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Mr. Charlie Hoppin, Chair
and Members of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via email to commentletters@waterboards.ca.gov

Re: Proposed Russian River Frost Regulation

Dear Mr. Hoppin and Members of the Board:

On behalf of Trout Unlimited (TU), I submit the following comments on the Proposed Russian River Frost Reasonable Use Regulation (“Frost Rule” or “Rule”). Trout Unlimited is a national trout and salmon conservation organization with 140,000 members, including more than 10,000 in California.

It has been three years since fish kills attributed to frost diversions were first publicized. At that time, the federal government requested action from the State Water Resources Control Board to prevent future harm to salmon and steelhead. While the Board declined to adopt emergency rules for the 2010 frost season, Board members stated their intent to establish a long term management solution. **Trout Unlimited urges the State Water Board to adopt the Frost Rule before another year passes.**

Since 2008, the State Water Board and many stakeholders have labored hard over the frost regulation and worked to put in place management programs to protect salmon and steelhead. While it is likely that the proposed Frost Rule will fully satisfy nobody, it provides a solid basis for moving forward.

TU still has significant questions about how the local water demand management programs will function. Depending on how the Frost Rule is implemented, the program could work very well for both salmon and the industry—or it could fail. But that is probably true for any regulation.

Some of our questions could be addressed with changes to the text of the Rule, but under the circumstances we think the best course of action is for the Board to adopt the proposed Rule as is. We believe we can address our remaining questions by working with grape growers, conservation organizations, and other stakeholders and agencies on the Rule’s implementation. Although some grape growers and trade associations have what I consider ideological objections to the Frost Rule, a large number of the individual farmers that we know are similarly focused on practical considerations.

The Scientific Basis is Straightforward

The frost issue has attracted significant attention because of the presence of fish carcasses. Most sources of stress on salmon and steelhead populations are more subtle. They

reduce a watershed's ability to support fish in the first place. The dead bodies are never found and in some cases the fish never existed. Frost protection has been different because actual fish have been found stranded or killed.

Still, some critics of the Frost Rule have focused on the relatively few times that fish kills have been documented and publicized. With respect, we think that criticism is misplaced. People who work in the watershed have known about the negative effects of diversions for frost for many years. Well before the documented fish kills or the Deitch, Merenlender, and Kondolf paper, I heard about the problem from farmers who approached me quietly after meetings. At its root, the problem is one of simple math. Direct diversions for frost typically use more than 1 cfs per 10 acres of vineyard. Many of the tributaries with coho and steelhead have dozens or hundreds of acres that are frost protected. Some of these diversions are operated with flashboard dams, direct diversion pumps, or streamside wells. This is on tributaries that can be running at only a few cfs during the frost protection season, depending on how recently it rained. In other words, frost protection can easily require *all of the water* during a very sensitive time for fish. In retrospect, the most surprising thing about the 2008 fish kills is that it took so long for the issue to be documented. We were also surprised to learn that the issue could affect the mainstem Russian River as well as the tributaries.

The situation is made dramatically worse by the sad state of affairs for salmon in the Russian River. We no longer have any margin for error. In the Russian River, coho salmon are almost extirpated. Only the coho broodstock program (the salmon equivalent of the captive condor effort) and restoration projects undertaken by wildlife agencies, private landowners, and other stakeholders are keeping hope alive. Since the Russian River is located in the heart of the Central California Coast coho salmon population segment and it historically supported one of its largest runs, the loss of the Russian River population threatens the survival of the entire species. For steelhead, the situation is slightly less desperate—but only slightly.

Vineyards and Orchards Have Alternatives and Sources of Support

The good news is that alternatives exist to direct diversion of water for frost protection. A great many farmers have already responded to the fish kills and impending regulation by installing fans and ponds. They deserve our thanks and our support.

It is also true that not all diversions cause the same level of harm. Since the 2008 fish kills, the industry and its regulators have developed a much better understanding of how many “priority” diversions exist that may require “corrective action” under the Rule. The highest priority projects will be those diversions that rely on flashboard dams or small ponds located above a fish-bearing stream reach. Those diversions dewater the reach immediately below them whenever the rate of pumping for frost exceeds inflow, and whenever they are filling or refilling. Many other diversions will have to be evaluated for their cumulative effects to fisheries, and some diversions will be able to continue operating as they do today. Our estimate of the number of diversions that might need to be changed corresponds roughly to the SWRCB estimate in the rulemaking package.

It is important to note that there are many stakeholders who are committed to helping individual farmers adapt to the new regulatory environment by providing financial and technical assistance. I will mention four.

