file of the cumulative diversion of water frost protection can have significant adverse effect on fish survival. This is from the staff report on the Russian River watershed 1997. And it was declared on the Napa River. And the discussion indicated that use of water for frost protection can be unreasonable when the effect can kill or harm fish and/or there are other ways to deal with the frost issue.

And so I need you to look at that and come up with better reasoning of why such use can be a beneficial use and when there can be harm to fish. It's not really discussed appropriately in the response to comments.

I was just pointed to number eleven in the most recent response to comment where the staff response was they are going to use real time monitoring. I'm saying this process cannot really work without real time monitoring where you know stage. So there is conflicting information in your responses, not only to this issue, but other ones, that I pointed out in my comments in CAG's comments. Three different sets of comments that real time monitoring is necessary. This process can't work if you're going to do after-the-fact management.

And you actually are in a sense issuing an incidental take permit and you're telling these people you're okay to go, and then you're going to look at information at the end of the year to determine whether there were violations when you were managing for stage. How does it work that at the end of the year you're going to look back and say, did they manage appropriately for stage? Or is it going to be adjusted for the next year, which is a different rain year and a different level of flows. So they have to -- the process needs to come up with a way of finding and determining what flows are necessary for fish survival. And there has to be a real time way of determining whether those standards are being met.

And I want to point out to you that you did

exactly this on the Gualala River in the complaint that -- an ongoing process that Coast Action Group with North Gualala Water Company where it was found that subterranean flows were in your jurisdiction and that the North Gualala Water Company was violating their flow conditions. This is all about maintaining flows, not just for grapes. It's for everybody else, too. And you issued them a Cease and Desist Order. You couldn't have done that without somebody doing real time monitoring. You didn't wait until the end of the year to find out that there was a problem. So there needs to be a way of dealing with that subject.

As far as CEQA goes, some of the responses to comments were inappropriately or incompletely dealt with. NMFS, National Marine Fisheries, and the Department of Fish and Game have indicated that your policy should do what you say. You use the word "ensure." That's the State Water Board's word. I don't know what "ensure" means, because there is no insurance there. Unless you're talking about the drink, Ensure. How do you define that word if you can't guarantee that the process is going to work to a certain level of confidence.

So the answers in the response to comment were, well, this is not policy that necessarily is being done to be in compliance with federal and State statute, but we

are going to ensure that there will be no stranding. I'm summarizing what the responses were.

And I think you need to do some more thinking and disclosure in writing of your rationale about how this is all going to work. Because if you don't, Coast Action Group is probably not going to sue you, but I think you might be litigated from the other side. And I'm encouraging you to do better in covering your butts, so to speak, legally in dealing with proper terminology and better responses.

There's conflicting responses. There's some responses that say you are not going to be consistent with AB 2121 and you don't have to. And there's some responses that say, yes, we are going to be consistent with the language, the flow maintenance language, in AB 2121. So you need to go through all the responses and make sure that there's appropriate consistency there.

This also goes to number 11. I don't believe your alternatives analysis really could come up with a conclusion why you need not do real time monitoring. That's back to that subject again, real time. That's the only way you're going to be able to manage this properly.

So if you don't have judicious discussion of the complete range of alternatives, including real time monitoring, you're in violation of CEQA. Somebody can

take you down for that.

Thanks for your time.

CHAIRPERSON HOPPIN: Thank you, Alan.

Steve Dunnicliff.

MR. DUNNICLIFF: I'm Steve Dunnicliff, Deputy Chief Executive Officer for the County of Mendocino. I'll be reading very quickly here on behalf of our Board.

Chair Hoppin and Board members, the Mendocino County Board of Supervisors believes the proposed Russian River frost regulation is unnecessary and will place an unreasonable burden on the agency and the regulated community.

We have written to and appeared before your Board on this issue beginning in March 2009. We have consistently advocated for a reasonable frost water program for the protection for the listed fish species in compliance with the Endangered Species Act, ESA. The successful efforts of the Upper Russian River Stewardship Alliance, URRSA, in collaboration with other regional stakeholders and individual landowners to address problems associated with direct diversion for instantaneous demand for frost protection are well documented.

The proposed regulation as written is completely unwarranted and ignores the unprecedented and comprehensive efforts taken to date to address this

problem. The Mendocino County Board has been missed by the failure by of your Board and other regulatory agencies, principally the NMFS, to acknowledge the URRSA-led efforts that have resulted in enhanced data, effective flow management protocols, and newly constructed off-stream storage.

For frost protection that offsets the need for 90 CFS of direct diversion for greatest flow deviation recorded in 2008 was 83 CFS. The problems observed in 2008 on the upper main stem of the Russian River have been successfully resolved, and URRSA has proposed protocols to ensure continued compliance with the ESA. The reluctance of your staff to recognize the URRSA led regional effort was explained when a Freedom of Information Act request confirmed that your staff while ostensibly engaged in a collaborative stakeholder process met secretly with other agencies and conspired to manufacture a need for regulation.

The record is clear that your staff not only solicited the February 19, 2009, letter from NMFS, but encouraged NMFS staff to specifically request emergency regulations. These actions undermine the collaborative process then underway and appear to have compromised the independent decision-making responsibility of the agencies.

In order to restore trust in this process, we respectfully request full public disclosure and a comprehensive investigation of this matter. We respectfully request that the proposed regulation be tabled pending the outcome of this investigation. We do not believe it is prudent to proceed until that is independently established and the need for regulation currently exists.

It is important to recognize that the use of water for frost protection is not unreasonable, but an allowable, permitted, and established beneficial use of water by agriculture. In fact, it is the proposed regulations which ignore the significant efforts by the regional stakeholders that are themselves unreasonable.

Further, sufficient regulations are currently in place to protect special status fish species listed by the ESA and the habitats upon which those species depend.

In conclusion, instead of the ill-advised and unwarranted proposed regulations, we strongly encourage your Board to recognize and approve the comprehensive and effective program developed by URRSA and the regional partners.

Sincerely, Kendall Smith, Chair of the Board of Supervisors.

CHAIRPERSON HOPPIN: Thank you.

Mr. O'Hagan and Mr. Rose, do you know of some effort we've taken not to recognize URRSA? I'm confused.

MR. O'HAGAN: No, sir. I'm not familiar with any efforts that we are not -- and I think believe in my presentations at the workshop and today I've recognized these programs.

CHAIRPERSON HOPPIN: Thank you for that clarity. David Koball.

How many times have we done this, Dave?

MR. KOBALL: Just one more time now hopefully, Friend.

Chair Hoppin, members of the Board, thanks for the opportunity to come up and speak with you.

Like has already been said, I'm sorry I don't envy your positions today. It's a tough crowd.

But before I start with my timed comments, I want to make sure I recognize the members of the Water Board staff that worked so diligently and professionally pushing forward with Fetzer vineyards application for storage for our off-stream ponds we've built just because of what we're talking about today.

Phil Crater, Darren Train, Kate Washburn, Aaron Miller have all worked very hard, very professionally to uphold the water code as well as respect our operational needs. We very much appreciate that and want to express

our gratitude.

CHAIRPERSON HOPPIN: Thank you.

MR. KOBALL: I do have a question about the regulations in terms of what happens to non-compliant diverters in the WDMP. If we have someone who's not compliant, what happens to them? And this relates to Sean White's comment in terms of liability. If you tell someone to turn off their frost apparatus, they lose a crop, there is a liability involved in something like that. And I think that's something that needs to be clarified.

To the rest of my comments, I've had to do lot of Xing out, because a lot of my comments have been covered.

I've heard there's been concerns on the part of the State Water Board that Mendocino County has not been progressing or doing their part in moving ahead in some of what's been happening in terms of the ordinances in Sonoma County. What I'd like to do is look -- to think objectively about some of the facts you've heard already today, as well as some of the others I have the same. We have already spent millions of dollars trying to alleviate this problem, all without a regulation telling us to do so. And we've been very successful in terms of alleviating the original problem that occurred on the main stem.

There have been no documented strandings due to frost protection on any tributary in Mendocino County. In 2009, '10, and '11, the Department of Fish and Game and NMFS agents were out in the field looking for these events and were unable to find them. Four gauges were installed in Mendocino County by NMFS in different tributaries for the 2011 frost season. Only one of those gauges showed significant signals due to frost protection, and that particular gauge was about 100 yards downstream from an in-stream flash board installation. If you want, I could send you a picture of the lines that were taken out from that grower's field. That grower's already made arrangements to pull water off of the main stem. Again, as a place where we thought we saw a problem, we're already working to address that problem.

On April 2nd -- or excuse me -- April 28th of this year, fish with found stranded in the west fork of the Russian River. I'm sure you're familiar with that. Daily decreases in the stage due to riparian use as in trees and bushes, not diverters, were many times greater than the signal observed due to frost usage. Yet, the day after the event, before growers were even aware of the fact there had been a stranding, a member of the press was calling us for statements on the event.

