

July, 4 2011

RE: Comments - Proposed Russian River Frost Protection Regulation

Gentlemen,



I do not think one can make a strong enough statement in opposition to the “Proposed Russian River Frost Protection Regulation” as being bad policy for the state; it sets a precedent with the potential to bankrupt segments of the population and the State. What this state’s citizens need is protection from oppressive regulatory interference. Yes, water management can be better to minimize potential fish stranding, but it will not end there. This is another example of reckless endangerment by state agencies charged with regulating water and wild life but have neglected the cumulative impacts of their own collective actions. And are now trying to retroactively shift the consequences of their actions back onto individual landowners while denying any complicity or accepting any responsibility for these impacts. This is yet another round of environmental restrictions and regulations that is not the end, but the start of severe micromanagement against private property rights. The time for a determination as to whether water use was reasonable or unreasonable was at the same time cumulative impacts were to be addressed. These water rights are property rights and to come by years later, after substantial investments in time and capital, and restrict that right in a manner that threatens that investment and livelihood is unconscionable. In water law the concept that first in time is first in right, for “beneficial uses” this concept should likewise apply to the more resent concept of recreational use, fish and wildlife protection, and enhancement and aesthetic enjoyment. I am unaware that these broadened concepts have been given a higher priority right, either by the Courts or Legislature, than any others water rights.

NOAA under ESA has listed several salmonids species as threatened and endangered in the Russian River watershed and they have provided, to someone, information supporting their position that the use of water for protection of grape vines from frost poses a documented threat to federally threatened and endangered salmonids in the Russian River watershed. The State received a letter that “documents two episodes of fish stranding mortality that occurred in April 2008, one on Felta Creek in Sonoma County and the second on the mainstream of the Russian River near Hopland in Mendocino County.” Because this is the impetuous for this regulation, did anyone ask a couple of key questions from NOAA like: Where these “wild Russian River” fingerlings or where they hatchery planted fingerlings? Was the determination made visually or genetically? Who made the determination - NOAA? Were reasonable precautions being undertaken or taken to protect the fish at the time (ITP)? Was there a documented and re-demonstrable

cause and effect relationship established? How many salmonid fry are killed at the hatchery each year? Would this not be a baseline figure for the rest of us before corrective actions are required? Or are there two standards one for government and one for the rest of us. The reason for the questions is NOAA has a body of work showing that anytime “wild” fish and hatchery fish intermingle, you no longer have “wild” fish you have something else. To illustrate this point, as recently as June 22, 2011, the Press Democrat ran an article that stated “wild” salmon had not been seen in East Austin Creek for over 50 years. “But last year, fish were spotted reproducing. They included a male wild salmon and a female with a clipped fin, indicating a hatchery fish”. Simply because the male did not have a clipped fin does not necessarily make him a “wild” salmon, he could be a second generation hatchery fish. NOAA admits that not all fins get clipped at the hatcheries. So, when these fish, in East Austin Creek, hatched, what kind of fish are they really? When these fish come back to spawn with all their fins, what kind of fish will they be? This EIR states fish were brought in to stock the hatchery after the dams were built. If one can buy “wild” pacific Coho, here in Sonoma County for \$17.99 a pound, how endangered are these fish?

The “Proposed Russian River Frost Protection Regulation” states “Frost protection of crops is a beneficial use of water under section 671 of title 23 of the California Code of Regulations (CCR)” presumably this is to preclude litigation on the issue of take. However, if one is prohibited from exercising that water right during the frost event time of the year, March 15 through May 15, their beneficial use of that water right, for frost protection, has in fact been diminished by regulation – a taking. I’m confused and perplexed by your concept where one can have a beneficial use that is also unreasonable at the same time, which precludes him from exercising a water right, which in turn could cause him to lose his water right because he cannot put it to beneficial use, which is an integral condition of that right. This inability to use one’s water right opens up the possibility that this historical use of water for frost protection would be put in jeopardy and then that water, at that time, not used for frost protection could be rededicated for instream beneficial use under Water Code 1707 (a) (1).

