SUPERIOR COURT OF CALIFORNIA
COUNTY OF MENDOCINO

RUDOLPH LIGHT AND LINDA LIGHT, **Petitioners,** **vs.** **THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, et al.,** **Respondents.**	**Case No. SCUK CVG 11 59127** **ORDER GRANTING PETITION FOR WRIT OF MANDATE IN CONSOLIDATED ACTIONS**
RUSSIAN RIVER WATER USERS FOR THE ENVIRONMENT; ALLEN NELSON; BILLY MUNSELLE; ROBERT TERRY ROSETTI; REDWOOD RANCH AND VINEYARDS, LP. **Petitioners,** **vs.** **THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, et al.,** **Respondents.**	

ENDORSED-FILED

SEP 26 2012

CLERK OF MENDOCINO COUNTY SUPERIOR COURT OF CALIFORNIA

I. INTRODUCTION

Petitioners Rudolph and Linda Light (hereafter "Light Petitioners") and Russian River Water Users for the Environment, Allen Nelson, Billy Munsell, Robert and Terry Rosetti, and Redwood Ranch and Vineyards, L.P. (hereafter "RRWUE") (collectively "Petitioners") separately filed writs of mandate seeking an order from the Superior Court declaring invalid Section 862 of Title 23 of the California Code of Regulations. The State Water Resources Control Board (hereafter "SWRCB") had voted to enact Section 862 on September 20, 2011, with an effective date of March 14, 2012. The cases were consolidated for trial in this court.

Petitioners attack the constitutionality of Section 862 on a number of different grounds. Petitioners also claim the SWRCB's jurisdiction was exceeded by enacting a regulation of this scope. Petitioners urge the court to invalidate Section 862 using its authority under Government Code Section 11350. Finally Petitioners claim the SWRCB violated the California Environmental Quality Act (hereafter "CEQA").

In a number of respects, the court agrees with Petitioners. Consequently, and for reasons fully explained herein, the court grants the consolidated petitions for writ of mandate and hereby declares Section 862 to be constitutionally void. The court concludes the SWRCB exceeded its authority by adopting a regulation encompassing all classes of water rights holders, including riparians, and failing to make the necessary specific findings as to those water users. The court also invokes its authority under Government Code Section 11350(b) and declares Section 862 to be invalid because there is not substantial evidence in the record to show the regulation, as enacted, is necessary.

II. FINDINGS OF FACT[1]

A. The Russian River

The Russian River Watershed consists of 1485 square miles of land and river. (AR 3377.) For a distance of approximately 110 miles, the river flows in a southwestern direction through Mendocino and Sonoma counties, eventually reaching the Pacific Ocean. (AR 1715.) The watershed includes numerous tributaries in both counties that feed into the river.

Water is diverted from the Russian River and its tributaries for a variety of purposes including municipal, industrial, domestic, and agricultural use. (ER 3876.) The Sonoma County Water Agency (hereafter "SCWA"), the Mendocino County Russian River Flood Control and Water Conservation Improvement District (hereafter "RRFC&WCID"), as well as the Redwood Valley County Water District each hold water rights to divert for municipal, industrial and irrigation use. (AR 3876.)

Numerous other public and private entities divert water from the Russian River and its tributaries as well. There are about 1778 water rights, water right claims, and pending water right applications in the Russian River watershed. Of this, 533 water records (roughly 30%) provide for the diversion of water for frost protection use. (AR 3876.)

B. Coho and Chinook salmon and Steelhead trout

Coho and Chinook salmon as well as steelhead trout are protected species under the Endangered Species Act. (AR 2.) Coho salmon are at risk of extinction (AR 241.) The remaining species have a low probability for viability. (AR 241.) Any takings of these species are against the law. Section 9(a)(1) of the Endangered Species Act makes it unlawful for any person to "take" any endangered or threatened species. "Take" in this context includes harming, wounding, or killing. (AR 2.)