Within five days, Dan Torkmata, Assistant Special

Agent in charge for NOAA Law Enforcement Office, was quoted in the press as follows: "This incident illustrates that voluntary efforts have not prevented frost diversion related fish kills and confirms the need to regulate water use."

I believe that this illustrates in this case NOAA is not objective and does not rely on actual facts or scientific analysis in order to draw conclusions. But they do know how to construct a very good PR campaign.

Lastly, when I pose the question to NMFS staff a month ago that if only they would enforce the ESA like they are supposed to, this would cause growers to manage water resources so the fish takes cannot occur, which is exactly the same lever this regulation is going to pull. You're going to push growers to manage the resource, so does fear of the ESA.

The response that I got was, "It's too difficult and takes too much effort," as you heard today, "to prosecute ESA violations. It's easier for us to put regulations like this in place."

To which I responded, "Did they not think complying with this regulation would be onerous or expensive for growers?"

The response that I received was unremarkable and showed that efforts involved in compliance were of no

consequence to them. This arrogance and lack of concern very much upsets me.

As a note of interest, Dan Torkamata was the NOAA Office of Enforcement Employee of the Year in 2002 because "He investigated and assisted the first successful prosecution of Section 9 ESA take case without recovery of dead fish as evidence." It would seem that Mr. Torkamata is very able to prosecute ESA takes. And this could be an effective tool.

Lastly, there is more to population decline for these species than frost protection. I urge you to remember that. Frost protection has been vilified in this process as the cause of fish decline in our watershed. And I don't believe it's the case.

Thank you very much. Appreciate your time.

CHAIRPERSON HOPPIN: Thank you, Dave.

We're going to take a break until 20 'til and then we'll resume.

(Whereupon a recess was taken.)

CHAIRPERSON HOPPIN: If you would all take your seats, please.

Mr. Brian Johnson.

MR. JOHNSON: Do I have a green light? I do.

CHAIRPERSON HOPPIN: Right. By the way, I was informed by the AV people this green light I keep telling

everybody there is a switch for, there isn't a switch for it. Jeanine controls the whole thing. So I'm just full of crap.

MR. JOHNSON: I got here and was looking for a button. And I thought that was your way of making fun of all of us.

CHAIRPERSON HOPPIN: No. It was me.

MR. JOHNSON: Thank you.

CHAIRPERSON HOPPIN: It wasn't an electronic conspiracy, however. I just was ignorant.

MR. JOHNSON: I'm here on behalf of Trout Unlimited. And I would like to start by thanking you as Chairman and Board Members Spivy-Weber and Doduc for your engagement on this and for getting us to this point and, you know, not just for allowing it to happen and urging it to happen, but being personally involved with us and with many of the grape growers. I think it probably would have been -- nobody would have been surprised if you hadn't, but I think people are appreciative. And I know I am. And it's good to have that kind of engagement. I think it bodes well for the future.

So on behalf of Trout Unlimited, we urge you to adopt the rule and adopt it today and without further amendments. It isn't perfect. We have our issues as well. I think our main substantive concern is that we're

not as far along as I would like in terms of knowing what the water demand management programs are going to be like or even exactly what the criteria are for approving those.

I share the concern that you've heard from a couple of the farmers about how the lines of responsibility get drawn. If something goes wrong and somebody doesn't comply with the corrective action or hires experts to dispute it or if they're in the process of complying, but somebody finds a dead fish.

But all in all, I think that the rule is workable, and it certainly provides room for us to develop these things. And so, on balance, we really do urge that we adopt it and move on to implementing it.

And I would just say that despite all of the controversy and some of the ill will that's still pretty clearly present, we do remain very optimistic about the industry's ability to work with you and the wildlife agencies to solve this problem. And there are a lot of resources out there, non-profits and agencies, that can help individuals with their own water supply systems. And so we're very optimistic in the long run and want to get to work on the short term.

CHAIRPERSON HOPPIN: I want to thank you again for your involvement in this. I'm sure at times it wasn't easy. And you were in the room more than once with a lot

of people that'd just as soon you probably weren't there. And you know, I think you showed your commitment, not only to working with the grower community, but certainly on behalf of the fish, which is your organization's mission.

And you, like ourselves, have a difficult task because it's not all about fish. It's not all about water. It's finding the balance. And finding that balance is such a critical and illusive point at times. But once again, I appreciate your help. So thank you.

MR. JOHNSON: Thank you. I appreciate that.

CHAIRPERSON HOPPIN: Doug McIlroy.

MR. MC ILROY: Good morning, Chair Hoppin and members of the Board.

I wanted one last opportunity to talk about something I've talked about several times in comment letters, et cetera. And that's the groundwater portion of the regulation, which is you have to opt out of it and how it's very inconclusive where you -- either everybody is in and you have to show that you don't have an effect. And that there is no standards there to -- by which to opt out.

And as you've heard me say several times that the main system of the Russian River is really part of the solution here, but it's not necessarily part of the problem, because you've got larger well fields out there

that have the ability and not have a significant effect on the river that you pump from. And that have always said it's not so much a groundwater issue; it's a surface water issue, and predominantly the tributaries.

And my main concern is if you are a senior water right holder, like I am -- and today I'm wearing my personal hat -- you have this burden of proof that if you're in a well field that has junior rights and they're pumping at the same time that you are and it's very difficult to determine whether you have a significant affect on when they're actually pumping. And that's specifically municipal users effect. And so that portion, that language is still disconcerting to me, because here we are and we're now part of this regulation and will be for perpetuity, and almost in my mind without these standards and added expense to join the water amendment program to comply with the regulation. All those things, when I believe that there is quite a few users like myself that probably shouldn't be included or must have a way out so that at a time they don't have to be included.

And hopefully that your staff is working on some language that has been sent your way with respect to Mr. Peter Healberg of the Wine Institute. And I'm hoping that you'll consider that in the regulation and that we can get to a place where we have a way out and have some of these

standards.

CHAIRPERSON HOPPIN: Doug, I certainly understand your concern. It's my understanding from talking with Dave and John that that mechanism is in place, will be in place.

And, you know, my concern was that this frost regulation morphed into some larger groundwater management program. And my feeling and my comments to staff had been that while all wells more than likely in that drainage are interconnected at some point in time with the Russian River, our concern, my concern is this instantaneous drawdown phenomenon. So the way I would look at the groundwater issue as much as in the way that Tim Schmeltzer and Peter Keel presented it to me six weeks ago, whenever it was, and that is that someone extracting groundwater that had an affect during that frost protection event would probably be considered or would be considered the same as a surface water diverter. Working with your water demand management group will be the process where people will be eliminated from that.

And I honestly don't think that from what I've looked at that there are going to be an awful lot of groundwater diverters that fall into the category where they have this instantaneous effect. I mean, my analogy of it is very much the people growing groundwater are very

much like the people we're encouraging to put in ponds for frost protection. They may be authorized to fill those ponds from 1:00 o'clock in the afternoon until 7:00 at night after the frost protection event to avoid the simultaneous instantaneous drawdown.

So while I appreciate your concerns, I think that issue has been addressed. I'll give Tim Schmelzer and Peter a lot of credit for raising it. I think it was a reasonable request they made, and I think it's being dealt with.

MR. MC ILROY: Well, I just want to make sure it is, and it's dealt with in a way that you're not assumed that you're causing an effect. And the aspect of that is, like I said, I think you have -- it has to -- unless you demonstrate that -- it's the fact that you're included and it's very difficult to opt out is my main concern. I hope to see some language that would alleviate that issue. I mean, it's almost like you have to have a significant affect on the stream before you're included.

CHAIRPERSON HOPPIN: I understand your concern.

David, do you want to go over that now? Or why don't we go over that after we hear all the comments and we have our debriefing, if you will.

MR. MC ILROY: Thank you.

CHAIRPERSON HOPPIN: Thank you.

Bob Anderson.

MR. ANDERSON: Good morning. Bob Anderson representing United Wine Growers for Sonoma County.

And as our last comment letter said, we're interested in a program that works. And I'm not a lawyer. So I often say, I have any Master's degree in child development and family relations, but I can read documents. And I would just point out a couple.

The Bible, Hutchins, California Law of Water Rights page 137 cites, "reasonable beneficial use as demanded by the Constitution." And Hutchins cites the Constitutional amendment of 1928 wherein it is provided that, "The right to use water -- the right to water or to the use or flow of water in or from any natural stream or water course in the state is and shall be limited to such water and shall be reasonably required for the beneficial use to be served..."

I just find fascinating that the Bible doesn't include the second half of the sentence, but it's in the room today. And the second half being the Constitution, Article 10 cite to unreasonable use.

I also find fascinating that the record -- I'm one who tries to read the Response to Comments, Statement of Reasons, the proposed rulemaking notice. And I was in this room in 2002, March, when Professor Sax presented his

report to the State Board. "Review of the laws establishing the Board's permitting authority over appropriation of groundwater classified as subterranean streams and the Board's implementation of those laws."

