

Sonoma County Water Coalition

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Charles Hoppin, Chair,
State Water Resources Control Board,
1001 I Street,
PO Box 100,
Sacramento, CA 95812-0100

BY EMAIL with PRINT COPY TO FOLLOW BY MAIL

July 5, 2011

Copies to:

Governor Jerry Brown, State Capitol, Suite 1173. Sacramento, CA 95814

Senator Noreen Evans, 50 D St., Suite #120A, Santa Rosa, CA 95404

Assemblymember Jared Huffman, State Capitol, P.O. Box 942849, Sacramento, CA 94249-0006

NMFS attn: Steve Edmondson and David Hines – By Email

Re: Draft EIR Report Russian River Frost Protection Regulation and Proposed Regulation;
Amendment to Division 3 of Title 23 of the California Code of Regulations

Dear Chairman Hoppin, Water Board Members, and Staff:

The Sonoma County Water Coalition (SCWC) comprises 32 organizations representing more than 24,000 concerned citizens. SCWC is especially concerned about preservation of a safe, economical and reliable water supply for all living things, including the people of Sonoma County. SCWC also works to preserve healthy ecosystems, supports watershed restoration and protection and careful oversight of all public trust resources, especially surface and groundwater quality and quantity.

SCWC members are concerned about impacts on endangered coho salmon, threatened steelhead trout and threatened chinook salmon from water diversions for vineyard frost protection. The National Marine Fisheries Service (NMFS) has documented the cumulative harm that human land and water uses have had on the species' critical habitat, which impairs essential behavioral patterns. The result is severely declining salmonid populations in all of California's north coastal streams and rivers.

The following comments address:

- problems inherent in the regulatory process that need to be corrected;
- necessary changes to the proposed regulation for protecting endangered fish species; and
- needed revisions to the Draft Environmental Impact Report (DEIR) in its present form.

We reserve the right to submit additional comments on the DEIR when the regulations attain final form.

Please add these comments to the official administrative record of the State Water Resources Control

Members: * Atascadero/Green Valley Watershed Council * Community Clean Water Institute * Friends of Mark West Watershed * Northern California River Watch * O.W.L. Foundation * Russian River Watershed Protection Committee * Sonoma Coast Surfrider * Sonoma County Conservation Action * SWiG (Sebastopol Water information Group) * Valley of the Moon Alliance * **Supporting Organizations:** Bellevue Township * Blucher Creek Watershed Council * Coalition for a Better Sonoma County * Coast Action Group * Forest Unlimited * Forestville Citizens for Sensible Growth * Friends of the Eel River * Friends of the Gualala River * Graton Community Projects * Laguna Lovers * Madrone Audubon Society * New-Old Ways Wholistically Emerging * Occidental Arts and Ecology Center Water Institute * Petaluma River Council * Russian River Chamber of Commerce * Sierra Club (Sonoma County Group) * Town Hall Coalition * Western Sonoma County Rural Alliance *

Board's review of water diversion practices for frost protection of crops in the Russian River watershed in Mendocino and Sonoma counties. We also hereby incorporate by reference all comments previously submitted to the State on the subject of diversions for frost control by the Sonoma County Water Coalition, its agents, and its member organizations.

Regulation Writing and Review Process

The Federal Endangered Species Act (ESA) requires states to ensure that the actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. The ESA also prohibits any action that causes a "taking" of any listed endangered wildlife species, including fish.¹

Rapid dewatering of streams, the critical fish habitat (inclusive of headwater creeks, and mainstream rivers), is unequivocally impairing essential behaviors, breeding, and feeding of the listed species, and thus is harming and harassing them. The State therefore has a duty to regulate diversions related to frost protection of wine grapes, to avoid species extinction.