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[1]The court's factual findings are taken from the record developed at the administrative level. That record consists of over 15,000 pages of written material and over 15 hours of videotaped testimony from the April 2009, November 2009, January 2010, and September 2011 hearings. To assist the trial court, the parties prepared an appendix of documents which they jointly considered relevant. Due to the importance and complexity of the issues presented, however, the court did not limit its review solely to the appendix and the documents therein. The court reviewed the complete record and watched all video taped hearings held on the above referenced dates as well as the NMFS video of stream footage.

Coho, Chinook and steelhead all spawn and rear in the Russian River water basin. (AR 2.) Collectively, these species are referred to as "salmonids." (AR 230.) According to the National Marine Fisheries Service (hereafter "NMFS"), there is 1778 miles of potential salmonid habitat in the Russian River. (AR 232.) Salmonids in both the smolt and fry stages are susceptible to stranding both from natural causes and unnatural causes. (AR 237.)

There is overlap between vineyards and the salmonid habitat. As of 2008 there was 60,640 acres of vineyard in the Russian River water basin. Seventy percent (70%) of these acres are within 300 feet of the salmonid habitat, and twenty-five percent (25%) of the salmonid habitat is within 300 feet of a vineyard. (AR 233.)

"Stranding" is the separation of fish from flowing surface water. (AR 3903.) Juvenile salmonids are more vulnerable to stranding in the spring due to their size. They can become stranded over gravel bars or trapped in off-channel habitat. (AR 5620.) Stranding can occur as a result of natural declines in flow, municipal or industrial water withdrawals, and agricultural withdrawals. (AR 3903; *see also,* 2008 Biologic Opinion Prepared by U.S. Army Corp of Engineers and NFMS at AR 4758-4760.)

Over time, the health of the spawning and rearing habitat has declined. (AR 240.) There are many factors contributing to this situation. In fact, NMFS has identified 22 of the 35 salmonid habitat attributes are limiting reproduction and survival. (AR 240.) One of the top four stressors is water diversion and impoundment. (AR 240.) NMFS has identified specific risks to salmonids from low in-stream flow: 1) increased risk of stranding of fish in edge water habitats: 2) decreased cover exposing the species to predators; and 3) possible interference with late end of spawning season. (NMFS spokesperson AR Disc #5.)

Ensuring the viability of these species is not only a public trust mandate but also a significant element in the environmental and economic stability for Sonoma and Mendocino counties.

C. April 20, 2008

On April 20, 2008, two incidents of juvenile salmonid strandings in the Russian River watershed were reported to the NMFS. One incident occurred in Mendocino County on the main stem of the Russian River near Hopland. A NMFS biologist documented the stranding of ten (10) steel head fry in this location. (AR 2398.) The other stranding incident occurred in a tributary called Felta Creek in Sonoma County. NFMS documented thirty-one (31) stranded juvenile salmonids. These were the only documented salmonid strandings in the watershed in the spring of 2008. (AR 828, 2397

The strandings on April 20, 2008, were a result of a "perfect storm" of several coinciding conditions during an unusually cold and dry spring. The record shows that "the [2008] frost season was the worst frost season in the history of the upper Russian River." (Lee Howard, President of RRFC&WCID. AR Disc #2 and AR 33-34.).

There was virtually no rain during March and April that year. March was the driest on record with no recorded rain fall at all. (AR 823-831.) The lack of rain resulted in severely low base stream flows in both the main stem and the tributaries of the Russian River. Base flows measured by the SCWA were well below average at the time of these events. In other years, the average March-April flow measured at the Hopland gage is 976 cubic feet/second (cfs). (AR 828.) Flows in April 2008 were barely above the minimum in-stream flows required by [SWRCB] Decision 1610, peaking at 215 cfs and rarely exceeding 200 cfs. In-stream flow on April 20, 2008, was only 168 cfs. (AR 828.)

Little or no rainfall also results in very dry air. On April 20, 2008, there was extremely low humidity. Low temperatures and low humidity produce the most severe type of frost events called advective frosts. (Glen McGourty, Mendocino County Farm Advisor, University of California Cooperative – AR 138-196.). Advective frosts are caused by large cold air masses, usually accompanied by wind and low humidity. (AR 151.) The air actually may become colder with elevation and temperatures can drop as low as 21 degrees. Most frost events in Mendocino County and many in Sonoma County are advective freezes.