But nowhere in the record is there any citation to Professor Sax, though I find of note in his report 92 pages on page 85 citing he does recent court cases in favor of the claim that the Board can assert jurisdiction over percolating groundwater pumping to adjudicate and remedy claims that come within the scope of waste and unreasonable use, covered by Water Code Section 275.

Such jurisdiction could be a powerful tool to deal with pumping that impairs instream flows needed to protect fish and riparian valve use, one of the major issue underlying complaints urging the Board to take a broadened view of this jurisdiction.

And on page 92, he concludes with a three point strategy for dealing with the problem of surface groundwater and surface water management in California. And an aside, the whole report lays out how we got to where we're at. I commended to you you've included a link to it. Wine Growers' September 16th comments, it's not easy to find on your Board site. It is on the website.

He recommends:

1. Adoption by the Board of clear criteria to

implement the existing statutory purpose by taking jurisdiction henceforth over groundwater use diminished appreciably and directly the flow of the surface stream.

And proactive use of the Board in any source of its jurisdiction it has to implement the constitutional prohibition of waste, unreasonable use, and unreasonable methods of use to protect the public trust.

I cite these because there is missing for me an explanation of how we got to where we're at. And I associate myself with speakers before who made the case that there may be time needed to think it through and determine if we are at the right place or not.

And you may find odd -- I find odd -- those who know, I associate myself with the previous speaker, Alan Levine, making some of those same points.

But I do appreciate the work of everybody, the agencies, the staff, your Board, the distance we've come from where we started. I appreciate that. And the resolution before you I think is a big step towards finding a way to make it work as we go forward.

So with that, I thank you.

CHAIRPERSON HOPPIN: Thank you for your comments.

Scott Greacen.

MR. GREACEN: Thank you, Mr. Chair Hoppin. My name is Scott Greacen, North Coast Director for Friends of

the Eel River.

I would just note these regulations are long overdue. They're important, even essential. But in our view, not yet sufficient to the task at hand.

With respect to the question of the significance of the resources, the stakes, if you will, I would note and commit to your attention the study that Dr. Peter Moyle and Company published in July of this year in the Journal of Biological Conservation, which assesses the relative level of threat to each of California's inland fisheries and found that the essential coast coho, the fish that were killed in the Felta Creek stranding, are the second most critically endangered fish run in California.

I remind you as well that NMFS found not only that there had been take in that case, but absent some effective regulations along the lines of those proposed today that the continued diversion of water for frost protection would constitute a jeopardy to that species. That's as strong as the Endangered Species Act gets.

Friends of the Eel River strongly supports the proposed regulations, but we would respectfully urge you to provide greater transparency and improved accountability in the processes of the regulation.

As previous speakers have noted, annual reports

simply aren't going to provide the public and allied agencies with the kind of information necessary to really track what's happening in the watersheds. We need real time flows.

We have heard today that the wine growers are clinging to economic survival. The phrase "clinging to survival" to me seems poorly chosen in this situation. If there is a group that is clinging to economic survival, it's the fishing fleets of the north coast. If there's a species that's clinging to survival, it's the central coast coho. I would urge you to keep those points in mind as you make a decision. Thank you.

CHAIRPERSON HOPPIN: Thank you, Mr. Greacen.

David Keller.

MR. KELLER: Good morning, Chair Hoppin, Members Doduc and Spivy-Weber.

David Keller, friends of the Eel River, Bay Area Director.

Just to reiterate Scott's note on that, we strongly support moving this legislation forward and moving these regulations forward.

I find it unfortunate the County of Mendocino only recognizes the economic importance of their grape industry and not tourism, recreation, commercial and recreational fishing industries that for so many years

depended on the identity of a healthy fisheries within their county. It's rather unfortunate.

We support moving these regulations forward and hope that they can be strengthened in several critical areas. As has been mentioned, of course, the real time availability and transparency of stream gauge monitoring; so you have a stage level hopefully before damage is done, rather than having a footnote about damage was done, here was the stage level. Folks, what do we do next year? That's not sufficient to avoid jeopardy and to avoid take.

The legislative -- the regulations still don't ask the question if any of the applicants for using frost water, in fact, have legal water rights, permits, and licenses. Sonoma County refused to do that, saying that was your responsibility when they developed their regulations, which are shoot full of holes. And I hope that the State Board will, in fact, take it up and put it on paper as a requirement for anybody proceeding within this process.

The details, of course, of the water demand management programs are still absent. We like the direction they're going in. But without the actual details, it's hard to tell how they're going to be implemented, if they're going to be effectual, and how the responsibility for failure to comply is addressed. That

is a very important question. And I agree with some of the prior speakers about that. Is it going to be the entity that conducts the WMPs? Is it going to be the counties? Is it going to be back to the Board? Is it going to be an individual grower? That needs to be spelled out.

And with that, and as well as the rest of the details of the WDMP implementation, I'm hoping that the final environmental review on the impacts of those regulations will be coming back for public discussion, not administerial decision, within the Board or within the governing bodies. Because there are so many environmental implications that will be hashed out in exactly how those WMPs work. That's an important step of the process.

The governing body, of course, as we mentioned in prior comments, needs to be transparent, needs to be publicly available, and accountable. Such organizations as the Russian River Water Conservation Council is expressly not in that category.

And then we need to see that the State Board, in fact, has within this a determination that there is actually water available on a seasonal timely basis in any trib or the main stem for use from frost. If it takes further investigation and reporting on that as part of this process, it needs to be done. Because, of course,

from the Eel River standpoint, the Eel River is constantly used to mask the overdrafting of the Russian River. That cannot stand. It's an abuse to both rivers. And I think you've taken an important step in moving this forward. And I hope to see the details hashed out.

Finally, the important economic analysis that is included with the staff report is fatally flawed. It's unprofessional. Produces no dollar value allowed or accounted for for the benefits of fish, fisheries, industry, recreational industry, tourism industries, or the regional identity. And you can't have a balance sheet if one side is blank.

So that analysis unfortunately is ludicrous. It's not professional and should be discarded.

There is value, of course, to the wine industry. But the rest of the picture has to be part of your consideration.

Finally, on the letter that I delivered by e-mail last night and in print this morning, I do note that unfortunately because of the timing of your release of the revised DEIR and the amended regulations simultaneously with the final EIR, the CEQA required time period for allowing comments on the revised DEIR was obliterated. So please take that into consideration of your process. It failed to allow the public adequate time as CEQA requires

for comments on the REIR.

CHAIRPERSON HOPPIN: Mr. Keller, can I ask you, how does your organization view fishing on the Russian River?

MR. KELLER: Sorry. How do we --

CHAIRPERSON HOPPIN: How do you view -- what position do you take on sport fishing on the Russian River drainage?

MR. KELLER: We'd love to see fish numbers back to the point where that can be recovered. Absolutely. And the recovery of the healthy fish population for the next ten generations in both rivers is essential so that we can get back to the traditional activities and traditional industry and value of just those activities. So it's very important. And unfortunately, two rivers are tied fatally at the Potter Valley Project. And that is, of course, another story we'll get to with you.

CHAIRPERSON HOPPIN: You realize FERC has more inform do with that than we do?

MR. KELLER: We are aware of that, and we are aware in your role in the revisions to 1610 that will be coming up. And needless to say, we'll be here again and always happy to work with you.

CHAIRPERSON HOPPIN: Thank you.

Nick Frey.

MR. FREY: Nick Frey, Sonoma County Wine Grape Commission. Just some brief comments.

First of all, I think we really appreciate the Board working with the growers to try to hear our concerns. We hope that those have been beneficial as you work on some final language.

I really do feel that you can count on the local program in Sonoma County. The growers have a tract record. We work with the environmental community to develop the vineyard erosion and sediment control ordinance. And we've had excellent not only compliance but we've had better vineyards throughout the county. And those are better in ways that would protect the fish.

We think the local ordinance for frost protection will do the same. Growers are committed to doing what we can to preserve the resource and at the same time preserve grape growing as an economic agricultural activity in our county.

We have a lot of growers in Sonoma County. We show about 1800 vineyard owners. Come down to individuals, maybe 12- to 1500. And many of those we show about 40 percent or fewer than 20 acres.

The economic analysis on the impact on small growers has concerned me. Small growers are inefficient by definition, and it's hard to make a small vineyard

citizens, many of whom we understand are also wine drinkers.

The comments that we made in July and the comments that we made also in response to the Sonoma County ordinance, the key points of those were we would like to see transparency in any of these regulations. We would like to see real time monitoring. We would like to see that those using water for frost control have water rights, have the right to use that water. And also we'd like to see full encouragement of alternatives to water for frost protection.

I have been a marketer for 40 years. I've been selling stuff and helping people sell stuff for 40 years. And 25 years ago, I coordinated the Wine Marketing Symposium at Sonoma Mission Inn in Sonoma County for Sonoma State University.

The wine industry helps create the prosperity of where I live in the Redwood empire. And I appreciate this.

However, we see a rising tide of outrage in blog comments and social media across the country in response to news of how the wine industry is affecting the natural resources of what is now known as wine country.