Your proposed regulation also treats all water used for frost protection equally, when in fact there are great differences between each and every user and his direct impact, if any, to salmonid mortality by stranding. The Supreme Court of California has stated; “CESA allows the DFG to authorize a “take” that is incidental to an otherwise lawful activity if certain conditions are met. (Fish & G. Code, § 2081, subd. (b); see also Cal. Code Regs., tit. 14, § 783 et seq.) At the heart of CESA is the obligation to mitigate such takes. “The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the

species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation.” In other words, reading the “roughly proportional” language together with the “fully mitigate” language leads to the conclusion the Legislature intended that a landowner bear no more — but also no less — than the costs incurred from the impact of its activity on listed species.” “The focus of the full mitigation requirement is on adverse impacts that result from an ‘act’ — i.e., a purposeful activity. (Fish & G. Code, § 2081, subd. (b).)” One would presume that those extracting beneficial use water, are or were in the process of becoming in compliance with their ITP requirements that DFG just enacted and were fulfilling those obligations. Did DFG fulfill their obligations timely?

I do not see that your proposed regulation complies with the “roughly proportional” requirement under CESA. Please explain. CESA “not only allows but expressly compels giving consideration to economic objectives.” of the applicant. Please explain how this regulation meets that requirement. This implies that the replacement of a fish with a fish would meet this objective, or setting up a trust fund by a group would fulfill this objective to replace fish and created fish habitat as it has in other instances in the state. An enterprising Native American could set up a fish enhancement facility to provide fry for replacement fish and other conservation efforts -- at far less cost than this regulation calls for.

As the court stated: “With respect to unforeseen circumstances, the full mitigation requirement does not apply.” “Adverse impacts that result from unforeseen circumstances are impacts that cannot reasonably be anticipated, not impacts from purposeful activities.” Because water right holders, applicants and water users have relied on state agencies to administer these laws and regulations and have no control over water issues and the allocations these agencies have or would approved, under what conditions, and what amounts of water would be allocated. The current water users should not be punished and put in jeopardy for the cumulative effects and reasonableness of use, the state is required to review and considered, but has allowed to happen, makes this a state responsibility. The costs associated with this agricultural program to minimize fish stranding is a cost that the state bears and Water Code 13141 affirms ... “prior to implementation of any agricultural \*water\* quality control program, an estimate of the total cost of such a program, together with an identification of potential sources of financing, shall be indicated in any regional \*water\* quality control plan”. The costs associated with the purchase, installation, operation, maintenance and interpretation of real-time data collection should be a state cost. The EIR states it is required only during March 15 to May 15 and it is unclear that it would even regulate any frost activities related to its use, which could just as easily be achieved with a float switch and

flow meter. If water cannot be used for frost protection, why does anyone need this real-time data collection system at all? This looks like someone's unfunded scientific experiment unrelated to the issue of frost protection and is a tax on the few.

To keep this in perspective the regulation is only applicable about 15% of the time but has fixed capital and annualized costs that are exorbitant. Governmental costs (DFG & SWRCB) of \$390,000 a year, or is it 15% of a year, (unclear if this includes pensions and healthcare) no office costs, no auto cost, no course enhancement costs, no administrative costs, no assistant secretarial costs, etc., so what is the total cost of this governmental expansion? Who pays? And if it goes statewide how much will it cost and will it require additional tax monies? Have the Governor and Legislator approve of your expansion efforts so we, the taxpayers, will know whom to hold accountable?

The extrapolated costs the EIR has sighted for this program on the 63,825 acres covered by the regulation:

1. Initial capital costs range \$60 to \$100 per acre X 63,825 acres gives a total cost range between \$3,829,500 and \$6,382,500.
2. Capital costs range \$1,475 to \$2,197 per acre X 63,825 acres gives a total cost range between \$94,141,875 and \$140,223,525.
3. Annual costs (or tax) range \$18.75 to \$28.50 per acre X 63,825 acres give a total annual cost between \$1,196,718 and \$1,819,012
4. Acreage displaced by offstream storage, Sonoma, lower range 250 acres @ \$35,000 = \$8,750,000, @ \$50,000 = \$12,500,000, Upper range 2820 acres @ \$60,000 = \$169,200,000, @ \$125,000 = \$352,500,000 for storage ponds! Crop loss related to offstream storage  $8515 \times 250 \text{ acres} = \$2,128,750$ , @ 2820 acres X 8515 = \$24,012,300 The other part to this is that in a drought year, fish could become impaired and the argument could easily be made that this water storage is also unreasonable and needs to be used for instream flows as DFG proposed in the Scott and Shasta Rivers Watershed Programs.
5. Plus this regulation threatens a \$500,000,000.00 agricultural enterprise to an extent that has not been determined.

