

September 16, 2011
Charles Hoppin, Chair
Board Members
State Water Resources Control Board
Sacramento, CA



Dear Chairman Hoppin and Board:

Please make these comments a part of the official administrative record for the proposed Russian River Frost Protection Regulation. These comments incorporate by reference previous comments of Northern California River Watch, Coast Action Group, and the Center for Biological Diversity.

Introduction

It has been over two years since the National Marine Fisheries Service requested that the State Water Resources Control Board pass emergency regulations to prevent the "take" of federally listed species of salmon and steelhead due to frost protection activities. In the spring of 2011, in the absence of the regulation, more listed species were killed by the very activities identified in 2008 as causing the "take" of these protected species. The state chose in lieu of emergency regulation to engage in a protracted process to accommodate any and all individuals wishing to grow grapes - a non food crop, in areas that can experience water scarcity. This was unreasonable and unwise. Another season of unregulated or under regulated frost diversions that places listed species at risk is not acceptable. In the event that this regulation is unable to be passed in a form that is adequate to avoid the harms that have occurred in the past or if it is held up in court for any reason, an emergency regulation will be necessary.

The photos below underscore the need for a timely regulation free from loopholes, that errs on the side of conservation and recovery of the listed species, and provides complete transparency. Despite three years of highly visible efforts by many in and out of the industry, steelhead were harmed as frost sprinklers poured water onto grapes in the Redwood Valley in April of 2011.

(April 2011 Mendocino County - steelhead stranded morning of frost protection pumping. Many steelhead were rescued from gravel and many did not survive. In the absence of any precipitation, the water depth increased later that day.)

Many in the grape growing industry of the Russian River basin apparently continue to interpret the lack of a state regulation as a safe harbor and as a sign the state continues to condone this practice.

Transparency

Real time monitoring and public reporting of water depth, water temperature, and air temperature is the best available feasible means to deter activities that kill listed species. Nothing less is called for at this critical time. The revised draft Initial Statement of Reasons acknowledges that publicly available real time data is "rigorous". It suggest however using such method selectively. "[M]ore rigorous diversion and stream stage monitoring and reporting program probably would be warranted, including the posting of real-time stream stage monitoring data on a **public** internet site." (emphasis added). There exists no credible reason that less rigorous methods be

used. Avoiding more loss of rare specimens is achievable but only if the best available method is required of landowners on all habitat streams that will potentially be affected by frost protection activities. Monitoring data must be gathered at least every 15 minutes and immediately posted to a public website. Water law supports this reasonable requirement. (WC 5103 (e) (1) On and after January 1, 2012, monthly records of water diversions. The measurements of the diversion shall be made using best available technologies and best professional practices. Nothing in this paragraph shall be construed to require the implementation of technologies or practices by a person who provides to the board documentation demonstrating that the implementation of those practices is not locally cost effective.) As the state correctly states, diverters may have to bear some costs. The reasonableness of the costs must be measured against the needs of an imperiled fishery.

STRANDING MORTALITY

The response to comments in the DEIR explain that, the language change from "harm" to salmonids to the narrower terminology "stranding mortalities", is the state's effort to address the cause of the identified problem based upon the information provided. The problem identified, however is broader than "stranding mortalities". The federal resource agency urged the state to pass emergency regulations in 2009, because of its "concern over the threat of frost protection irrigation" stating that the federal "ESA makes it unlawful for any person to "take" any endangered or threatened species." (2-19-09). Take is broadly defined. The federal resource agency specifically concluded its letter by stating that it urged the SWRCB to protect the important public trust resource from further "harm".

In the face of pressure from the California Farm Bureau Federation, the Board unfortunately intends to adopt the narrower language. Such a narrow interpretation of the problem identified is a mistake and will likely continue to pose problems for the state with respect to its obligations to avoid "take". see Comment 1.1.28.

GOVERNING BODY

The "governing body" must be completely independent of the industry and be composed of qualified scientists and agency personnel. The insertion of the sentence, "The governing body is authorized to include its own expert scientists and engineers...", implies that the governing body will be an industry group prone to argumentation rather than problem solving. This is a recipe for disaster that must be avoided. State and federal agents must not be put in a position of expending excessive time defending themselves from narrow self interests when the species are barreling toward extinction. The agencies must retain full authority to carry out their duties in a timely manner without threat of interference from industry sponsored spokespeople and consultants.

The body contemplated in Sonoma County would not qualify as independent insofar as it is a private mutual benefit corporation with unknown membership and operational goals and abilities. It is unfortunate that the proposed regulation is vague as to the required make up of this body, its operational structure, and its accountability to the public. This is to improperly defer important planning and analysis until after the public comment period for this project is closed. And it places the Board in the position of deciding whether to approve the

project in the absence of substantial evidence in the record with respect to how effective a body of unknown composition, with some presumed subjective or discretionary enforcement authority, and undefined accountability or responsibility will be in managing the WDMP to avoid harm to salmonids.

GROUNDWATER

Groundwater mapping has been provided by Stetson Engineering. Importantly, this firm notes that, "[s]ite specific investigations will be needed to verify the existence of subterranean streams or potential stream depletion areas." Reliance on the maps alone is not sufficient to determine the potential of a well to draw down a creek. Pump down tests with sufficient monitoring must be required to ensure that habitat is not compromised. (Potential Streamflow Depletion Areas, Stetson Engineers, Inc. Note: Because the delineated areas on this map were based on information readily available at the time of its development, this map does not claim to represent all of the subterranean streams or potential stream depletion areas that exist in the area. Site specific investigations will be needed to verify the existence of subterranean streams or potential stream depletion areas.) Frost pumping of the state's water must not be permitted until the landowner has demonstrated that sustained pumping on a repeated basis cannot harm the listed species.

Thank you for the opportunity to comment on this important regulation.

Kimberly Burr

Green Valley Creek Restoration Volunteer