This is a picture that I'm showing you I've seen in your files. It's the picture of the dead fish in Felta

Creek in April 2008. Images like this are now appearing online. They're being posted on web sites. And I'm struck by how the discussion of the economic impact to these rules has focused on the cost of grape production. However, the affect on the market remains significant if these rules are not strong enough and incidents like this occur again, the affect on the demand for the products of those who grow grapes in the Russian River may be very significant. Thank you.

CHAIRPERSON HOPPIN: Thank you.

Larry Hanson.

MR. HANSON: Hi. I'm Larry Hanson representing Northern California River Watch and Green Valley Creek Restoration Project Coordinator. Appreciate the opportunity to speak today.

I had in previous comments that I think that would help make the regulations more effective. And some of these -- or maybe even most of these may already we may be incorporating in the new regs.

So, first of all, we'd like to adhere to all provisions of AB 2121. Frost regulations must be consistent with State policy to maintain flows in northern California streams.

Second, bring about consistency of the federal ESA, State ESA, Water Code and DFG codes, including the

is necessary and to be managed by a state responsible agency.

In addition, I support the NMFS positions and comments. And in the final analysis, the regs need to be enforceable and enforced and accountable to the public trust.

Thank you very much.

CHAIRPERSON HOPPIN: Thank you very much.

Kimberly Burr.

MS. BURR: Hello. My name is Kimberly Burr. I'm a Green Valley Creek Restoration volunteer and have been for many years.

Thank you for the opportunity to speak. And I want to take this opportunity to thank staff for all their hard work trying to grapple with this very difficult problem.

I want to be on record strongly supporting the comments of the resource agencies. I think that I would even go further than their comments, and I would expect that there would be complete transparency of the monitoring data in real time and contemporaneous with the data being uploaded to a website. That's the best available method to protect the fish, and it's not being fully employed. And you would expect at this point in time that the best available method would be employed.

This is an old problem. This did not get sprung on people yesterday. The change on the part of extreme elements in the industry is not going to happen. And expanding vineyards is not helping the situation. It's not reasonable to continue to accommodate every demand that we would wish to make on these critical habitat areas. Take has always been illegal, and this regulation doesn't change that.

Leadership in the industry with a few exceptions have brought uncertainty, and they have brought regulations and they have brought litigation. And they're bringing that upon their members.

If a good regulation is challenged in court, I would expect the State to immediately pass an emergency regulation. And I don't think the good growers really deserve that.

The final comment I wanted to make is to say that Dan Torkamata is a courageous agent, had an honorable career. And I wish we had more people like Dan Torkamata to bring some sort of balance back to this equation.

Thank you very much.

CHAIRPERSON HOPPIN: Thank you, Kimberly.

Steven Passalacque.

MR. PASSALACQUE: Good morning. Stephen Passalacque.

First of all, I want to say --

CHAIRPERSON HOPPIN: Stephen, do that one more time on the last name so I don't butcher it again.

MR. PASSALACQUE: It's "pass the water" in Italian. Passalacque.

Good morning, Mr. Chairman and members of this Board.

First of all, I want to just thank you for your service as appointed officials. Having been elected District Attorney of Sonoma County for the past eight years, I certainly can appreciate and understand the challenges of an elected official or an appointed official. So I commend you for your public service and for your patience and willingness to have these hearings and listen to both sides of the aisle.

I'm here today as a citizen only. I'm not representing any particular corporation or individual. I'm getting up to speed on these particular regulations just the last couple months. And I do want to say a few things just to give some food for thought to this Board, some observations from a different vantage point perhaps that I see when I read the documents included in the environmental impact report.

I was surprised to see that there was not any in-depth discussion of frost protection in terms of the

process, in terms of data over the years as to how many days during that 90-day period there was frost. I didn't see that anywhere in the documents, nor an historical perspective in the process of land owners and wineries and how they monitor it very closely with the weather reports to turn on the gauges and divert water at the appropriate time.

Also was surprised to see that the report is silent on any in-depth factual discussion of stream flow levels. There is no information from the National Fisheries Services Association regarding the data from their gauges over the years with respect to two things. And the stream water flow and in-depth level of the water in the tributaries and in the various rivers.

I also didn't see any in-depth discussion of how the other consumers, municipalities, industrial use, the Corps. of Engineers in terms of their actions of opening and closing the gates, if you will, may contribute to the topic we're having a discussion here today.

And lastly, I just want to say that there's been some very well thought out discussions or points made to this Board today. I think all have -- all made with good intentions, all have some particular value to what they say, what they share with this Board.

I think one of the things that lastly I want to

share with this Board is that it's clear that these are the most difficult economic times. Not only is the United States -- the Standard and Poor's in the United States downgraded today, Greece is on the drink of financial disaster. All these things are going to affect the economy in California and in the United States. We will continue to see layoffs with local government, State government, and federal government.

And I think it's telling that across the street in the Capitol last week there were two bills passed that reduce regulations regarding CEQA. And I think at the end of the day, I think we have to take note of the climate we're in economically.

And also one of the things that really perplexed me was we're talking about water. There's different demands from different areas, and I certainly understand that. Just months ago, the Governor declared that the drought was over in California. So I would just ask as you go forward, I would suggest that perhaps based on some of the comments that we made here today that this Board re-evaluate some of these issues, because I think from my vantage point being a lawyer that the division of -- administrative division -- administrative law division may very well bring it back to you to request a more in-depth analysis that may be valuable as they proceed down the

road.

Again, I want to thank you for your diligence and for the opportunity to speak to this Board. Thank you very much.

CHAIRPERSON HOPPIN: Thank you for your comments.

Tim Schmelzer.

MR. SCHMELZER: Good morning, Chair Hoppin and members.

I wanted to take the opportunity to express the appreciation of the Wine Institute in making your staff available to really pull up the sleeves and work with you on frankly a boat load of issues that we've brought up regarding the initial proposed regulation. And by and large, I think the September 1st recommended changes address nearly all of the issues that we had brought up.

I will never say the industry is excited about the prospect of regulation here. Though, understanding, you know, that this is where the Board is going with this, we're doing our best to work with you to make this implementable in a fair fashion for us.

The two issues I wanted to mention today were in our comment letter. And the first is with regard to unreasonable use. The proposal that I'd like to make is very specific right now. But I believe it still accomplishes the Board's need to be able to enforce the

regulation. But at the same time, does not create a blanket designation of unreasonable use for all frost protection.

And my suggestion is that in the preamble portion of the regulation -- this is the sentence that begins "because a reasonable alternative to current practices exists," I would recommend a change that said that instead of "the Board has determined these diversions are unreasonable, unless conducted in accordance with the Water Demand Management Program" to instead state that, "The Board has determined that these diversions must be conducted in accordance with this section."

There is two reasons for that. One, we believe Subdivision E found later in the regulation serves the purposes for the Board, their ability to enforce. And secondly, speaking to section and not specifically to the Water Demand Management Program, this acknowledges the fact that it is possible that some growers aren't necessarily going to be captured by the program because their use is not considered to have a significant impact on frost. I wanted to pose that as capturing both of those concepts.

The second issue that I wanted to address was with regard to groundwater. Really appreciate the change that was proposed in September 1st to focus more

specifically on the effective groundwater during a frost event. I believe that's kind of the right construct to be looking at groundwater.

That being said, I wanted to propose what I consider to be a relatively minor clarification here that we should be limiting ourselves to groundwater that has a measurable significant effect during a frost event. I'm just concerned that hydraulic connectivity in and of itself during a frost event could reasonably be argued to contribute here. And a lot of people are having no appreciable effect on stream stage and process may be needlessly included in the regulation here.

CHAIRPERSON HOPPIN: Do you have a teenage daughter, Tim?

MR. SCHMELZER: No, but she acts like it.

CHAIRPERSON HOPPIN: If you've ever had, you'd be concerned about what a significant event was. You would argue about it until they were out of college.

So I have -- we'll talk about this when we go over all the comments. I have been slightly -- I know your intent and I appreciate it. And I have my personal concerns about significant, but we will discuss that, certainly.

MR. SCHMELZER: Okay. Those were the two issues that I wanted to bring up to you. So definitely

appreciate your consideration on both of those points.

CHAIRPERSON HOPPIN: Thank you.

Once again, we appreciate your input into this issue. I don't expect anybody to enjoy it or think it's great, but the attitude that came forward certainly helped us craft something that makes the best of the situation. So thank you.

MR. SCHMELZER: Thank you.

CHAIRPERSON HOPPIN: Al Cadd.

Where's your sidekick? I even brought him a bottle of water and he didn't show up.

MR. CADD: He's unavailable today. But he sends his regards.

CHAIRPERSON HOPPIN: You can take immaterial him that bottle of water from me

MR. CADD: Chairman Hoppin, members of the Board, my name is Al Cadd. I'm President of the Russian River Property Owners Association.

I'd like to mention one old adage here in the west. Whiskey is for drinking and water is for fighting. And that seems to be pretty true these days.

