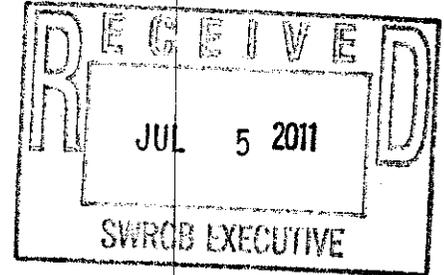




Mendocino County Farm Bureau

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Affiliated with the California Farm Bureau Federation and the American Farm Bureau Federation



July 5, 2011

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Via Email: commentletters@waterboards.ca.gov

RE: Comment Letter- Proposed Russian River Frost Regulation

Dear Board Members,

The Mendocino County Farm Bureau (MCFB) is a member of the Russian River Frost Program (RRFP), a two-county coalition of agricultural organizations formed in 2009 to address water management issues in the Russian River Watershed, including the use of water for frost protection. MCFB would like to submit the following comments on the Environmental Impact Report (EIR) and the proposed Russian River Frost Regulation. MCFB also supports the more thorough comments submitted by the California Farm Bureau Federation and those submitted on behalf of a grower coalition by Jesse Barton.

Stated Objective in EIR

(p i- ii) The State Water Board's objective for the project is to establish a regulation that will prevent salmonid stranding mortality while minimizing the impacts of the regulation on the use of water for purposes of frost protection. In support of this objective, the State Water Resources Control Board's goals are to (a) promote local development and governance of programs that prevent stranding mortality during the frost season, (b) provide transparency of diversion and stream stage monitoring data, (c) ensure that the State Water Board can require any changes to WDMP's that are necessary to ensure that WDMP's are successful and implemented on a timely basis, (d) provide for State Water Board enforcement against non-compliance and (e) develop a comprehensive regulation that includes all diverters of water for frost protection use, including diverters who pump groundwater that is hydraulically connected to the stream system.

- 1) If the State Water Board's objective is to prevent salmonid stranding mortality than **ALL** water users who divert water during the frost season (March 15-May 15) need to be included in the regulation, not just agricultural diversions. On page 11 of the EIR it is stated that, "Water is diverted from the Russian River and its tributaries for a variety of purposes including municipal, industrial, domestic and agricultural use." On page 12 of the EIR it is also stated that 30% of the water right records for the Russian River Watershed provide for

the diversion of water for frost protection use. The EIR identifies the fact that other water users divert water from the Russian River Watershed, most likely during March 15-May 15, yet the SWRCB only proposes to apply the regulation to frost protection diversions, 30% of the water rights on record. The SWRCB should address the impacts on salmonids from non-frost diversions, such as municipalities in the EIR process.

- 2) Regarding the promotion of local programs that prevent stranding during frost protection season, this has already been accomplished. The RRFP has developed a comprehensive program to continue to work on resolutions to be able to continue to use Russian River water for frost protection while protecting the fishery resources. This program was submitted to the Board in 2009 and very little feedback was provided. The VOLUNTARY efforts that took place in 2009, prior to the draft regulation being released in January 2010, were amazing. In the upper Russian River Watershed 61 CFS worth of storage infrastructure were put into place. Currently close to 91 CFS worth of storage has been completed. This is why the mainstem of the Russian River should be excluded from the regulation since instantaneous demand issues seen in 2008 related to frost diversions have already been resolved. There is no need to endure the environmental effects of a regulation if no additional issues have been identified. Regarding the tributaries, the tributaries of concern named by NOAA have been organized into tributary diverter groups that have improved communication and awareness of diversions during the frost season. In addition, the California Land Stewardship Institute, a member of the RRFP has implemented training sessions in both Mendocino and Sonoma Counties to teach land owners how to monitor tributary conditions. If the Water Board's goal is to continue to promote local programs to work on solutions to the multiple uses of water in the Russian River, including water used for frost protection and the fishery, then this needs to be done in a collaborative manner and not through a regulatory approach.

- 3) The regulation is asking for diverters of frost water to be transparent in any monitoring that occurs. This transparency needs to work both ways. Currently, it seems that the monitoring is being used for enforcement purposes only without actually analyzing the best locations for gauging to occur for the fishery. The gauges that were placed in the tributaries in the Upper Russian River by NMFS and the SWRCB were not discussed with the RRFP and often were placed in stream conditions not conducive to quality control standards. The gauges placed in the Upper Russian River were monitored by diverters during the 2011 frost season and there were no obvious signals seen that showed frost protection having a negative impact on the stage of the tributary. If additional monitoring is to take place it needs to be done to develop a base line to determine the scope of the "problem" and to determine what the flows and stage levels need to be to support the various stages of the salmonid life cycle. Monitoring for the sake of monitoring is not going to benefit the fishery and will only create unnecessary financial burden on the agricultural industry.