SCWC members, representing a large segment of the concerned public in Sonoma County, are looking to the state for regulations that will both 1) finally ensure no endangered coho, threatened steelhead trout, or threatened chinook salmon are sacrificed due to vineyard frost pumping activities, and 2) contribute significantly to their recovery. In contrast, the proposed regulation's stated goal is only to prevent "Salmonid Stranding Mortalities due to Instantaneous Demand for Frost Protection." Clearly, this focuses the regulation less on protecting fish than on minimizing the regulation's impacts on grape growers' use of water for frost protection.

Coalition members see the problem as much broader than limiting stranding mortalities, and urge the state to pursue a regulation that recognizes unnatural and rapid dewatering of the Russian River stream system as threatening to all life stages of salmonid species, and severely impairs their ability to recover from the current stages of population collapse. An aim to merely lessen the risk of further population reductions for the protected categories will not suffice.

Maintaining adequate stream flows is essential. The regulation must be cleansed of components that allow continued diversions in critical habitat, until and unless any and all diversions are determined to be individually and cumulatively harmless to the listed fish species.

Unfortunately, during a drawn-out regulation-writing and review process the wine industry has continued to sacrifice thousands of fish. Several components of the Water Demand Management Plan (WDMP) process allow continued damaging diversions for at least another frost season, and perhaps for a much longer time.

If the State extends the DEIR timeline due to changes in the draft proposed regulation, it must quickly institute emergency rules to avert "take" in the interim period. Such emergency rules were recommended in February, 2009. Since the State chose not to act on that recommendation, fish kills have continued.

¹"Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." "Harm" is "an act which actually kills or injures wildlife." Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Harassment" is an intentional or negligent act, either by action or omission, that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns such as breeding, feeding, and sheltering.

Draft Proposed Regulation

The draft proposed regulation contains important improvements, but then weakens them with:

1) a local governance plan; 2) an implementation schedule that allows diversions without previous risk assessment, monitoring plans, or inventories; 3) a corrective process that could take up to three years; and 4) delayed reporting.

1) The WDMP concept yields administration and implementation to a local governing body or individual, without specifics of qualifications, independence, structure, accessibility, or funding. The omissions undermine timeliness and protective effects. Corrective measures may require up to three years — equivalent to the life cycle of endangered coho salmon.

SCWC members do not agree that local frost regulation administration and implementation is the best strategy for avoiding harm to listed species. Three years of a poorly conceived WDMP could wipe out the population in a small watershed.

Effective salmonid species protection regulations also protect a fishery, so protecting fish is a State issue and can be administered economically by requiring real-time publicly accessible monitoring prior to and during a frost diversion season. Such a structure places the costs on appropriate parties, while costing the State very little. It also opens up the process to public scrutiny.

2) The regulation states that use of diverted water and pumping of hydraulically connected groundwater for frost protection is unreasonable in the absence of a board-approved WDMP. Yet WDMP approval can come before completing a frost diversions inventory of a watershed or developing a stream stage monitoring strategy, and apparently before doing a risk assessment.

SCWC members insist that WDMPs must err on the side of conservation, if they err at all. Corrective measures must be identified and rectified as soon as possible. The regulations must be crafted to avoid "take" related to frost diversions and pumping, in the broadest sense of the word.

The use of the phrase "prevent stranding mortalities" suggests that the state is looking at the potential for species harm in an overly narrow manner. Although stranding mortalities are the most dramatic form of harm and harassment from frost protection diversions, the courts and scientists have recognized for decades that "harm and harassment" include impairment of breeding, sheltering, and feeding, which lead to mortalities over longer time frames. A narrower focus will doom the regulation to failure, and the listed fish species to extinction.

3) Timelines for completion of all these elements are protracted if they exist at all. As a result, the effect of this regulation is to permit 2012 diversions if diverters submit a form. The form's content has not been verified, completed, or deemed protective in the short term.

SCWC members object that, if the industry has not yet completed the necessary inventories and diversion monitoring before the 2012 frost season, they should not be allowed to divert in spring 2012. In addition, the SWRCB needs to adopt interim measures until they put effective and strictly enforceable measures in place to protect listed species. Given the fishery crisis, such corrections must be instituted prior to the next diversion season.