I want to -- with all due respect, in my opinion, the proposed draft regulation is poorly thought out and a knee jerk reaction. It's not based on science, but rather on guesswork and opinions. Bureaucrat paperwork will

force many small growers out of business. At the same time, it will not help, will not be beneficial to the fish. That's just bureaucratic pressure.

As I see it, there is no provision to the end of this nightmare. Even if it's been established there is no harm to fish, reports will still be required. The Water Demand Management Plan to be approved by the Board, what does that mean? What criteria has been developed for this plan? Or does it just depend on how some bureaucrat feels at the time?

We, the Russian River Property Owners Association, implore you to go back to the drawing board and come up with a regulation that is based on science and common sense. Thank you.

CHAIRPERSON HOPPIN: Thank you, all.

Pete Opatz.

MR. OPATZ: Chairman Hoppin and Board, thank you very much. Pete Opaz. I'm a grape grower in Mendocino and Sonoma County, actually and a number of other counties throughout the state.

But this has been an anecdotal. It's quite an experience. We've had a lot of conversation about live data. We had a bit of information from a USGS gauge about the period of time of the stranding in Hoplin (phonetic) in April of '08. That data was not -- was left

provisional for a period of time of 18 months by the folks at UGSG.

And with the incredibly dry year, I'm sure there's very good reason why they were unable to get the provisional data updated to the final data status.

But what we learned through that particular experience when there was a reaction towards one of our partners in that watershed, I believe that partnership I made is really irrelevant. But that drew some pistols out of the holster looking at them as part of the problem on that April period of 2008. Where, in fact, after the provisional data was re-calculated and the curves were recounted, they weren't complicit in that shortfall of water on that dreadful period.

So as we go forward and we're looking at mapping out live data and where it's to be put, I have to be quite honest with you, it's been very illuminating for me taking Dr. Mancondalf's local classes in Sonoma and Mendocino County about water place classes and how to rate them. It's not something I figured I'd be doing at this point in my career, but it was very illuminating the fact at how dynamic the stream system is.

As we navigate forward at the risk of alienating partnerships, we make sure with great certainty apply the data that is actually imbedded and gone through by

professionals, not me. Because like I said, just because I took one class certainly Dr. Conlin doesn't make me a stream gauge expert. Quite the contrary.

But it was an experience we had locally that was counterproductive. And it caused us to have some consternation within our community with an agency who's, quite frankly, been very cooperative and very helpful.

I want to leave that thought with the community here about openness and transparency, and they're nice buzz words. But there is science that has to be attached to data and how it's managed. And I would agree with the gentleman who spoke earlier about the risk and liability to our industry and the public arena and our community.

And just a word of caution from the same type of experience, we need to make sure that the data has been vetted and looked at by professionals before it gets in the blogasphere or wherever else these things go these days.

I want to thank the State Water Board staff, the agencies. This has been I think an extremely productive and co-educational process. And I hope it goes on for decades. Thank you very much.

CHAIRPERSON HOPPIN: Thank you very much. That takes care of our comment cards.

Mr. Lauffer, we had announced that we would

adjourn to review the comments we've heard today for various reasons. Would you like to resume at 12:30? How much time do you think it will take?

CHIEF COUNSEL LAUFFER: Just to be clear, wouldn't so much be the Board adjourning. It would be a brief recess so staff can talk amongst themselves. And what I would encourage -- I don't know if David and John have had a chance to confer and I'm going to buy them some time by talking to figure out how much time they need. If there are any specific issues that the Board members would like them to address, you may want to flag that issue now and then probably get away with taking at most a 15 or 20 minute break. Although that would change dynamically based on what you all say in the next few minutes here.

CHAIRPERSON HOPPIN: Fran.

BOARD MEMBER SPIVY-WEBER: I'll start. And to me, on the issue of monitoring, how do you envision the transparency of this both monitoring and analysis occurring over for the public?

MR. O'HAGAN: The monitoring for the stream gauging is real time every 15 minutes. That will be collected by the governing bodies, and they will also be collecting the diversion data. That information will be as Mr. Opatz mentioned, the governing body would be able to combine that information. And then all that data is

pursuant to the regs comes to the Board with the annual report that's due in September. So all that information will be available to us. The governing body would have the real time data available to them at any time to make the corrective actions, if necessary, or recommend corrective actions.

BOARD MEMBER DODUC: Building on to that, should there be an unfortunate event during the season, is there a mechanism for us to receive that real time data, or do we have to wait until the end of the season?

MR. O'HAGAN: I believe we could request it. There's nothing in the reg that would require at this time to be submitted.

BOARD MEMBER DODUC: The reason I'm following up on that is we've obviously heard today and I've also discussed with staff my concern in terms of the enforceability of these regulations and the Board's potential need to take enforcement action. Should there be an unfortunate event that, of course, would have -- we would need the data to follow up on, and we would not be able to have that data until September, is what you're telling me.

BOARD MEMBER SPIVY-WEBER: Let me piggyback on that, because I think it's all wrapped up in a package. Then it gets to liability and who's responsible. And it

all hinges on if there is a stranding event caused by provably caused by frost protection activities, and so we have real time data that go to the groups and they see this and something has happened, are they held responsible for it or not? I mean -- and when do we find out this has happened? When do we find out it has happened? It's all kind of mixed together, seems to me.

MR. ROSE: In terms of responsibility, I think maybe there is some confusion as to who exactly is responsible and for what.

This regulation doesn't have any affect on responsibilities outside of this regulation, like compliance with the Endangered Species Act or water rights permitting or anything like that. So those enforcement authorities of the Board and any other entities who enforce those authorities, like the ESA, would exist simultaneously with the regulation.

It's my understanding that enforcement of this regulation would be against individual diverters. Because all of their requirements for individual diverters, all the requirements are essentially that the individual diverters have to be under a water demand management program. And the water demand management program has to meet certain minimum criteria.

So again, it would be my understanding that the

diverters would put together a WDMP that would satisfy the Board for the minimum requirements that are laid out in here. And if they don't have a WDMP or they violate what the WDMP comes up with as spelled out in the regulation, they don't do corrective actions that are specified as necessary, then the diverter would be responsible for that.

So the WDMP I don't understand that there would be any enforcement action taken against the WDMP, although if it is not adequate to meet the Board's needs, it may not be approved or it may be approved with different requirements.

Does that answer your question?

BOARD MEMBER SPIVY-WEBER: Yes.

MR. ROSE: Was there another part of the question we didn't answer yet? Okay.

CHAIRPERSON HOPPIN: I have a couple of questions. Pete McIlroy raised the question of the course of exemption for groundwater diverters that work in the periphery that is affecting something during the frost effect. Would you kind of either now or when we come back go through how you would envision the course through the water demand management group and what would happen during the twelve-month period of study? I think we need a little clarity there. We can either do it now or --

MR. ROSE: I think I understand the question. Is it about how somebody, groundwater pumper who --

CHAIRPERSON HOPPIN: Can opt out.

MR. ROSE: Can opt out.

CHAIRPERSON HOPPIN: And during the -- as I recall, there was a twelve-month period for them to be able to opt out. What happens during that twelve-month period?

MR. ROSE: First of all, as the regulation is currently drafted, there is not a twelve-month period, per se. There is a three-year period during which groundwater pumpers who believe that they can demonstrate that they have no -- I'll read exactly what the language would be. The definition for hydraulically connected who believe that their pumping does not contribute to reduction of stream stage to any surface stream in the Russian River watershed during a single frost event. That's the hydraulically language.

This opt-out provision is for somebody who believes they can meet the criteria. They're no longer hydraulically connected. During the first three years, they would still have to participate under a WDMP, but they could provide the data that they think supports that they are not hydraulically connected as defined to the WDMP. And the WDMP can bring to the State Water Board

that information and say these people submitted this evidence, and we want you to review it. But we don't think they belong under this program. After three years, those individuals can bring that data, that evidence, whatever they have that they think supports they're not hydraulically connected as defined under the regulation directly to the Deputy Director for water rights as opposed to going through the WDMP. That kind of a time difference is to ensure that the WDMPs get the data they need so they are effective in managing all the diversions that may have problems at this point.

CHAIRPERSON HOPPIN: The other question I have, this reporting of diversion absent any particular event that may require more scrutiny during a time period, will that coincide with reporting of diversions under Senate Bill X7X. I mean -- or will there be two separate reporting that needs to be done? It just seems that one reporting would be adequate if things were equal.

MR. O'HAGAN: The regulations require keep records of hourly operation, because frost on a short time burst periods, you know, events. The Water Code requirements under 5103 is a monthly diversion, and those reports come in in July.

MR. ROSE: So these reports are due September 1?

MR. O'HAGAN: So September 1 with hourly records

of operations.

BOARD MEMBER SPIVY-WEBER: Short.

MR. O'HAGAN: For the short frost events, because you want to identify the diversions during -- may only have two event in a whole month.

MR. ROSE: And just to be clear, if it's not clear already, there is a difference in the data that's monitored. There's stream stage monitoring that's happening every 15 minutes under the regulation. And there is diversion data that is not being monitored, not being required to be monitored at this point on a real time basis. Although that was I think expressed as a potential corrective action. If there are problems, then the WDMP may require that individual diverters or the diverters in a certain area, however it's appropriate, do real time monitoring as well. So that's real time monitoring of diversion data versus the stream data, if that's not real already.

