

November 30, 2010

Bill Cowan
State Water Resources Control Board
P.O. Box 2000, 1001 I. Street, 14th Floor
Sacramento, CA 95812-2000
rrfrostregulation@waterboards.ca.gov

Re: Scoping Comments for EIR on Frost Regulation

Please make these scoping comments a part of the official administrative record in promulgation of a regulation intended to address the impacts of frost protection activities on listed salmonids in the Russian River basin (Section 862, Russian River, Special to division 3 of Title 23 California Code of Regulations).

OBJECTIVE

The main objective of the proposed regulation is to avoid take of federally protected species of salmon and steelhead facing extinction in the foreseeable future. To this end, strict, timely, and meaningful measures are required.

LAND USE PLANNING

In the past, County land use decisions that affect water use have not been adequately supervised by the state. Will this regulation adequately protect listed species from inappropriate County land use decisions with respect to water use? Specifically, how would the proposed regulation affect county land use decisions?

Given the crises created for the anadromous fish by poor planning and poor supervision, will “adaptive management” be relied upon? If so, how will that ensure that no additional take will occur? What alternatives to strategies like “adaptive management” exist, and are they feasible?

POTENTIAL ALTERNATIVES

Does the state consider a local grape industry-effort, involving the creation of a private mutual benefit corporation to gather monitoring data, an alternative or partial alternative to the state regulation? If so, on what basis would the state involve an industry whose aim is to defeat the state regulation, which fights against reasonable ground water management, and that pressures regulators and politicians to prevent meaningful regulation of water use for habitat needs?

Will the state regulation rely on local government to implement any portion of the regulation? If so, on what basis would this be justified? Will the state regulation rely on any local government enforcement of the regulation? If so, on what basis would this be justified? Does the state regulation delegate or carve out a role for local government participation in regulation of water use for frost protection activities?

Does the state regulation uphold the principle of public participation in environmental review at the earliest possible phase of the permit process? Does the state regulation provide for comprehensive real-time publicly accessible stream monitoring data?

The regulation of stream flow in salmon streams in the near future is of course of critical concern for the endangered coho, which have fallen to record-low population numbers in the central

California coast - some have estimated that remaining spawning coho are less than 800 fish (Sonoma West Times and News, November 10, 2010).

Isn't the most reliable approach that meets the objectives of protecting listed species from activities that threaten and cause harm to them a prohibition on the use of water for frost protection in salmonid-bearing streams? Given the crisis in which the threatened and endangered species find themselves, are there any other feasible measures other than a prohibition on frost protection in salmonid-bearing streams that would address the practical realities of the inability of agencies to police every frost prone-tributary that salmon inhabit and in which grapes have been planted? In the absence of effective plans that include robust funding and enforcement, isn't a prohibition the best response to the determination that use of water for frost protection activities is wasteful and unreasonable, and therefore unconstitutional?

The National Marine Fisheries Service has explained that the "take" of listed salmonids documented in 2008 and 2009 indicates that the dewatering of critical habitat occurs in many other watersheds. The fact that the resource agencies have not been able to document take in other locations does not indicate the absence of take in these watersheds, but is rather a function of the code of silence among growers, lack of transparency, and lack of cooperation to access private land. How will this regulation address such behavior to ensure future operations do not further harm the listed species facing extinction?

AGRICULTURAL RESOURCES

All claims of crop losses or economic impacts must be evaluated by peer-reviewed science. Will the economic analysis acknowledge that business decisions come with risks and rewards?

Will such an analysis acknowledge and evaluate the costs to society when an industry attempts to externalize its costs on to society at the expense of society's public trust resources?

AIR QUALITY

Will this regulation identify cumulative impacts on creeks and rivers prior to ministerial and discretionary permit approval? If so, will this regulation have the potential to prevent forests and riparian areas from unnecessary destruction? Would mapping of all areas prone to frost which contain natural vegetation and forests inform decision makers as to the acreages containing, air-cleansing and pollution-sequestering trees that might otherwise be destroyed if vineyard planting were allowed in frost prone areas with inadequate water supplies?

Would this regulation have the potential of discouraging deforestation and land disturbing (CO₂-releasing) activities by identifying inappropriate areas in which to divert creek water for frost activities prior to clearing or conversion?

CULTURAL RESOURCES

What positive impacts on cultural resources might a regulation of this type have?

GEOLOGY AND SOILS

Would the mapping of all areas prone to frost be a valuable and important step in the environmental review in order to assist local government, the public, and the state in avoiding unnecessary impacts? Will the regulation have the potential to prevent destabilizing activities and erosion, by an initial determination of

where frost occurs thereby avoiding potentially inappropriate areas?

HYDROLOGY AND WATER QUALITY

How would the regulation adequately evaluate and address existing uses, and time of use, in order to ensure no harm to listed anadromous fish? Will a water demand management plan (WDMP) ensure that no more listed species will be sacrificed for frost protection activities? If not, why not? Are best management practices adequate to avoid take? If not, why not? Will the concerned public, intent on preventing take, be kept informed of the monitoring and diversions as they occur, and if so, how will that occur? Will this regulation require peer reviewed verification that there will be adequate water supply to protect the grapes without threatening harm to listed species?

HOUSEKEEPING

Has the proposed regulation been modified since the last public hearing on March 30, 2010? What if any changes were incorporated that were suggested by any member of the wine industry since that time?

The version available to the public on the State Board's website states that frost protection regulation is proposed between March 15 and June 1 of each year. The Notice of Preparation now describes the regulatory period as March 15 through May 15.

Which date is being proposed by the state, and if it was changed to May 15 subsequent to the March 30, 2010 hearing, when was that done, why, and with whose consent?

CONCLUSION

The industry and the state have had many years to acknowledge and address the impacts posed by mass frost protection activities on rivers and streams. In the Russian River, such impacts were identified as least as early as 1997. In the Napa River basin, such impacts were identified and corrected in the 1970's. Absent government autonomy from industry, state and public enforcement is critical to effective environmental protection. The entity responsible for protecting public trust resources, avoiding take, and managing the use of water in California must embrace its duty and institute meaningful and timely regulation of frost protection impacts on listed salmonids and affirmatively reject yet another attempt by powerful local interests to delay such needed and, unfortunately, overdue regulation.

Thank you for the opportunity to submit questions and comments with respect to scoping for the environmental impact report on the proposed Russian River Frost Regulation.

Larry Hanson
Northern California River Watch

Jeff Miller
Center for Biological Diversity