The spring of 2008 also brought very cold temperatures to the region. In fact, the 2008 frost season was the coldest in over thirty years with freezing temperatures on at least twenty (20) nights in late March and early April. (AR 828.) An average spring in this area has 5-6 nights of freezing temperatures. (AR 300.) On April 20, 2008, a severe advective frost of unusually long duration arrived in the region necessitating grape growers and pear growers to use water for frost protection or lose their crops. On this occasion, the temperature dropped to 23 degrees Fahrenheit. (McCourty AR Disc #2.) For those in water management, "the combination of record cold and reduced base flows set the stage for an operational worst case scenario." (AR 33-34.)

D. Frost Protection

Under California law, frost protection is a recognized beneficial use of water. (Cal. Code Regs. Tit. 23, §662.5.) Many of the farmers in the region frost protect their crops using an overhead sprinkler system supplied by water obtained from direct diversions from the Russian River or from a tributary thereto. Diversions are sometimes supplemented with water from a storage pond or from a well. Due to the lack of rain, by late April 2008, storage ponds had largely been depleted. (Koball, AR Disc #3; AR297-98.) Some farmers rely solely on groundwater for frost protection. Section 862 applies to groundwater users even though not all aquifers are connected to the river; and even of those that are, the SWRCB has no information about the extent to which there is a correlation between drawing water from an aquifer and a corresponding instantaneous reduction in the river or tributary.

Using overhead sprinklers to frost protect is the most effective way to protect grape vines and pear trees during times of severe advective frosts.[2] (McCourty, Farm Advisor to Lake and Mendocino Counties from the University of California Cooperative and the Department of Agriculture, testified before the SWRCB in April of 2009 and again in November 2009.) Frost protection is necessary to protect the green tissue on the plant from frost damage. Thirty minutes

[2] Overhead sprinklers serve other purposes such as cover crop maintenance which is a means of controlling erosion and insects. (Koball, April 7, 2009, AR Disc #3, AR297.)

below 32 degrees Fahrenheit results in crop damage. (McCourty, April 2009.) Buds are especially susceptible to frost damage. and frost damage can result in complete crop loss. Crop loss during frost season usually cannot be remedied by replacement crops; those vines that are damaged are lost for the entire year.

There are passive methods of frost protection including site selection, cover crop management, adjusting the time and method of pruning, and early spring irrigation. These management techniques are inadequate for advective freezes such as that on April 20, 2008. There are synthetic sprays available for use in lieu of water. Copper is the most effective but it is toxic to aquatic life. It is not widely used for frost protection because in the spring-time it runs or seeps into the river or groundwater, causing toxicity to fish and other life.

Other active methods of frost protection include wind machines and heaters. Wind machines are futile when temperatures drop below 28 degrees because their effectiveness depends on the presence of warm air which only occurs during radiation frosts. (AR 170-171; *see also* Pete Opatz AR Disc #5 crop failure in Sonoma County on April 20, 2008 in vineyard using wind machines; and AR 1555-57.) Heaters are not commonly used because they rely on diesel fuel which is expensive and negatively affects air quality. Air Quality Control Districts discourage and, under certain conditions, prohibit their use due to the compromise in air quality. They are also ineffective in advective freezes. (AR 297.)

Sprinklers are an effective form of frost protection because when the water freezes on the plant it forms a protective coating around the vine. When the water turns from a liquid to a solid during freezing, heat is liberated and it protects the vine. A temperature of 32 degrees is maintained within the coating as long as there is a mixture of water and ice dripping off the plant. Depending on the dew point, sprinklers often must be turned on before the air temperature reaches 32 degrees and left on after the air temperature returns above 32 degrees. In summary, using sprinklers for frost protection is the best method available to defend against advective frosts in the Russian River watershed. (AR Discs #2 – 5.) The record at the agency level conclusively shows that using water to frost protect is an essential element of vineyard and orchard management in the upper river and middle river basins because it is the only method available that is effective in advective frosts.