CHAIRPERSON HOPPIN: I believe it was the folks from Mendocino County that implied that we haven't recognized or acknowledged the validity of URRSA. And that struck me as strange. Can someone comment on that? That has not been my understanding at all.

MR. O'HAGAN: Again, as I said in my response to that comment, I believe in my presentation today I

recognized the efforts of the Sonoma County efforts and Mendocino, and also I recognize those efforts during the workshop in April.

CHAIRPERSON HOPPIN: Thank you.

BOARD MEMBER SPIVY-WEBER: I have one.

CHAIRPERSON HOPPIN: Fran has another question.

BOARD MEMBER SPIVY-WEBER: On the issue of water rights, who has legal water rights, and we know that in this area there's been quite a backlog. And so how is the water rights issue being handled by your division?

MR. O'HAGAN: As you know, the AB 2121 policy was passed. The policy was passed by the Board. That is one of our high priority areas. For enforcement, we are currently in the five county area investigating potential unauthorized facilities at the same time. So the regulation doesn't authorize an unauthorized diverter to divert water for frost. So we still have our own -- the Board has its own enforcement authority and to take actions for unauthorized diversions. And we are continuing that effort in all these areas, including the Russian River watershed.

BOARD MEMBER SPIVY-WEBER: Okay. Thank you.

CHAIRPERSON HOPPIN: With that, Michael, you want to adjourn back to the room to have a discussion or where do you want to go?

CHIEF COUNSEL LAUFFER: It will be staff adjourning to confer about any comments they heard today, CEQA-related comments they may need to respond to on the record. It will probably be about ten minutes or so that staff needs to confer. So that will put us right at the noon hour. I know we have a 1:00 workshop. I don't know if Executive Director Howard or the Board members have a preference. My initial recommendation would be to go ahead -- come back in about ten minutes, about five 'til noon, and try to resume this item and complete it before lunch.

CHAIRPERSON HOPPIN: Very good. Thank you.

(Whereupon the Board recessed at 11:48 AM and resumed at 12:08 PM)

CHAIRPERSON HOPPIN: Ladies and gentlemen, if you'll take your seats, please.

So Mr. Rose.

MR. ROSE: Shall I begin?

CHAIRPERSON HOPPIN: If you would.

MR. ROSE: First thing I'd like to make sure is completely clear -- Tam, a question you had asked I'm not sure I fully responded to.

BOARD MEMBER DODUC: You did not. So please do so now.

MR. ROSE: I wasn't sure. So let's make that

clear for your satisfaction.

As to the real time data being available for potential violations, if there is an incident would a data be the available to the public or the Board before September 1st, I think that was part of your question.

BOARD MEMBER DODUC: To clarify. It's not necessarily for determining a violation purpose, but also just to understand what happens and to make corrections where appropriate.

MR. ROSE: Absolutely. And I think that while it may not be clear under the regulation that that is something that the regulation provides for, people to give the data on a real time basis or to us to get it immediately as we need. We do have a number of other tools that we can use, subpoenas, Public Records Act request, if appropriate, or we can simply modify the WDMPs or just ask for the data. There are a number of tools available to get the data if we think we want it before September 1st.

BOARD MEMBER DODUC: And how resource intensive would it be to implement those other tools? Is it something that's more efficiently handled as part of this regulation, or do you feel confident that it is a simple enough and straightforward enough mechanism that we can exercise outside of this regulation?

MR. ROSE: I think there are a number of mechanisms, and they are fairly simple and straightforward. The most obvious one would be we could ask for it. If somebody says, no, you can't have that data prior to September 1st, maybe because it hadn't been amended to reflect the gauge data as USGS does or if they had some reason for that, then, of course, we would potentially want that data to look at or decide what to do at that point. But it's free to ask. And then we have any number of more legal asking methods that we can use as well that I don't think would be resource intensive.

BOARD MEMBER DODUC: Thank you.

CHAIRPERSON HOPPIN: Do you have your question answered?

BOARD MEMBER DODUC: Yes. I'm satisfied.

CHAIRPERSON HOPPIN: How about as it relates to groundwater and --

BOARD MEMBER DODUC: I think he was going to address that separately.

CHAIRPERSON HOPPIN: Okay.

MR. ROSE: Could you repeat the question, the other groundwater question that you wanted or --

BOARD MEMBER DODUC: Are you going to cover any suggested changes to the groundwater section?

MR. ROSE: I don't think that staff was going to

propose any additional changes.

BOARD MEMBER DODUC: Well, then let me ask my question.

In -- I believe it was the comment letter submitted by the Wine Institute and also reference made when Jim was speaking, there was a suggestion to include the word "significant" and measurable in the groundwater section.

I have various concerns with that. One is how do you define "significant"? And secondly, well -- let me get your opinion.

I believe that as part of the evolution of this program there will be opportunity as we are going to develop the data to further flush out terms that address measurable and significant and remove the appropriate entities from coverage as we better understand, as we implement the program. Is there anything in the regulations that would prohibit that from happening as the program evolves?

MR. ROSE: As the regulation is currently drafted, I think that exactly what you said is true; nothing would prohibit the Board from deciding what needs to be decided for the appropriate entities to be included or not included.

BOARD MEMBER DODUC: And nothing would prohibit

the local authority implementing water management programs to help us flush out those terms, those understandings, and to better address the groundwater situation.

MR. ROSE: I think that the regulation does have provisions that the WDMP would bring information to us if they think somebody shouldn't be included or isn't hydraulically connected.

But certainly, we are going to be very involved with the WDMPs as to getting all the information that we need or that they think is appropriate for us to have for who should be involved and who shouldn't be.

BOARD MEMBER DODUC: And then finally, I don't know if staff is going to be proposing it. But I would like to propose that we make the amendments that Tim suggested during his remarks to the preamble with respect to unreasonable use terminology and usage of that terminology in that one paragraph.

CHAIRPERSON HOPPIN: I would concur with that. I think Tam and I both had language that we felt addressed it. I think the language that was presented certainly took care of -- added the same clarity in a different form.

MR. ROSE: Okay.

CHAIRPERSON HOPPIN: Fran.

BOARD MEMBER SPIVY-WEBER: On the issue that Tam

was bringing up, part of the concern, I gather, is that to say something contributes doesn't give a real sense of whether you actually can see the contribution. And so -- but if you put in significant or measurable and then how much -- then you get into a whole new approach, which we have -- which is I think still to be worked out. Is that what I'm hearing, that it is going to get worked out. That there will be clearer than there is right now, a clearer term -- defined clearer term so people will know if they are included -- should be included or not.

And I'm also -- the other recommendation was that this be only on streams that can support salmonids, which is I'm sure understood. And I don't have any reason to think it would be for streams other than those that support salmonids. Is that true? Is it just for streams that support salmonids? And is there going to be a working out of the detail who is in and who isn't?

MR. ROSE: Seems to me like a two-part question. If there is more than two parts, let me know after I've answered those two parts.

As to whether streams that don't support salmonids are included at this point, I think that the problem as understood is cumulative. So what we're talking about is whether they have an impact on -- may cause stranding mortality. I don't know that we can draw

a line at this point, depending on where the diversions are, as to whether they'd have an impact or which stream if you're drawing groundwater and you're in between. Let's say, an example, east fork and west fork Russian River. I'm not an expert on this stuff. Where are you drawing from? And they're different, so what does it mean?

So it's my understanding that at this point, because it's a cumulative problem, everybody is included. And then if you don't have any problems or don't cause any problems, certainly there are mechanisms to be no longer included under the regulation.

The second part of your question was about adding significant or whether that will be addressed down the line. I think that what we did in the September 1st version of the proposed regulation is provide a more clear definition of hydraulically connected so there is a standard. If somebody knows what they are trying to meet and what we are trying to attain for somebody to no longer be under the regulation, for the same reason as I said in the response to the first point, it's hard to develop criteria at this point because there are so many differences amongst the tributaries and the main stems.

So I expect that the criteria would be developed for with the Board and the WDMPs to determine how somebody

is considered not hydraulically connected as it's defined in the regulation over time. I don't think that adding in the words like "significant" or measurable provide any additional clarity, because those are words that you fight about a lot. And so in my mind, they would be less clear than what we have now, with the understanding that we do intend to work out the specifics for every particular person or every situation.

Does that answer your question?

CHAIRPERSON HOPPIN: To that point, David, when I listened to the request, I mean, there will be an affect. There is going to be affect from surface water diversions. The intent is to have that affect be de minimis. And so how we go about that, I'm concerned that we said effect -- I'm sure there is going to be an affect. Hopefully, it's de minimis. If it's significant, as I told Tam earlier, "significance" is a significant word.

MR. ROSE: Especially for a cumulative problem.