First, the USDA Natural Resources Conservation Service has devoted a commendable level of staff time and funding for farmers who want to switch frost protection to offstream ponds or to fans. The Agricultural Water Enhancement Program alone could bring \$5.7 million to the Russian River between the years 2009 and 2014. Many farmers have already taken advantage of it.

Second, cooperative programs such as the Russian River Coho Water Resources Partnership are helping farmers with engineering, scientific support, and construction funding for fans and ponds (www.cohopartnership.org). That partnership includes the Gold Ridge Resource Conservation District, Sotoyome Resource Conservation District, Center for Ecosystem Management and Restoration, Occidental Arts and Ecology Center's WATER Institute, UC Cooperative Extension and California Sea Grant Program, and Trout Unlimited. It is funded by the National Fish and Wildlife Foundation with additional support from the Sonoma County Water Agency.

The Coho Partnership and others have also installed stream flow gages that could be made available to the "governing body" and others tasked with responding to the Frost Rule. The Partnership currently operates more than 20 gages in Sonoma County, and we have told Sonoma County and the county's industry representatives that we hope to work with them to meet the needs of the Frost Rule and the County's Ordinance.

Third, many people are focused on expediting permitting for farmers who wish to switch from direct diversions to diversions to offstream storage. Trout Unlimited and the wine industry worked with SWRCB to include special incentives for such projects in the North Coast Instream Flow Policy. More recently, TU and the wine industry have been discussing proposed legislation with Assemblymember Huffman's office, as well as SWRCB and DFG. That bill (A.B. 964) would create a new Small Irrigation Registration modeled on the Small Domestic Use Registration.

Fourth, Sonoma County has stepped forward to support development of a local program that could satisfy part of the Frost Rule. Although some conservationists remain skeptical and a few grape growers resent the County's effort, it provides a sound foundation for the stream inventory, stream gaging, and diversion reporting components of the Frost Rule.¹

The Proposed Frost Rule is Generally Sound

The final Frost Rule should contain the following elements.

Framework: Diversions are Unreasonable Unless consistent with the Local Program

The Frost Rule must retain its present form in which frost diversions are "unreasonable unless" done in compliance with the Water Demand Management Plan. This is a good balance between statewide regulation and support for local solutions. Although some growers and trade associations continue to object to the word "unreasonable" we see no better way. With respect, I believe that concerns about creating a stigma for the public perception of winemakers, or economic ruin for the industry are overstated. After all, Napa County went through a similar

¹ As the Draft Statement of Reasons notes, the County Ordinance is focused on the data gathering part of the Frost Rule, and does not require corrective actions. This is true by design, and TU agrees with SWRCB staff's assessment that the County Ordinance is no substitute for the State Rule. However, we believe it is an appropriate role for the County to play.

exercise with a reasonable use rule and their wine industry survived. And if the past is any guide to the future, the regulation will not spread like wildfire to the rest of the state. Again, almost 40 years passed between the Napa River experience and the current rulemaking for the Russian River.

Applicability to All Diversions

The Rule must continue to include connected groundwater and all types of surface water rights. This is no other way for it to work.

Frost Inventory

Most stakeholders agree that the first step is to inventory frost protection diversion practices. The Draft Rule and the Sonoma County Ordinance both address this critical step. It should remain in the final Rule.

Stream Gaging

The Draft Rule includes measures recommended by TU and many other stakeholders for a comprehensive stream stage monitoring program. We have several remaining concerns. We do not suggest additional changes to the Draft Rule at this point to address those concerns, but we do believe that there are important questions that have not yet been answered and will be need to be answered as part of the review of the WDMP. For instance, the Rule is silent on whether the gages should be online. It is important for most (if not all) gages to be online in real time for many reasons. The Rule should be about preventing harm as well as identifying problems after they occur. Therefore, if gage data reveals problems in the middle of the season, the governing body, the grower, and SWRCB need to know it and be able to respond accordingly.

The rule is also silent on whether the gages will be rated for flow, although the section is called “stream *stage* monitoring.” Without a flow rating, it would be impossible to project how much a given diversion or set of diversions is capable of changing stage, so it would be impossible to assess risk.

Finally, the Rule could be interpreted to indicate that there is a single stage that must be maintained to prevent stranding. In fact, stranding is a function of both stage and the rate of change of stage. While it is true that fish are more vulnerable to stranding at certain levels of stream stage, the management program might do better to focus on maintaining acceptable changes in stage at different flows rather than maintaining a single minimum stage.