Without water to frost protect, complete crop loss due to frost damage would be far more prevalent in certain areas of Sonoma County and much of Mendocino County. Crop failure due to frost damage has measurable and potentially catastrophic economic consequences to the individual farmer, employees and county revenues. (*See* Dyson, "Economics of Advective Frost Damage in Sonoma County," March 2010, AR 1555-1557.)

Sean White, General Manager of the Mendocino County RRRC&WCID and a fisheries biologist, confirmed that overhead sprinklers have proven to be the most effective in the Russian River Water basin where there are so many advective frosts. (April 2009, AR Disc #3.) There was no evidence presented at the agency level contravening this conclusion, nor the severe negative economic consequences from wide-spread crop loss from frost damage.

This method of frost protection uses a significant amount of water for a crop that is otherwise very water efficient. (McCourty, Nov. 9, 2009 AR Disc #5[3].) On April 20, 2008, the low humidity and fast moving cold front resulted in temperatures dropping very fast and remaining well below freezing for a long time. The Agricultural Advisor for Mendocino County advised farmers to turn on sprinklers at 37 degrees when 34 degrees is average. This resulted in roughly twice the amount of water being consumed in Mendocino County as compared to an average frost event. (McCourty, April 2009, AR Disc #2.)

E. Water Management and the SCWA

Water management decisions influenced developments on April 20, 2008 as well. As noted above, the Russian River is a managed river. In-stream flow is not determined solely on natural flow and natural regeneration. In fact, in-stream flow is managed by the SCWA. There are two dams on the Russian River relevant to this case. Coyote Dam was built in 1959 creating the reservoir at Lake Mendocino, north of Ukiah. SCWA manages water releases from Coyote Dam. Warm Springs Dam created the reservoir at Lake Sonoma, which is located at the north end of the Dry Creek Valley in Sonoma County. It too is operated by the SCWA.

In the upper basin of the Russian River the flow levels in the main stem are controlled by the SCWA's water releases from Lake Mendocino. SCWA is legally responsible for maintaining minimum in-stream flows set by SWRCB decision 1610. (AR 283-284.) Flow in tributaries is not affected in the same manner. (Sean White, General Manager of RRFC&WCID, and Pam Jeane, SCWA Chief Engineer, Coyote Valley Dam, April 7, 2009, AR Disc #3.)[4]

On the morning of April 20, 2008, when the temperature started to drop precipitously, SCWA released insufficient amounts of water from Lake Mendocino. Larger advance releases were needed to compensate for the already very dry conditions, the approaching cold front, and the expected need to frost protect. The failure to release more water occurred in part because the dam at Lake Mendocino is operated in Santa Rosa--many miles to the south where weather patterns are much different. In Santa Rosa, operators were unaware of the approaching severe frost and therefore the dam operators did not have time to increase water releases before the farmers turned on their sprinklers. Some estimated that the delay due to the lack of accurate information exceeded 24 hours.

In the spring of 2008, SCWA Coyote Dam operators had only one source of information in the upper Russian River basin to assess in-stream flows. There was one electronic stream flow gage at Hopland, located approximately 14 miles south of the dam. By the time a drop in stream flow due to frost protection was measured at the Hopland station, it was too late to adequately

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[3] UC Cooperative Extension Ag Advisor McGourty testified that since 1985, water consumption in the upper basin of the Russian River watershed has been static even though there are more grapes under production. This is explained largely because agriculture in the upper basin has converted from pear orchards to grape vineyards. Grape vineyards use half the amount of water for irrigation and frost protection than pears. (AR Disc #5, 1:40-45.)

[4] The RRFC&WCID store approximately 8,000 acre feet of water in Lake Mendocino in conjunction with SWCA. RRFC&WCID is the agricultural and municipal water rights holder for the upper Russian River basin. The District provides irrigation water to industry, approximately 4,000 acres of agriculture, as well as water for municipalities such as the City of Ukiah. (AR Disc #3.)

respond because water released from Coyote Dam takes 10-12 hours to travel to the Hopland station. Therefore, there was a lag time *before releasing* water at the dam due to the lack of timely information about conditions, and even more lag time after the release simply because it takes time for the water to travel the 14 miles of river channel.