CHAIRPERSON HOPPIN: Can you give us an idea if we bring this to a vote and pass it, how long would you anticipate the process of AOL? We have -- are we in a timely state here where we have this regulation before the next frost season or do we have any way of anticipating what they will do over there?

MR. ROSE: Before you vote, I will take a few

additional comments to respond to comments we received just so there's a placeholder on that.

We very carefully built in the amount of time that we feel that AOL and submittal to the Secretary of State would be required for this to take effect prior to the first requirement under the regulations or prior to February 1st for the upcoming frost season. As to a guarantee as to whether AOL would approve it, I can't give you that.

CHAIRPERSON HOPPIN: Whether they approve it or not wasn't my question. Would it be within the time line they normally would require?

MR. ROSE: We expect with the time lines they usually take, this would be in effect prior to the upcoming frost season.

CHAIRPERSON HOPPIN: And you have responses to other comments you've heard. I certainly vetted your process there.

MR. ROSE: Not at all.

First, I wanted to be clear that what staff is responding to today is not all comments that we've received on the -- and that's for the document that was posted in the back as well as oral responses right now. What we're not -- what we are doing is not responding to all comments received, because that will take place as

identified in the proposed regulation -- sorry -- the proposed resolution for submittal of the final packet to OAL.

What we're trying to do today is make sure that we have responded to all CEQA-related comments so that when the Board adopts the proposed resolution, the Board is also at the same time certifying the final EIR. So that group of comments is completely taken care of. So I wanted to make that clear that comments that haven't been -- people don't feel have been responded to yet, it's most likely because they're not CEQA-related comments. And they will be responded to for the submittal to OAL for the full packet.

So the one CEQA-related comment it seems that has not already been responded to -- we did go through all of the comments we received on the September 1st submittal and the oral comments today. And it seems that all the CEQA-related comments have been responded to, except for one point raised by Friends of the Eel River, which was that the DEIR should have been recirculated for 30 days and had been sent out for 20-day comment.

I understand the point, but I think it should be made clear that staff and the Board didn't recirculate the draft EIR under CEQA, which is something that usually requires a 30-day noticing period because there were no

substantive changes to the draft EIR.

What we did was we provided that under the 15-day noticing provisions of the APA as a supporting document for the proposed regulation. So the changes, the amendments, the modifications made to the draft EIR as it was sent out on September 1st were completely non-substantive minor changes essentially and almost exclusively just to reflect changes in the proposed regulation. They didn't have any effect on any of the environmental analyses, and so they weren't changes that in our opinion required 30-day recirculation.

So I just wanted to make it clear that as a CEQA point, staff and the Board did not recirculate the DEIR. This is not a revised draft EIR. It's simply we made some changes to reflect what's in the proposed regulation and it was sent out as a courtesy as a supporting document for the regulation under the APA.

CHAIRPERSON HOPPIN: As it relates to the amendment we may have proposed to have made, you see no significance there as far as public notice?

MR. ROSE: No. The one that's on the screen?

CHAIRPERSON HOPPIN: Yeah.

MR. ROSE: I see that as a non-substantial change that's definitely covered by both noticed versions that are in strike out there already.

CHAIRPERSON HOPPIN: Before we go forward, I spent a lot of time when I opened the meeting by thanking people that have participated in the process. Certainly, it's important to me that all of you that are here today realize that as we as a Board and as staff dealt with this issue, we didn't just deal with it from the perspective of ESA and fish. We dealt with it from the perspective of ESA and fish and the economy of Sonoma and Mendocino County and trying to find a balance. Someone will point out what we've done is not perfect. Very seldom is what we do is perfect.

If we give a grant to a needy community to put in a waste water treatment facility for a municipal waste disposal and we give them the money, that might be coming pretty close to perfect. But when we get into issues like this, it's never possible to satisfy everyone. But finding that balance where we protect the resource and protect the viability of the community is important to all of us.

And I know staff -- I remember Tam was with me when we had a five-person Board when I first came here. Karen Niiya and Eric Oppenhimer briefed me on this. And I had a hard time walking out of the room I was in such a state of shock trying to figure out how we were going to get to a point that I believe we're at today. And it's

taken a lot of work. It's taken a lot of repetitive answers to me from staff and from Michael Lauffer and Tom Howard as it related to this unreasonable use component of it. And the fact is the language there is something that's required for us to have enforceability over 314 riparian and groundwater pumpers or it probably wouldn't be there in the way it is.

But I feel with the amendments that are there, while somebody is still going to whine and cry about it, I think it clarifies the intent that certainly we view the use of the water frost protection, if used in proper means as a beneficial use of water and certainly a reasonable use of water.

So I don't know how many times you all had to go through that. David, you are very patient as you, John. Every time I would bring it up, Barbara Evoy would look at her BlackBerry like she had an important message coming through it for fear I was going to call on her. Worked pretty well. So I want to mention that to you because staff -- this just isn't one of these easy things we do. We have a whole string of not easy things this week that have all kind of come at one point here.

But I hope all of you appreciate what staff has had to go through to try to come up with something that while you may or may not like it is certainly our best

effort to be equitable and fair.

So with that, I'll hear from my colleagues if you have any further comments.

BOARD MEMBER DODUC: I do.

CHAIRPERSON HOPPIN: Or a motion.

BOARD MEMBER DODUC: I have both actually.

I'll start by just adding to Charlie's comment and thanking staff for your tremendous effort on this very complicated matter. And thanks to all of you. Charlie has already named names. I won't do an Academy Awards speech and name names as well, but you know who you are. We've certainly talked enough. And I know how hard everyone in this room and outside of this room has worked to get us to this point.

I also want to take a moment and thank the guy to my left. You know, I think we have an excellent Board. And given the fact that we come from such diverse background with different experiences and perspectives -- and in fact I think there were several items yesterday where, you know, we didn't a unanimous vote. If this turns out the way I hope it will, I think it says a lot for the strength of this regulation. No, it's not perfect. But I think it's a solid beginning. I think it forms the basis for the collaboration, the partnership that is needed to move forward in a way in addressing this

matter.

And a lot of credit to that goes also to the leadership that Charlie has shown as Chair of the Board on this item. I think, you know, he took some shots this morning that I thought were not fair and not grounded. And he can take care of himself. He's a big guy.

But I would have to say that on complicated matters such as this one and many others, I find myself most of the time in agreement with Charlie and also with Fran, because it's always been my opinion that while we come from different perspectives and have different backgrounds and while each of us if we were making a decision alone may make a different decision, but with our cumulative input, the end result I think is always stronger, more comprehensive, and will result in a better product.

And so I want to take a moment and thank Charlie for his leadership on this issue. And I know that we did attend that first briefing together. And yes, I actually had to help him out of the room. And I think we have gone a very, very long way. And I credit a lot of that to Charlie's leadership on this issue.

CHAIRPERSON HOPPIN: Thank you.

After that, you're not going to get out with an abstention on this one.

BOARD MEMBER SPIVY-WEBER: I know. I think I'm going to -- I will move that we adopt the regulation with the clarifying amendment. And I assume I will get a second, but let me just make a couple of comments.

Again, you know, thank you. Thank you to everyone who's here and who's been involved and a lot of people who aren't here, because we have had numerous meetings in the region and participation from those who aren't able to come to Sacramento is equally important.

The thoughts that come to my mind about this particular regulation and particularly over the time that it's taken to put it together is that the things that I like about it -- one, it addresses a very narrow issue. It addresses frost protection. There are many other issues on this river and in this watershed that will need to be and are being addressed. And this particular regulation is quite narrow. But it is developed in a way that I think is a harbinger for the future as to how this river and this region, the two counties, manage their river in many other areas. It's basically community-based. It's focused locally on people of -- smart people, experienced people coming up with approaches that will solve some of the problems. And hopefully, it will be a diverse group of people who do this. I know that scientists will be engaged as well as

non-governmental organizations and growers and cities and counties. So I think that's important.

It's also not aimed -- I heard a lot about the cost associated with this, and there certainly will be cost. But working together and working with both the federal and the State agencies that are going to be engaged and with the nonprofit community that a number of the environmental folks are associated with, I think we can handle these costs. And I'm assuming that's the case. And I think we should -- to me, that's encouraging. And we couldn't do it if we did it individual by individual by individual. It will have to be a group effort.

And lastly, we're focusing on high risk areas first, where there is an identified problem -- and/or identified potential problem, that's going to be the early focus. We heard that from NMFS this morning. And I assume that is what people will be focusing on.

And I'm glad that -- recognizing that we can't do everything that we need to do, but we will address those issues that we think are the highest risk areas first.

And so with that, I reiterate that I'm moving that we accept -- that we adopt the regulation with the changes -- or change actually that is proposed.

BOARD MEMBER DODUC: I'm happy to second Fran's motion. Having been so overwhelmed by my aggravation for

Charlie that I forgot to make a motion myself.

CHIEF COUNSEL LAUFFER: If I may, as has been indicated and requested by Board Member Doduc, there is language up on the board that reflects the initial change that the Wine Institute, Mr. Schmelzer requested.

