

March 17, 2010

Victoria Whitney
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Re: Frost Protection Sonoma and Mendocino Counties

Dear Ms. Whitney:

Please accept these observations and comments as part of the March 18, 2010 Frost Regulation Working Group process. Northern California River Watch welcomes regulation of frost activities in Sonoma and Mendocino Counties. Much valuable time has elapsed with tragic result. River Watch urges the state to approach this process not as a time to negotiate but as the time to finally exert its authority and carry out its duty. The observations and comments below address transparency, removing political influence from the process, creating deterrents, and reversing harm.

Verifiable Scientific Information Required

Section 740 (a) states that diversions are significant unless they are pursuant to the board approved demand management program. Such a program must be scientifically rigorous and immune from political pressure.

In a scientific article published in the University of California's periodical, it was determined that official records of local jurisdictions, like counties, can be very inaccurate. Using GIS, for example, acres of vineyards in Sonoma County was determined. "The total acreage was calculated to be at least 48,000 acres in 1997, 20% more than reported by county agricultural officials."(University of California - *Mapping Vineyard Expansion provides Information on Agriculture and the Environment*).

The growers must be required to produce for public scrutiny, now and in the future, information to verify their claims. During the formulation of a regulation, the standards must include reliable parcel maps of acreages dependent upon frost protection measures. All acres that have historically relied on overhead sprinkling, in addition to those acres utilizing micro-sprinklers, must be known. Accurate and complete maps of frost ponds and pond capacity must be made available during this formulation phase. Such information strengthens management models but also effective enforcement efforts.

Time and staff constraints with respect to permit issuance must be acknowledged and accepted by the regulated communities as a fact of life and now simply as a part of an effective species recovery process.

Section 740(a)(2) requires monitoring information to be posted only to the Board. Rather than

increase the effectiveness of the agencies, which is a large part of the solution here, and making information public, the information will be secret. Not only does this squander an opportunity to inform all water users of the state of the creeks and rivers in real time, it is a stunning blow to urgent efforts to save the last salmon and steelhead.

It is not possible to effectively quantify water demand and supply based upon mere assertions especially in light of the fact that only a portion of the growers are constructively engaged in the effort to maintain in stream flows in both the main stem Russian and the tributaries of Sonoma and Mendocino Counties.

Growers must actually cooperate not just say they are. It is largely the growers' code of silence and failure to cooperate that makes solving this serious problem so difficult. The big agricultural interests have done their members a huge disservice by downplaying the issue of limited water supplies for so long, and they bear the responsibility to cooperate with the regulatory agencies to reverse the impacts on protected species. The agencies have the duty and authority to stop diversions in the name of the public trust and the ESA, and it is incumbent upon the growers to do the heavy lifting.

Responsible growers should be rewarded and recalcitrant growers and growers' organizations marginalized. The state cannot be bound by the industry's code of silence and in fact must carry out its duties in spite of and in the face of that silence.

The public does not accept the fact that it the burden of the agencies to find the bad actors, especially as the industry is seeking more lenient treatment. Regulatory agencies have been shut out and the result has been TAKE. Realistically, unless and until, the growers are required to fully cooperate, TAKE will continue.

Illegal Diversions

What is missing in the proposed regulation is a means by which the illegal diversions and storage facilities will be addressed. The ecosystems are over appropriated for large parts of the year, and the illegal activities will likely render good efforts ineffectual to protect the species. Please add language that requires proof of license, water right, appropriative right, etc. in order to verify that diversions are legal. Grower cooperation in this area i.e. require that growers describe any and all known legal and questionable diversions in the watershed, must be required. The growers know best where the diversions are occurring and these numerous unregulated diversions will undo all constructive efforts to manage demand.

Definitions

Industry efforts to redefine thresholds of significance and reasonableness must be seen for what they are. The thresholds of significance with respect to viable salmon populations were passed long ago. The baseline from which to proceed must be based upon functioning watersheds. That baseline does not exist in some places during large parts of the year. The burden is on the growers to establish that their efforts, necessarily embodied in a final regulation, will not adversely affect in stream flows, individually or cumulatively, and are sustainable in a watershed

context. In this manner, demand may be reduced to a “reasonable” level.

Redefining reasonable and beneficial uses cannot be done with a stroke of a pen or by fiat.

These are terms meant to have a basis in reality - that is, based upon what the protected species need to survive including cold clean water supply year round throughout the designated critical habitat. Legal precedents matter, as do biological principles. There are potential impacts of redefining terms of art in this manner; therefore an initial study would be required.

Stetson engineering maps need to be expanded to cover ground water areas that are heavily cultivated like on Felta Creek, the Gualala River, Green Valley Creek, etc. that are not currently mapped as having the potential to affect stream flows.

Independent Manager

A water demand management person, or body, must be completely independent of agricultural interests. Professor Kondolf is the type of person that might be retained to effectively manage water demand for the benefit of the recovery of the listed species. Scientist from the National Marine Fisheries Service and the Department of Fish and Game would also be acceptable. The growers can participate only to the extent the independent water demand management person, or entity, deems necessary for informational purposes. Subjecting the management of the water to a stakeholder process is tantamount to continuing to place the protection of the last salmon and steelhead behind the interests of a politically powerful well-funded lobby. This is the current problem, and it is opposite of what is required to satisfy current law.

Although professional staff is, the Board is not well suited to be the final arbiter of what makes up a satisfactory demand management plan. Professional staff is much better suited to verify that individual or cumulative impacts of demand are acceptable.

Conclusion

The state of the fisheries dictates rapid and full implementation of the precautionary principle. There can be no further tolerance of delays, complaining, and obstruction. A meaningful, timely, enforceable, regulation that reverses the harms caused by the industry in the past, and that fully evaluates and rectifies present and future impacts to the critical habitat and the protected species is the only acceptable regulation.

Sincerely,

Larry Hanson

LARRY HANSON
Northern California River Watch