Lets take the average of these 5 items; 1. \$5,106,000; 2. \$117,182,700; 3. \$1,507,865; 4.  $\$260,850,000 + \$13,070,525 = \$273,920,525$ ; 5. \$250,000,000 and it comes to \$646,360,000. Do not obscure the total costs. That's real money for a fish one can buy in a Sonoma County supermarket! This looks like a new tax, on a select few, for a public benefit.

Your EIR states the by implementing this type of program “Section 21100, subdivision (b)(5) of the Public Resources Code requires an EIR to discuss the growth-inducing impacts of a project. (See also State CEQA Guidelines, § 15126.)” Section 15126 also states “All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.” Under operations your EIR does not discuss specifically “the ways in which the proposed project could foster economic or population growth” reductions caused by “a reduction in vineyard acreage [that] may occur due to reduced profit margins, which could cause continued production under the present use to become infeasible.” No wonder this state is broke. As a taxpayer who pays real money to this state, I want a full accounting of all cost related to the implementation and on ongoing costs for this and every new regulation. What are the true potential cost reductions in economic productivity, reduced property taxes, reduced sales taxes, and reduced income taxes, lost employment, potential crop losses from frost, and the additional costs to the remaining participants? Where is a detailed breakdown of the total cumulative costs for compliance with this proposed regulation? How much true governmental expansion will occur to implement, manage and monitor, just this regulation in this watershed, and what will its total costs be the first year, 3 years, 5 years, 10 years. What are the costs if implemented statewide? What is the source of its funding? What will be the net effect to the state’s GDP?

Using this notion that SWRCB can retroactively change its mind on what is reasonable and unreasonable when a bio-diversity group or U.N. Agenda 21 advocate propose some fringe position is disconcerting. As an example, if the original concept of Lake Sonoma was to use Dry Creek as a water conduit but at certain times of the year volitional fish passage is impaired and undetected fish mortality takes place. Under your logic this would be an unreasonable use of water. Sonoma-Marin water district has a beneficial use of water, but to lessen the impacts on fish, SWRCB could restrict the districts customers from being allowed to water lawns or non-native plants, wash cars, no water for pools or spas, no new subdivision, maybe a cap on the total population, food could only be grown organically as anything else would be unreasonable, water meters not used for year could be rededicated for instream use, where would it stop? NOAA could just as easily make the arguments about fishing, given the apparent correlation between no fishing and now more fish, that fishing boats operating in state waters is an unreasonable use of water because it could cause a “take” — “meaning harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect — any species protected by the Endangered Species Act” that is fishing - right. How many fry have been vacuumed up by jet boats or skies? Would that not be an unreasonable use of water too?

This EIR implies that in the future where TDML impaired waters accrue that this also would be considered an unreasonable use of water and now we would be talking real money, statewide. With 3,507; 303(d) listings in 2010, what are your projections of the negative financial impacts the State and Counties could expect? One would think it prudent to inform the Governor and Legislature of any potential revenue losses or GDP reductions, which could be anticipated and attributed to SWRCB's and CDFG new regulatory efforts related to unreasonable use of water. How will those losses affect economic output and property values throughout State? What magnitude of budget reductions can be anticipated for the State and Counties? What collateral bankruptcy damages is SWRCB projecting will occur.

I have been unable to locate any SWRCB definitions of what is reasonable use for water. More importantly I have not been able to find any published definitions for when water use becomes unreasonable, under what conditions and circumstances, and by whose interpretation. As far as I can see we only have the approved historical uses to gauge reasonable use. What types of reviews, hearings and scientific review criteria will be required before a reclassification from reasonable to unreasonable use takes place? What remedies apply for the modification to these property right changes? How will reductions in economic output and a reduction in property values be resolved and compensation calculated? What effect will this have on future state budgets and will it cause any new governmental extractions (taxes, fees, etc.)? Who makes up for these losses? If these action where to cause a tax increase does that not need to be voted on first before implementation? How much unemployment will this regulation cause?

Thank you

T. Connick

Taxpayer

cc. Governor