Diversion Monitoring and Reporting

The Draft Rule includes measures to require growers to record the rate of diversion, hours of operation, and volume of water diverted during each frost event for the year, and it requires that information to be reported to SWRCB and be publicly available. This is critically important. The State Water Board and wildlife agencies, and the governing bodies all need to know not only supply (gaging) but also demand (diversion reporting) to develop a WDMP and to ensure compliance with it. Earlier drafts of the rule went further and required real time reporting of diversion data, which Trout Unlimited supports. While we still believe that information would be useful, we understand that it has been deleted in part out of concerns over cost.

Trout Unlimited can support a final Frost Rule without real-time diversion reporting if our other concerns are addressed, but there are circumstances under which an annual report will

not be adequate. SWRCB, the governing body and the wildlife agencies must have the ability to request diversion data on short notice if circumstances warrant. Such circumstances might include a case where stream gages show a signal after one frost event, weather forecasts predict a larger event later in the week, and the governing body and agencies want to contact growers. (For example, it would be helpful to know if the first event was a “worst-case” scenario in which all diversions that could have operated did operate, or whether only a few of them did.)

100% Participation

Chairman Hoppin and other Board Members identified this as a priority, and TU wholeheartedly agrees. Without the Frost Rule, a voluntary program could never achieve 100% participation, and the cooperating growers would be at an unfair disadvantage to non-cooperators.

Transparency

The Board and many stakeholders have stressed the need for transparency. We agree. The Draft Frost Rule includes important language mandating publicly available reports. We still have questions about the composition of the “governing body,” and its interaction with stakeholders and even other growers who are not represented on its board. We also believe the composition and governance of the “Science Advisory Panel” proposed as part of the grower draft plan will be incredibly important. We do not suggest additional changes to the Draft Rule at this point to address those concerns, but we do believe that there are important questions that have not yet been answered and will be need to be answered as part of the review of the WDMP.

Accountability

Trout Unlimited expressed concerns over the previous draft that it was not always clear who would be accountable if a “corrective action” was not taken. Would it be the governing body or the individual grower? The final draft is much better in that it makes the governing body accountable for identifying corrective actions, and for reporting whether they were taken, and makes the grower accountable if they are not. In other respects, the devil will still be “in the details.”

Respect for Water Right Priorities

Many industry commentators have stressed the need for the Frost Rule to respect the prior appropriation system. We agree, and we are pleased that the final Draft incorporates changes to that effect. Of course, the most junior possible diverters are those who have no valid basis of right. It is unfair to legal diverters to allow illegal diversions to threaten the legal diverters’ ability to continue operations. For this reason, our prior recommendations included requiring disclosure of the basis of right as part of the Frost Inventory, and requiring valid water rights and Fish and Game Code permits to continue in good standing as part of the WDMP. We wish the Frost Rule required legal water rights for growers to be considered in good standing, but we believe that issue can be addressed in the approval of the WDMPs.²

² Sonoma County did not include that recommendation in their Ordinance, but that is perhaps understandable since they are not the permitting agency.

Economic Benefits

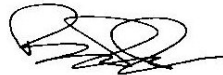
As the Initial Statement of Reasons notes, the Frost Rule has economic benefits as well as economic costs. Those benefits have not been quantified but they could be significant. The economic contribution of recreational and commercial fishing is enormous. Recreational fishermen in California spent \$2 billion in 2006 (the last year for which data is available), and California earns more state and local tax revenues from sportfishing than any other state--over \$336 million in 2006. Some estimate the direct value of fishing for salmon alone at \$255 million. The Russian River no longer supports harvest or recreational fishing for salmon, but steelhead are a different story. It is no longer the fabled sportfishery it used to be, but a great many TU members still fish the Russian regularly for steelhead. They contribute substantial revenues to the communities in the watershed and they are an important part of our cultural heritage.

The CEQA Analysis

The CEQA analysis is legally adequate. However, it is not particularly informative. CEQA can be an unsatisfactory tool to evaluate regulatory programs that will benefit the environment. This is because lead agencies typically evaluate changes to the status quo. If the status quo is bad, and the program results in improvements to the status quo, those improvements do not show up in the CEQA ledger. However, if the program results in incidental adverse changes to the environment, those changes will show up as CEQA "impacts," even if they are less significant than the beneficial changes to the status quo. So it is with the CEQA analysis for the proposed Frost Rule. For instance, if a diverter changes from a relatively harmful direct diversion to a less harmful diversion to storage, the diversion to storage shows up in the CEQA "impact" ledger but the cessation of the more harmful direct diversion does not register. This can be explained in CEQA terms, but it could also obscure the more important point, which is that the proposed Frost Rule would have dramatically positive effects on the environment.

Thank you for your consideration of our comments. We look forward to working with the Board, the industry, and other stakeholders to implement the program.

Sincerely,



Brian J. Johnson