- 4) The regulation declares that water diversions for frost protection are unreasonable unless performed in a coordinated manner through a Board approved WDMP. The requirements of the WDMP have been in question over the last year or so and have been expanded in the latest draft regulation language. Although the language in the current draft regulation has clarified some concerns, the burden to quantify the water needed to satisfy the "no salmonid stranding" component of the regulation still remains with the agricultural industry. The fisheries agencies have not provided performance standards in which diverters or a WDMP can determine what stream stage in each tributary is necessary to prevent salmonid mortality. The Main Stem of the Russian River has guidelines under D1610. The main goal of this regulation is to prevent salmonid stranding mortality, but the research has not been adequately performed to develop standards for such a complex water shed. In fact, on page 3 of the regulation, the words "sound science" were removed when describing what the risk assessment component of the WDMP should be based on. The WDMP, and therefore the agricultural industry, is being asked to quantify the extent of the possibility for salmonid stranding, develop a standard for preventing salmonid mortality, provide self-policing of violations to a standard that has yet to be created and financially support this entire process. The Board is looking to enforce non-compliance, when there are very grey compliance standards available. This is a guilty until proven innocent approach that will be very difficult to satisfy.

- 5) The frost events of 2008 that are being used as the basis for the regulation were based on surface water diversions. The regulation has proposed to not only regulate the use of surface water for the purposes of frost protection, but has also included hydraulically connected groundwater. The first question that has to be asked is, "what is considered to be hydraulically connected groundwater?" The term hydraulically connected groundwater is vague and exceeds the jurisdiction of the Board to regulate. The regulation should exclude diversions from groundwater. Pumping groundwater does not result in an instantaneous effect on stream flow, and should be encouraged as a tool for reducing peak surface water demand during frost events.

The EIR Does Not Provide a Valid Reason for the Proposed Regulation

The EIR references a letter dated February 19, 2009 from the National Marine Fisheries Service (NMFS) to the SWRCB describing two instances of fish stranding assumed to be the result of water diversions for the purpose of frost protecting crops. Both stranding events described in the letter occurred in April 2008, one on Felta Creek in Sonoma County and the other on the main stem of the Russian River near Hopland in Mendocino County. The EIR indicates that the SWRCB is relying solely on the allegations in this NMFS letter as the basis for explaining why a regulation of the use of Russian River Watershed water for frost protection purposes is necessary. For the reasons explained below, this reliance is misplaced

First, it is important to recognize that the concerns raised by the NMFS letter were acute problems in discrete locations that occurred during an unusually cold and dry spring and are not endemic to the entire Russian River watershed. While the importance of these episodes is not to be understated, these two

occurrences do not support the generalization that salmon stranding are a chronic problem occurring every year throughout the entire Russian River watershed. The vast majority of years are not as critically cold and dry as 2008 and 2009; nor do the conditions that existed near the locations where stranded salmonids were found exist throughout the entire Russian River watershed. Basically, it does not follow that two instances of stranding, only allegedly due to diversions for frost protection, justify a conditional ban on all frost diversions throughout the entire watershed.

Second, management and infrastructure improvements have already been made to resolve any contributions frost diversions may have had on the stranding incidents described in NMFS February 19, 2009 letter. As a result of a SWRCB workshop held in April 2009, water users set to work to develop a plan, now formalized as the RRFP, to mitigate any contribution frost diversions may have had on the instances of stranding that occurred and worked to make additional management and infrastructure changes to improve conditions for salmonids. Since then, local voluntary actions on the part of landowners, wine grape and pear growers, as well as the RRFP, has resolved any impacts frost diversions may have had on the issues brought forward in the February 19, 2009 NMFS letter

The stranding incident on the Russian River near Hopland, which was related to an instantaneous 83 cfs drop in river stage, was resolved by numerous property owners who were directly diverting water from the Upper Russian River. Since 2008, these individuals have invested in the installation of off-stream storage ponds which permanently reduced the cumulative instantaneous demand on the Russian River by 91 cfs. Regarding the stranding incident on Felta Creek, the property owner has invested in a groundwater well and an off-stream storage pond and no longer diverts water from Felta Creek.

