

June 29, 2011

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**RE: COMMENT LETTER – PROPOSED RUSSIAN RIVER FROST REGULATION, 4
TOTAL PAGES**

I would like to take the opportunity to respond to the draft EIR produced and made publicly available by SWRCB. Below I will address and request comment back from SWRCB in regards to the purpose of the regulation, the alternatives addressed in the EIR, the assessment of the environmental impacts, the precedent cited by SWRCB, and the inclusion of groundwater in the regulation.

I. Purpose of the Regulation

It is clear that the purpose of the regulation was precipitated by events that occurred in April 2008 of stranding mortality. It appears from the draft EIR that two episodes of stranding's occurred. However, lacking from any and all documentation is the data which extrapolated the two incidents into what now appears to be a series of incidents throughout Sonoma and Mendocino counties in 2008 and thereafter.

Admittedly, there has been a “lack of monitoring and eyewitnesses during the early hours when frost events occur”. The draft EIR takes this lack of data as an assumption of more incidents of strandings. I respectfully **request that SWRCB produce specific data showing the exact number of strandings, location and timing of such strandings.** Failure to do so shows a lack of causation that it was in fact a withdrawal of water for frost protection measures that caused the strandings and a lack of evidence that there has in fact been a violation of the Endangered Species Act.

It is certainly my position, as well as other local growers, that we do not wish to endanger any fish and certainly we wish to do our part to save such species. However, failing to acquire accurate information and thereafter imposing regulations on faulty data will not produce the goal of SWRCB to decrease the risk of salmonid mortality. In order to adequately protect the Coho, Chinook and Steelhead we must properly addresses the issues and that requires specific and accurate data which is lacking from the draft EIR.

II. Alternatives to the Proposed Regulation

I urge SWRCB to strongly **consider a regulation similar to the Sonoma County Vineyard and Orchard Frost Protection Ordinance.** The data that is so very lacking from all agencies could be gathered and analyzed through this type of regulation. Only then can we all specifically address the problems and come up with a solution that will indeed save fish.

III. Assessment of the Environmental Impacts & Mitigation

SWRCB has stated several specific actions that affected persons could potentially take. I will specifically address each one of these and the listed mitigations.

a. Increase in groundwater use

The legislature has repeatedly tried to regulate groundwater use because the public views groundwater use in California at an already detrimental high. Should legislation, as introduced every year, eventually be passed, new groundwater rights will not be a feasible option. Also, local ordinances require permitting processes for new wells and air quality regulations hinder the availability and cost of well pumps. Therefore, **the ability to switch to groundwater instead of using surface water rights is not truly a feasible action.**

b. Constructing new offstream storage facilities

The construction of new offstream storage facilities is only a feasible option once approved by the County and SWRCB. The impediments to such approvals are extraordinarily high due to the topography and economic climate of Sonoma County specifically. Therefore, **offstream storage is also not a viable option** to surface water use for frost protection.

c. Removal of existing surface water diversion facilities

The removal of such facilities will increase the below mentioned alternatives, all of which will have a detrimental effect on the environment and are not as environmentally and economically efficient as using surface water.

d. Wind Machines

Wind machines, while potentially helpful in frost conditions if the certain topographic and climatic elements are present, simply are not as effective or cost efficient as using surface water. Wind machines also have an adverse effect on air quality and likely will be regulated to the point of extinction by the California Air Resources Board. Again, this is not a viable option when **its longevity is likely jeopardized by other environmental concerns.**

Some wind machines use cleaner burning fuels such as propane. These machines may continue to be operational despite new air quality regulations. However, as is testament to other parts of the State, during a devastating freeze propane and oil inventories both rapidly deplete in quantity and increase in price, **leaving the option both unavailable and/or uneconomical.**

e. Orchard Heaters

Like wind machines, orchard heaters are to the point of extinction due to air quality concerns. In other parts of the state, orchard heaters are no longer permitted due to the detrimental effects on air quality. To say that Sonoma and Mendocino counties will not also be subject eventually

to the same regulations is irresponsible and naive. The **same issues arise with oil and propane commodities stated above.**

IV. Precedent

SWRCB cites as its precedent for the regulation its previous adoption of the regulation in regards to the Napa River watershed. It is true the Napa regulation has been successful and is an example of diverters using offstream storage and coordinated diversions to reduce instantaneous demand on the stream system.

However, I respectfully request that SWRCB **respond to the varying degrees of differences between the Napa region and the Russian River Watershed.** Napa is a fairly simple system compared to the complexities of the Russian River. There are significantly fewer and much larger growers in Napa. There is also a much smaller watershed to be dealt with in Napa. The Russian River Watershed is comprised of numerous tributaries and numerous small growers. Also, Napa growers had both the financial and physical capabilities to build offstream storage. Those capabilities are simply lacking in the Russian River Watershed.

It is true SWRCB has appropriately regulated frost water in the Napa region in California. However, as stated over and over again in legal precedent, **reasonableness is determined on a factual and case by case basis.** I respectfully request that SWRCB acknowledge and respond to the many factual differences between the Napa region and the Russian River Watershed and that merely because the use of frost water in Napa was unreasonable does not mean that Russian River frost water is per se unreasonable.

V. Groundwater

SWRCB has repeatedly stated that the regulation would apply to groundwater hydraulically connected to the Russian River. I respectfully request that the groundwater language be removed. The **appropriate language to be used for addressing the type of water rights to be regulated is riparian and appropriate.** These are the only water rights involving surface water that could affect Coho, Chinook and Steelhead. I am sure the Board is well aware that riparian water may also be confused with groundwater, however using the terms in such a loose fashion leads to great confusion.

I also respectfully request that the **Board change the standard of determining surface versus groundwater from the “Board’s satisfaction” to a more definite legal standard, such as a preponderance of the evidence.** Using the “Board’s satisfaction” is extremely vague. Should SWRCB continue to use this standard, I respectfully **request a definition of the “Board’s satisfaction”** and how such a requirement could be met specifically in regards to determination of groundwater usage.

VI. Phasing

Should SWRCB implement this proposed regulation, I respectfully request that it be

implemented in a phasing method over a period of at least five years. The changes required to switch from water for frost protection to other methods will be extremely timely and costly and should the Board continue down this path, we respectfully request some patience to implement such changes.

Sincerely,

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