

MEETING  
STATE OF CALIFORNIA  
WATER BOARD

JOE SERNA, JR. BUILDING  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
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TIFFANY C. KRAFT, CSR  
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52 LONGWOOD DRIVE  
SAN RAFAEL, CA 94901  
(415) 457-4417

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 Dunicliff, 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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1 PROCEEDINGS

2 CHAIRPERSON HOPPIN: Good morning, ladies and  
3 gentlemen.

4 Staff, are we ready?

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

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

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

15 CHIEF DEPUTY DIRECTOR BISHOP: That's okay.

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

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

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

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

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

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

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

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

1 that very much.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5           The goal of the regulation is to preserve the  
6 species;

7           The regulation should encourage participation;

8           The regulation needs to be flexible for  
9 adaptation;

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

12          Transparency and clarity are important;

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

15          The regulation must identify how we deal with  
16 enforceability.

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

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

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

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

13 Due to these changes, staff provided another  
14 15-day notice of the revised proposed regulation and  
15 supporting documents. Included with this public notice  
16 was a response to comment document and a draft Board  
17 resolution for the adoption of the proposed regulation and  
18 certification of the revised draft EIR. Comments on those  
19 changes were due by September 16th.

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

1 site.

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

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

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

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

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

15           CHAIRPERSON HOPPIN: Thank you, John.

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

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



1 If Steve Edmondson would come forward, please.

2 MR. EDMONDSON: Good morning, Mr. Chairman.

3 CHAIRPERSON HOPPIN: The green light, Steve.

4 MR. EDMONDSON: How much time do I have?

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

9 MR. EDMONDSON: Good morning. Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the survival and recovery of salmonids is remained or  
2 restored.

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

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

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

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

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

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

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

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

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

1 I like to see him squirm.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

16 MR. CLUER: Do I have to push buttons?

17 CHAIRPERSON HOPPIN: No. You're all right.

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

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

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

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

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

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

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

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

13 Thank you.

14 CHAIRPERSON HOPPIN: Thank you very much.

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

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

21 Derek Roy.

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

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

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

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

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

22 MR. ROY: Absolutely.

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

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

2 CHAIRPERSON HOPPIN: Thank you.

3 David Hines.

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

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

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

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

25 CHAIRPERSON HOPPIN: David, something that your

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

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

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

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

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

25 CHAIRPERSON HOPPIN: I know in conversations with

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

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

17 CHAIRPERSON HOPPIN: Thank you very much.  
18 Ed Sheffield.

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

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

24 "Dear Chairman Hoppin,

25 "Thank you for the opportunity to comment on

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

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

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

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



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

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

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

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

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

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

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

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

25 Thank you.

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

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

11           MR. MERKLEY: Sorry I was late.

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

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

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

18           MR. PORGNAS: Thank you.

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

21           MR. PORGNAS: Thank you so much.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 CHAIRPERSON HOPPIN: It's always entertaining,  
17 Patrick.

18 MR. PORGNAS: Appreciate that.

19 CHAIRPERSON HOPPIN: Terry Gross.

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

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

25 Difficult to be called so early in the program,

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

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

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



1 additional costs on that sector of our economy.

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

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

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

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

7 CHAIRPERSON HOPPIN: Thank you, Ms. Gross.  
8 Sean White.

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

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

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

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

6 That's it.

7 CHAIRPERSON HOPPIN: Thank you, Sean.

8 Al White.

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

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

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

22 MR. WHITE: I did hand additional copies --

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

25 MR. WHITE: Yes. From page 176.

1 CHIEF COUNSEL LAUFFER: It's from 176.

2 MR. WHITE: Jesse Martin submission.

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

5 MR. WHITE: Page 173.

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

9 MR. WHITE: Thank you.

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

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

22 If you look at the framework, you'll see at Step  
23 6 you assess the risk to the individual. And when you  
24 have a dead fish, it's pretty clear there is a risk. So  
25 that is fine.