Since both stranding event locations identified by NMFS in the February 19, 2009 letter have been addressed and resolved, the SWRCB must identify the current reason why a regulation on the use of frost water in the Russian River is necessary.

There Has Been Little Evidence Brought Forward to Support the Need for a Regulation.

After almost three years, there has been little evidence brought forward to support the need for a regulation. What evidence that has been brought forward in the document from NOAA in March 2011 titled, *The Biological Context of the Spring 2008 De-Watering Event in the Upper Mainstem of the Russian River*, has extrapolated that the ten Steelhead young of the year found stranded on the Upper Main Stem of the Russian River near Hopland in 2008 was expanded through assumptions to a number listed as 25, 872. This document and the calculations was not released to the RRFP, but instead the 25 thousand number was first seen in an article on May 6th titled, *Feds Blame Farmers for Russian River Fish Kill*, that was printed in the Santa Rosa Press Democrat. The document was released without a credited author and was released to the court of public opinion through the press. This is not a demonstration of a collaborative effort, but a continued effort to create a negative public opinion that the agricultural community has not made efforts to resolve this issue. When inquiries were made on the March 2008 NOAA document it was found that David Hines was the author, but no additional supporting data has currently been presented (even though it has been requested) to explain how the 25, 872 number was statistically quantified.

The transparency amongst the agencies to develop collaborative solutions has been disheartening and the only information that was able to be obtained to truly understand the overall scope of the issue was found

through multiple FOIA requests. The information obtained in the FOIA on a single set of NOAA field notes showed that ten Steelhead young of the year were discovered stranded at the base of a tributary near Hopland within 2-6 inch cobble. This is the only evidence that has been substantiated. The Draft Initial Statement of Reasons, p1, states that, "Scientific *research indicates that the two episodes of stream dewatering documented by NOAA Fisheries were not isolated incidents and diversions for purposes of frost protection likely are adversely affecting salmonids throughout the Russian River Watershed.*" The work **LIKELY** needs to be considered as well as the lack of solid evidence to justify such a statement. This regulation lacks both factual analysis and evidence to support the conclusion that every frost diversion in the Russian River watershed is harming salmonids.

NOAA has also stated that the use of water for frost protection in the Russian River and related impacts to the fishery has been a known problem for years. If this was the case, then why was the agricultural industry not informed? Why was the use of water for frost protection not considered as an impact during the development of D1610? Once the issue was brought to the attention of the agricultural industry in 2008, the industry made great efforts to work on solutions to reduce impacts to the fishery.

The Proposed Regulation Would Exceed the SWRCB's Authority

The NOP also indicates the SWRCB is relying on its authority pursuant to Article X, Section 2 of the California Constitution and Water Code section 100 to prevent the waste and unreasonable use of all waters of the state as a basis for the regulation of frost water diversions in the Russian River watershed. However, a single letter describing two instances of fish stranding allegedly due to frost water use is not substantial evidence sufficient to demonstrate that every existing frost water diversion in the Russian River watershed is *per se* unreasonable. The law provides specific standards for determining whether a particular use is unreasonable and each water user has the right to be heard regarding whether their individual diversion is in fact unreasonable.

Summary of Main Concerns

The proposed Russian River Frost Regulation is concerning for a number of reasons. The proposed regulation would: regulate all water used for frost protection in the Russian River Watershed including pre-1914, riparian, licensed, permitted and groundwater; would declare all diversions for frost protection unreasonable unless and until the water is diverted pursuant to a Board approved water demand management program; is not based on sound science; includes water users that have no detrimental effect on salmonids; provides little consideration for the priority of individual water rights; ignores other water users in the watershed such as domestic or municipal; will require detailed data collection; and will result in significant costs on agricultural operations within the watershed. Even more concerning is the fact that the proposed regulation is based upon an unprecedented and justified assertion of the Board's authority under the reasonable use doctrine, ostensibly for purposes of regulatory convenience and in order to avoid the takings clause.

Conclusion

MCFB encourages the Board to reconsider the regulatory approach. The proposed regulation is based on a number of claims that have not been substantiated and the February 2009 NOAA letter lists two incidents that have both been addressed. In terms of enforcement, current law such as the Endangered Species Act and Fish and Game Code exists that can be used if necessary. MCFB instead supports the development of non-regulatory collaborative, cost effective and productive solutions to allow for Russian River water to be used both for farming and the fishery.

Sincerely,

A handwritten signature in black ink, appearing to be "Mike Anderson", written over a horizontal line.

**Mike Anderson
President**