The slow response by SCWA at Coyote Dam on April 20, 2008, was a significant factor adding to the problem of critically low stream flows due to the dry conditions in the Russian River Basin. Pam Jeane, Chief Engineer for the SCWA at Lake Mendocino, testified that "the biggest issue with regard to frost protection and maintaining in-stream flows is this issue of being reactive as opposed to proactive" about water demand. (April 2009, Disc #3, AR 287.) She also underscored that in 2008 there was an insufficient number of in-stream flow gages throughout the river system both north of Hopland and south into Sonoma County. This prevented SCWA from being proactive in advance of freezing weather.

As set forth previously, temperatures plummeted during the early morning hours of April 20, 2008, and the farmers began to frost protect to save their crops. U.C. Agricultural Advisor McCourty testified that at 20 or 21 degrees farmers cannot save their crops even with frost protection. On that particular morning temperatures dropped to 23 degrees and the associated frost posed a critical threat to crop survival. When the farmers turned on the sprinklers, there was a resulting instantaneous draw down in water as measured at the Hopland gage. The draw-down was measured as a reduction of 83 cfs. The in-stream flow prior to frost protection pumping was only 168 cfs. (AR 826-28.) The flow dropped by nearly half at that location. This was an unprecedented set of circumstances.

F. The Cause of the Strandings

In sum, the court finds that the combination of 1) the severe cold temperatures on April 20, 2008; 2) the low humidity in the air, 3) the above average number of preceding frost events that spring consuming any prior storage; 4) the duration of this and prior frost events; 5) the far below average in-stream flow resulting from the dry conditions; 6) the failure of SCWA to timely release water to compensate for the incoming freezing weather; and 7) the commencement of frost protection by farmers; resulted in the stranding of the salmonids near Hopland. No one factor alone caused the strandings: it was the culmination of these unique conditions.

Thirty-one juvenile salmonids were also found stranded in Felta Creek, a tributary to the Russian River located in Sonoma County. (AR 3391.) This stranding occurred for the same reasons except the flow in the tributary was not affected by releases from either of the dams. The administrative record shows this stranding happened near a single vineyard using direct diversion to frost protect four acres of grape vines. This stranding was a result of dry conditions, record cold air, and the farmer's direct diversion of water from the tributary.

These were the only two documented strandings of salmonids during the 2008 frost protection season. No strandings were documented during the 2009, 2010, or 2011 frost seasons.

The two documented strandings on April 20, 2008 eventually caused the SWRCB to invoke its rule-making process which culminated in the passage of Section 862.[5]

G. Mendocino and Sonoma County Vineyards

Grape vineyards represent a significant percentage of the economy in both Mendocino and Sonoma counties. Both counties measure the value of grape production not only in terms of the crop itself, but also in terms of wine production. Vineyards and grape growing also contribute to tourism, tax revenue, and real estate stability.

In Mendocino County, the 2009 grape crop was estimated at $78 million. (AR 3905.) It is the most valuable agricultural commodity in the county. (McCourty, April 2009, AR Disc #2.) Pears and other crops bring in $30-40 million. There are 29,000 jobs in Mendocino County. Over 1,000 of those jobs are in the wine industry, which is valued at $220 million.

In Sonoma County, there are over 60,000 acres of vineyards. Approximately 48,000 of those acres are in the Russian River watershed. (Opatz, AR Disc #5.) The average vineyard size is 35 acres. In 2009, the grape crop in Sonoma County brought in $465 million. (AR 3905.)

It is unknown the percentage of vineyards in the Russian River water basin that irrigate for frost protection. The proportion of vineyards that rely on surface water diversions for frost protection is also unknown. (AR 234.) The percentage of ground water use that has any effect on the river is also unknown. Hence, there exists "the need for better monitoring and recording of that type of information . . . to better understand the risk." (NMFS-April 2009 AR Disc #3.)