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

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

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

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

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

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

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

8           If we look at the other side, and you consider  
9 the fry that are in the river -- and that's where if you  
10 look at that other photograph of the killing fields,  
11 you're looking at fish slaughter on a pretty significant  
12 scale. This is natural de-watering you're looking at, but  
13 there's quite a few fish. And if you were to apply the  
14 formulas that David Hines used for that ten fish that  
15 became 25,000, you would probably be looking at maybe  
16 200,000, two million. I don't know. The numbers would be  
17 huge. Because this isn't something that occurs during the  
18 extreme events with the extreme year with the extreme  
19 drought.

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

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

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

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

25           Thank you.

1           CHAIRPERSON HOPPIN: Thank you for your comments,  
2 Tom.

3           Allan Nelson.

4           MR. NELSON: Good morning, Board.

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

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

9           CHAIRPERSON HOPPIN: Could you center up on that  
10 microphone?

11          MR. NELSON: Is that better there?

12          CHAIRPERSON HOPPIN: Yes.

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

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

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

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



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

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

8 CHAIRPERSON HOPPIN: Thank you, Allan.

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

13 John Aguirre.

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

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

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

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

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

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

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

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

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

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

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

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

21           CHAIRPERSON HOPPIN: Thank you, John.

22           Jesse Barton.

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

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

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

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

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

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

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

25           CHAIRPERSON HOPPIN: Thank you, Jesse.

1           Maria Potter.

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

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

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

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

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

1 equivalent of the Hippocratic oath.

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

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

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

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

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

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

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

15 MR. ROSE: I haven't been involved in this from  
16 the start. But it's my understanding that the diversion  
17 data submitted later is simply because that's not going to  
18 be available in the time line for immediate submittal. So  
19 in the proposed resolution, I'm not sure if you've seen  
20 that. There is more of a time line for how things would  
21 be submitted. So I think that the diversion data will be  
22 submitted in the first annual report due September 1st,  
23 2012. We thought that was reasonable that people would  
24 have enough time to get it together in that time line.

25 Does that answer your question?

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

2 CHAIRPERSON HOPPIN: Thank you, Maria.

3 Alan.

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

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

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

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

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



1 apologized. It's wrong to say that.

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

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

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

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

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

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

25           And I want to point out to you that you did

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

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

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

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

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

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

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

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

1 take you down for that.

2 Thanks for your time.

3 CHAIRPERSON HOPPIN: Thank you, Alan.

4 Steve Dunnicliff.

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

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

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

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

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

7 For frost protection that offsets the need for 90  
8 CFS of direct diversion for greatest flow deviation  
9 recorded in 2008 was 83 CFS. The problems observed in  
10 2008 on the upper main stem of the Russian River have been  
11 successfully resolved, and URRSA has proposed protocols to  
12 ensure continued compliance with the ESA. The reluctance  
13 of your staff to recognize the URRSA led regional effort  
14 was explained when a Freedom of Information Act request  
15 confirmed that your staff while ostensibly engaged in a  
16 collaborative stakeholder process met secretly with other  
17 agencies and conspired to manufacture a need for  
18 regulation.

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

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

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

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

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

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

25           CHAIRPERSON HOPPIN: Thank you.

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

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

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

9           How many times have we done this, Dave?

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

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

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

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

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



1 our gratitude.

2 CHAIRPERSON HOPPIN: Thank you.

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

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

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

1           There have been no documented strandings due to  
2 frost protection on any tributary in Mendocino County. In  
3 2009, '10, and '11, the Department of Fish and Game and  
4 NMFS agents were out in the field looking for these events  
5 and were unable to find them. Four gauges were installed  
6 in Mendocino County by NMFS in different tributaries for  
7 the 2011 frost season. Only one of those gauges showed  
8 significant signals due to frost protection, and that  
9 particular gauge was about 100 yards downstream from an  
10 in-stream flash board installation. If you want, I could  
11 send you a picture of the lines that were taken out from  
12 that grower's field. That grower's already made  
13 arrangements to pull water off of the main stem. Again,  
14 as a place where we thought we saw a problem, we're  
15 already working to address that problem.

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

25           Within five days, Dan Torkmata, Assistant Special

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

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

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

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

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

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

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

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

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

15 Thank you very much. Appreciate your time.

16 CHAIRPERSON HOPPIN: Thank you, Dave.

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

19 (Whereupon a recess was taken.)