A large number of WDMPs will most likely be filed between adoption of a regulation and March 2012, pressuring State Board staff to approve them without adequate time for review and verification. Staff will come under intense political pressure unless the SWRCB adopts strong interim measures, which effectively protect listed species while allowing staff to carefully review the hydrology, inventories, stream stage monitoring and reporting plans, and risk assessments.

4) Annual reporting is unacceptable. For the regulation to have the effectiveness demanded by the perilous condition of the listed species, reporting needs to occur in real-time and be publicly accessible. Real-time monitoring and reporting is the most effective at protecting the species.

Draft Environmental Impact Report

The SCWC finds the DEIR lacking, due to: 1) a too narrow definition of the project and its goals, 2) overly limited economic analysis, and 3) overly restricted alternatives analysis

1) The proposed project, to establish a regulation that will prevent salmonid stranding mortality while minimizing the impacts of the regulation on the use of water for frost protection. (DEIR, page 9), is improperly narrow. The first SWRCB goal, to promote local development and governance of programs that prevent stranding mortality during the frost season, also is improperly narrow.

The proposed regulation is based largely upon the reasonable use doctrine, which requires use to be weighed against the availability of feasible alternatives. A DEIR's project description must not be so narrow as to restrict the range of alternatives. As the State explains, "Given the potential impact to salmonids and the availability of feasible alternatives to simultaneous diversions from the stream, uncoordinated, unregulated diversions of water from the Russian River stream system for purposes of frost protection are unreasonable."

The project description instead weighs use against minimal impact to frost protection activities. By using the phrase "while minimizing the impacts on the use of water," the project description leaves very little room for a reasonable range of regulatory alternatives. Only those alternatives that minimize impacts on the industry fit the project description. This is improper.

A DEIR statement under Project Description (DEIR page 10): "[t]he proposed regulation would ensure that tributaries are 'protected,' in addition to the main stem of the Russian River..." is inaccurate. "Protected" means "not harmed". The proposed regulation does not propose to protect critical watersheds and listed species from "harm" as defined under the ESA, as we have explained in the foregoing. The proposed draft regulation only proposes to prevent stranding mortalities, a significantly lower standard and narrower purpose.

2) In the absence of substantive evidence of the value of Russian River watershed salmonids, the DEIR is inadequate. The evaluation of the proposed activity – adopting a regulation, and the discussion of feasible alternatives, minimizing effects on the industry, a weighing of the relative benefits and costs, and analysis of cumulative impacts – is impossible without substantial information on the economic value of listed species and their habitat.

The DEIR's economic analysis addresses only the purported economic value of agricultural crops, mainly wine grapes. It presents only figures from the California Farm Bureau's website (DEIR p. 41) and emphasizes the impact on local family farmers. The DEIR makes no attempt to analyze the worth of salmon and steelhead to the economy or to ecosystems, what the functioning habitat is worth, or the costs to run hatcheries or restore destroyed habitat.

In addition, the DEIR's discussion of wine industry economics is largely superficial. By destroying forests, damaging soils on slopes, and overly diverting water resources, while increasing pollution from fertilizers and biocides, the wine industry has externalized many costs for decades. These externalized costs have been paid for by regulatory agencies, the public, and the environment.

Valid statistics show that the wine industry does not comprise family farms. According to the Marin Institute, seven companies produce 82 percent of all wine sold in the U.S., and six of them are global corporations. Seven of the top 10 wine companies (U.S. sales) also are global sellers of wine, spirits, and

beer brands.² This same list of powerful corporations dominates Sonoma County winegrowing, and the water withdrawals from California's north coast streams.

Analyses of the actual costs for replacing functions that habitat and species perform have concluded that "[a]llowing the current rate of biodiversity loss to continue could cost the global economy untold trillions."³ In the twenty-first century, it is time to enact adequate regulation, requiring that these giant global industries internalize costs, by properly valuing and protecting the environment.