And for the highlighted text shows changes that are being made. Double underlined bold text shows the addition of text, and double strike-out shows the deletion of text. So that in the preamble it will read, the sentence that begins, "because a reasonable alternative to current practices exist, the Board has determined these diversions" -- new text -- "must be" -- strike out "are unreasonable and less" -- and then resume -- "conducted in accordance with" -- and then new text -- "this section." And then delete the balance of the sentence that had been there. I concur with what Mr. Rose indicated. That is a non-substantial change.

There is one other exception to the APA requiring re-noticing and that is there is grammatical change. If we flip to page 4, we identified a misplaced comma. It's big C at the top of page 4. It's about the third point. There is an extraneous comma after "provisions for installation." Once again, it's reflected in double strike out that is being removed.

CHAIRPERSON HOPPIN: Think back, if Walt was

still here, we would have known that a week ago.

Thank you, Michael.

We have a motion and a second. Call for the vote. All those in favor signify by aye.

(Ayes)

CHAIRPERSON HOPPIN: Any opposed?

Thank you all. Appreciate very much. This concludes the hearing on this item.

(Whereupon the State Water Board meeting adjourned at 12:35 PM)

CERTIFICATE OF REPORTER

I, TIFFANY C. KRAFT, a Certified Shorthand Reporter of the State of California, and Registered Professional Reporter, do hereby certify:

That I am a disinterested person herein; that the foregoing hearing was reported in shorthand by me, Tiffany C. Kraft, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing nor in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of September, 2011.

_____

TIFFANY C. KRAFT, CSR, RPR
Certified Shorthand Reporter
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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.

EXHIBIT B

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]

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[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),

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[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

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[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,

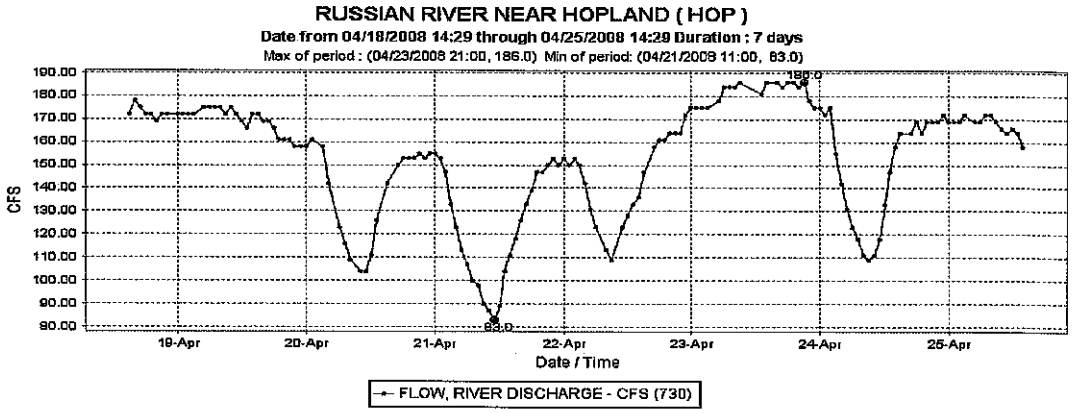
attached are a couple of pics of my observations on 4-20-08. I will put all of my info together and drop it off to you this wednesday if thats ok. td

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>

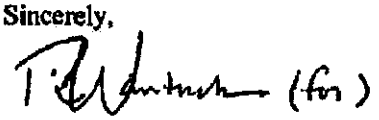
Sent: 2/18/2009 11:42:43 AM
Subject: Re: Letter

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,



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:

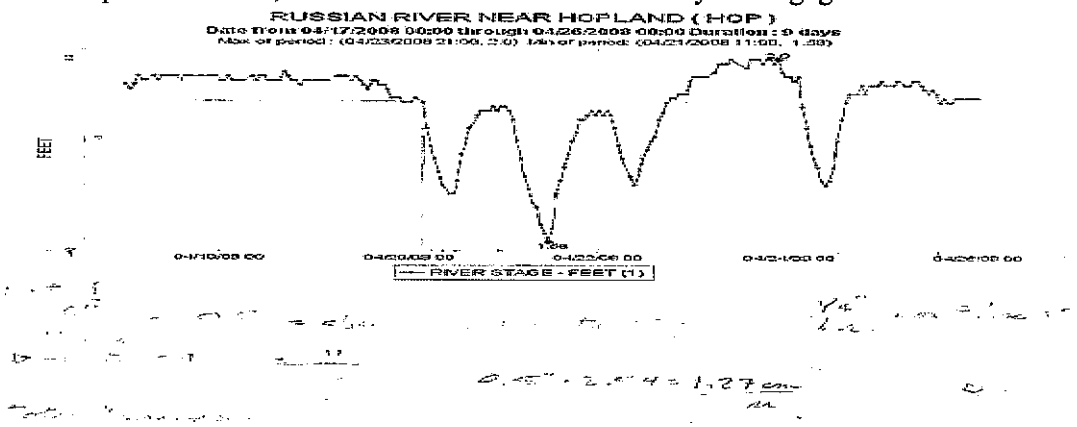
I met Corrine Gray in lower Redwood Creek at 7:30am. On my way in via Hwy 101 and Chalk Hill Road, I saw most vineyards that were set up for it, either spraying with overhead sprinklers or using wind machines.
Corrine said most vineyards in Knights Valley were using their overhead sprinklers. Flows in 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

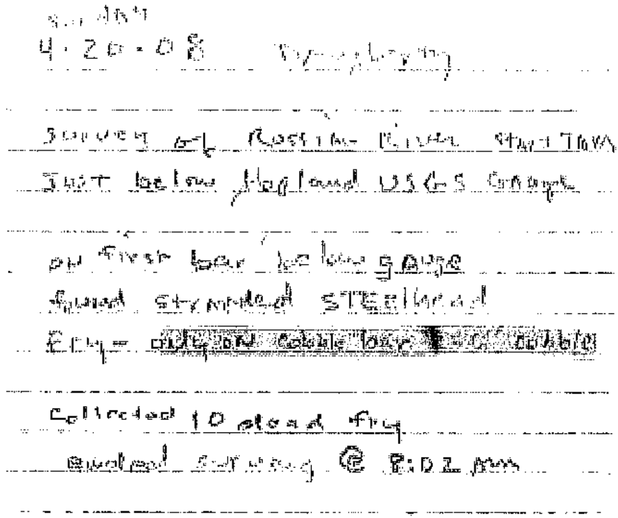
A year later, the nearly three-year-long "on-going investigation" is closed. Sean White of URSA asks SA Torquemada for the data. At this time, URSA is continuing to coordinate the development of offstream storage and would like to use the data to rank projects. Even though the investigation is officially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



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:

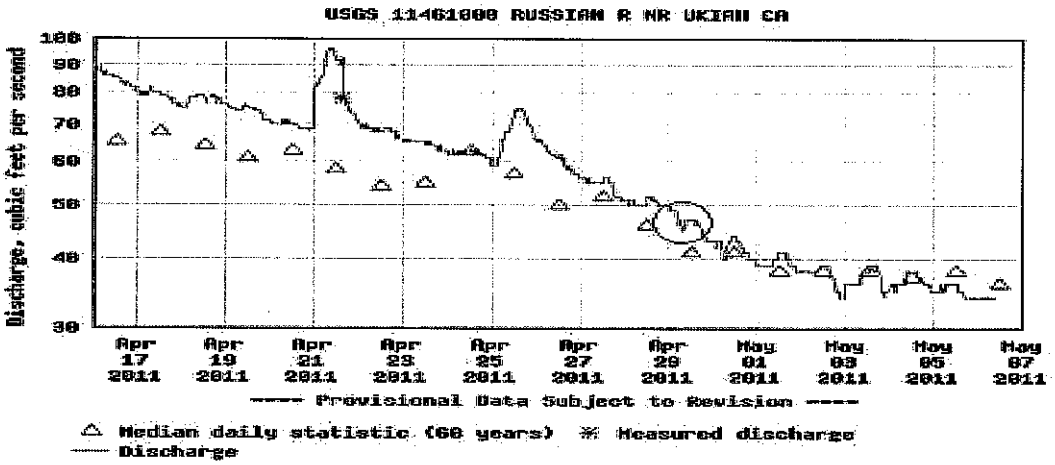
> In the valleys groundwater occurs in the alluvial deposits. The summer baseflow is maintained by groundwater discharge along reaches where the water table is higher than the adjacent stream. In the larger valley drainages, such as the Russian River, groundwater discharge is large enough to sustain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

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[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

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[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.

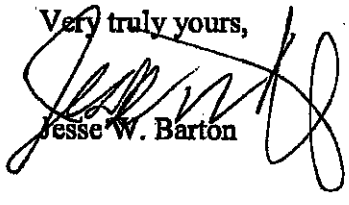
5. Extend the deadline date to March 14, 2013. Based upon **Exhibit V**, obtaining the necessary permits to install the stream gauges takes a minimum of one year.
6. Enroll all water diverters, including domestic and municipal, into the program.

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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