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

22 Mr. Brian Johnson.

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

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

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

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

7 CHAIRPERSON HOPPIN: No. It was me.

8 MR. JOHNSON: Thank you.

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

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

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

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

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

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

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

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

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

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

10           MR. JOHNSON: Thank you. I appreciate that.

11           CHAIRPERSON HOPPIN: Doug McIlroy.

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

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

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

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

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

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



1 standards.

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

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

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

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

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

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

20           CHAIRPERSON HOPPIN: I understand your concern.

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

24           MR. MC ILROY: Thank you.

25           CHAIRPERSON HOPPIN: Thank you.

1           Bob Anderson.

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

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

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

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

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

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

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

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

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

24 He recommends:

25 1. Adoption by the Board of clear criteria to

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

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

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

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

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

21           So with that, I thank you.

22           CHAIRPERSON HOPPIN: Thank you for your comments.  
23           Scott Greacen.

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

1 the Eel River.

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

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

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

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

25 As previous speakers have noted, annual reports

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

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

13           CHAIRPERSON HOPPIN: Thank you, Mr. Greacen.

14           David Keller.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

1 for comments on the REIR.

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

5 MR. KELLER: Sorry. How do we --

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

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

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

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

24 CHAIRPERSON HOPPIN: Thank you.

25 Nick Frey.

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

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

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

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

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

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

1 profitable and stay in agricultural production. So cost,  
2 anything we can do to save costs is certainly an important  
3 objective for us.

4           The other thing I would mention is that I think  
5 this process has opened the door for collaboration where  
6 collaboration was needed. And that includes National  
7 Marine Fisheries, your Board. We have common interests I  
8 think many times we line up to with the assumption that we  
9 do not. But we do, and I think if we can keep the doors  
10 of communication open that we can effectively do things  
11 that will benefit the fisheries and maintain grape  
12 growing. So we thank you for your support.

13           CHAIRPERSON HOPPIN: Thank you, Nick.  
14           Stephen Fuller-Rowell.

15           MR. FULLER-ROWELL: Chairman Hoppin, members of  
16 the Board, I'm very happy to be here today. Thank you.

17           My name is Stephen Fuller-Rowell. I live in  
18 Sonoma County. I'm one of the co-founders of the Sonoma  
19 County Water Coalition. We submitted our comments in  
20 July.

21           The Sonoma County Water Coalition, besides  
22 sharing initials with the Sonoma County Wine Grape Growers  
23 Association, SCWC, besides that we include 32  
24 organizations. And we were founded seven-and-a-half years  
25 ago. And we represent in excess of 24,000 concerned

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

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

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

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

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

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

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

10 CHAIRPERSON HOPPIN: Thank you.

11 Larry Hanson.

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

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

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

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

1 take avoidance discussed by DFG.

2 Thirdly, uphold your 1995 Water Board classified  
3 frost use as "waste and unreasonable use" due to the  
4 availability of other forms of frost protection and the  
5 adverse affects of standard frost actions have on fish,  
6 salmonids, in particular.

7 The fourth one, make real time, where  
8 appropriate, availability and transparency of stream  
9 monitoring data. The monitoring regulation should specify  
10 real time stream gauge monitoring as well as public access  
11 to all monitoring data.

12 Next, set a priority for the use of alternative  
13 methods for avoiding use of frost control of irrigation of  
14 water, alternative frost controls, including not planting  
15 in frost prone zones, wind, use of wind as in its use  
16 should be incorporated in the permitting process. In  
17 addition, an alternative analysis including alternatives  
18 listed here as well as other messages should be analyzed.

19 Require that all frost water irrigations actually  
20 hold legal water rights and require licenses and permits  
21 for diversions and/or storage prior to use of frost water  
22 for irrigations.