3) Alternatives

SCWC finds that the DEIR undermines a credible alternatives analysis by overstating adverse economic impacts to the wine industry from regulating diversions. As the regulation is now written, we find the No Project Alternative more protective, since continuing without a regulation would necessitate promulgation of emergency regulations and/or a prohibition on diversion of surface and hydraulically connected groundwater in order to avoid "take."

The DEIR found the No Project Alternative unable to meet the goal of avoiding stranding mortalities and so not environmentally superior. But a 'protective' regulation requiring no real time monitoring requirement, among other serious flaws, can be worse than no regulation at all.

Due to the narrowly worded purpose and description of this regulation, having a primary goal of minimizing impacts on frost protection activities, no goal of protecting listed species from harm, vesting control with non-public local governing bodies or individuals, requiring only annual provision of monitoring data, and providing cover to activities that threaten "take," the No Project Alternative conceivably could be of greater help to the salmonids survivability. The No Project alternative, for example, could force the state to take other measures that would be more protective, such as emergency regulations and/or enforcement of a prohibition on the use of water for frost protection without regard for the industry's economics.

The DEIR must acknowledge this uncomfortable reality: in the absence of a regulation, Sonoma County growers in the Grape Creek watershed have apparently turned to alternative frost protection measures, and reduced diversions from the Grape Creek.

For this regulation to be better than the No Project Alternative, the SWRCB must revise the DEIR to include a broader description of the proposed action and its goals, and properly allow for a reasonable range of alternatives, including adoption of a regulation that avoids "take" and minimizes threats from frost protection whenever feasible.

The minimal requirement of real-time accessible monitoring as part of a Water Demand Management Plan is essential. Among the limited alternatives provided, Alternative Five, the regulation plus real-time publicly accessible monitoring, combines this essential tool with the draft proposed regulation. Such a requirement is feasible, of minimal expense, does not in and of itself disrupt frost protection activities, and is a preferred alternative to the regulation alone. Alternative Five best fits a robust Project Description, if there were one, and best achieves the purpose of the regulation.

The DEIR states that real-time monitoring is effective at protecting rare species, the subject of this regulation. The state must not settle for half measures or label real-time monitoring as burdensome when "This alternative would be the most effective in terms of ensuring fast response to situations in which

² "Myth of the Family Farmer", MarinInstitute.org

³ International Union for the Conservation of Nature report at: <http://summitcountyvoice.com/2010/05/30/the-cost-of-extinction/>; Center for International Environmental Law report at: <http://www.ciel.org/Publications/summary.html>

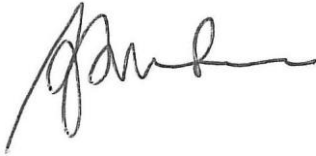
salmonids are at risk for mortality due to stranding. ... This information may be used by growers to adjust diversions, restore stream stage, and protect salmonids as soon as the risk is identified." (DEIR p. 93).

Various agencies and non-profits organizations ⁴ may have significant funds for meeting the minimal costs associated with properly monitoring and reporting diversions from critical habitat during times of the year when low flows are likely.

Conclusion

SCWC members welcome State regulation of frost pumping and diversion activities, and greatly appreciate the time the agencies have devoted to this task. But we urge the state to resist all efforts to yield regulatory administration to publicly unaccountable bodies or individuals, to resist reporting delays, and resist any framework that approves diversions before full analyses of impacts and elimination of threats to listed species. Noncompliance with any part of the regulation, or actions contributing to "take," as characterized by the State, must be considered serious and subject to swift and significant mandatory penalties.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stephen Fuller-Rowell', written in a cursive style.

Stephen Fuller-Rowell
Sonoma County Water Coalition

⁴ California Land Stewardship Institute, Resource Conservation Districts, and the like