23 Do not rely solely on voluntary measures to carry  
24 out provisions of the policy. Asserting a water demand  
25 management program to control and monitor such diversions



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

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

7 Thank you very much.

8 CHAIRPERSON HOPPIN: Thank you very much.

9 Kimberly Burr.

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

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

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

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

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

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

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

21           Thank you very much.

22           CHAIRPERSON HOPPIN: Thank you, Kimberly.  
23           Steven Passalacque.

24           MR. PASSALACQUE: Good morning. Stephen  
25 Passalacque.

1 First of all, I want to say --

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

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

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

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

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

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

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

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

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

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

25           I think one of the things that lastly I want to

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

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

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

1 road.

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

5           CHAIRPERSON HOPPIN: Thank you for your comments.  
6           Tim Schmelzer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 appreciate your consideration on both of those points.

2 CHAIRPERSON HOPPIN: Thank you.

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

8 MR. SCHMELZER: Thank you.

9 CHAIRPERSON HOPPIN: Al Cadd.

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

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

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

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

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

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

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

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

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

15 CHAIRPERSON HOPPIN: Thank you, all.

16 Pete Opatz.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Mr. Lauffer, we had announced that we would

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

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

15 CHAIRPERSON HOPPIN: Fran.

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

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

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

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

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

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

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

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

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

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

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

25 So again, it would be my understanding that the

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

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

13           Does that answer your question?

14           BOARD MEMBER SPIVY-WEBER: Yes.

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

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



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

3 CHAIRPERSON HOPPIN: Can opt out.

4 MR. ROSE: Can opt out.

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

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

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

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

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

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

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

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

1 of operations.

2 BOARD MEMBER SPIVY-WEBER: Short.

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

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

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

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

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

4 CHAIRPERSON HOPPIN: Thank you.

5 BOARD MEMBER SPIVY-WEBER: I have one.

6 CHAIRPERSON HOPPIN: Fran has another question.

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

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

22 BOARD MEMBER SPIVY-WEBER: Okay. Thank you.

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

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

12 CHAIRPERSON HOPPIN: Very good. Thank you.

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

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

17 So Mr. Rose.

18 MR. ROSE: Shall I begin?

19 CHAIRPERSON HOPPIN: If you would.

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

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

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

1 clear for your satisfaction.

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

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

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

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

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

12           BOARD MEMBER DODUC: Thank you.

13           CHAIRPERSON HOPPIN: Do you have your question  
14 answered?

15           BOARD MEMBER DODUC: Yes. I'm satisfied.

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

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

20           CHAIRPERSON HOPPIN: Okay.

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

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

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

1 propose any additional changes.

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

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

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

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

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

25 BOARD MEMBER DODUC: And nothing would prohibit



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

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

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

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

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

23 MR. ROSE: Okay.

24 CHAIRPERSON HOPPIN: Fran.

25 BOARD MEMBER SPIVY-WEBER: On the issue that Tam

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

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

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

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

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

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

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

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

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

9 Does that answer your question?

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

18 MR. ROSE: Especially for a cumulative problem.

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

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

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

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

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

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

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

19           MR. ROSE: Not at all.

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

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

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

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

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

1 substantive changes to the draft EIR.

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

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

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

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

22           CHAIRPERSON HOPPIN: Yeah.

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

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

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

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



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

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

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

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

1 effort to be equitable and fair.

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

4           BOARD MEMBER DODUC: I do.

5           CHAIRPERSON HOPPIN: Or a motion.

6           BOARD MEMBER DODUC: I have both actually.

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

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

1 matter.

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

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

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

23           CHAIRPERSON HOPPIN: Thank you.

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

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

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

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

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

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

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

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

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

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

1 Charlie that I forgot to make a motion myself.

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

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

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

25 CHAIRPERSON HOPPIN: Think back, if Walt was

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

2 Thank you, Michael.

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

5 (Ayes)

6 CHAIRPERSON HOPPIN: Any opposed?

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

9 CHIEF COUNSEL LAUFFER: And I just want to be  
10 clear before everyone adjourns that, the motion was to  
11 adopt the Resolution with these changes to the Regulation

12 CHAIRPERSON HOPPIN: Yeah.

13 Michael, we're scheduled to start at 1:00. Do  
14 you want to take an extra 15 minutes? We'll start at  
15 1:15.

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

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