H. Post April 2008

Immediately after the discovery of the two April 2008 incidents of salmonid strandings, NMFS instigated the formation of the Frost Protection Task Force (hereafter "Task Force"). The Task Force included government agencies like NMFS, the SWRCB, the Department of Fish & Game, SCWA, and the RRFC&WCID, several non-profits such as Trout Unlimited and Fish Friendly Farming, and representatives of the agricultural community. That group developed draft protocols to provide the SCWA with more accurate frost forecast information prior to the onset of frost protection. This forecasting information ultimately improved decision making regarding water releases from Coyote Dam in 2009. The Task Force collapsed when NMFS unexpectedly sent a letter on February 19, 2009, to SWRCB asking for the implementation of emergency regulations and for a prohibition on frost protection for the upcoming frost season. (AR Discs #2 & 3.) NFMS's request surprised many members of the Task Force, undermined its functioning, and caused it to disband.

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[5] A model was proposed by NMFS in March 2011 from which to extrapolate from the documented strandings the number of actual strandings. (AR 2397.) The model is flawed for a variety of reasons. The most significant is the admitted lack of data or science to support the conclusions. (AR 3401-3404.) The premises used in the model are nothing more than unverified assumptions without scientific data or other factual support. The model does not include a statistical component of naturally occurring strandings in the same areas for comparative analysis. It also does not address the effect of rapid flow reductions from diverters other than farmers. For these reasons, it was an abuse of discretion if relied upon. Importantly, juvenile salmonid strandings have been documented in the watershed in times other than frost protection. (*See* Affidavit on Stream Flow fluctuations AR 3542-3547.)

This letter triggered a series of hearings before the SWRCB. These hearings were conducted on April 7, 2009, November 18, 2009, January 19, 2010, and September 20, 2011. At the hearings members of the SWRCB heard hours of testimony and public comment about salmonids, farming, frost protection, water management, and the general condition of the watershed. Substantial written information was provided to the Board before and between the hearings.

Between February 2009 and September 2011 (when Section 862 was eventually passed), significant advances were made to provide for more effective water management and conservation by vineyard owners in the Russian River water basin. This effort became known as the Russian River Frost Program. It was a collaborative program of grape growers in Sonoma County and Mendocino County, the respective county Farm Bureaus, the RRFC&WCID, and the California Land Stewardship Institute. The primary objective of the Program was to manage the diversion and use of water for frost protection in such a way so as to benefit the fisheries and the fish habitat, especially in times of water scarcity.

At the November 2009 hearing, representatives of the program described the corrective action already taken and other changes underway. The Upper Russian River Stewardship Alliance (hereafter "URSA") and the Middle Russian River Stewardship Alliance (hereafter "MRSA") had formed to address the unique issues present in the different parts of the watershed. The two alliances presented implementation plans for 1) the Upper Russian River (Hopland and Ukiah growing areas) and 2) the Middle Russian River Watershed within Sonoma County (Alexander Valley, Dry Creek Valley, Knights Valley, and Russian River Valley growing areas). (AR Disc #5, representative of Russian River Frost Program: AR 823-38.)

In the upper basin of the watershed, between April 2009 and November 2009, a new telemetric flow gage had been installed at Talmage, California. Talmage is further up-river and therefore much closer to the Coyote Dam than the gage at Hopland. This allowed SCWA to receive instantaneous flow data at a strategic measuring point to better determine anticipated demand. The lag time for SCWA was reduced from ten hours to two hours. Telemetric meters were also installed by several individual growers at their points of diversion. These telemetric meters supply instantaneous information to SCWA that informs the agency when frost protection is commencing. Frost forecasting was improved both from a technological and scientific perspective. Communication of forecasting information between RRFCD, SCWA, and farmers had been improved in advance of the 2009 frost protection season. Improved frost forecasting allowed SCWA to have more timely and detailed information about approaching frosts and inform growers when compensatory releases would occur. (AR 845.)

The Pumping Coordination Protocol developed between SCWA and RRFCD&CID was used during the 2009 frost season. This protocol enabled SCWA to be more proactive in compensatory releases of water. SCWA was better informed about when freezing air was coming, and when the farmers would need to frost protect. This resulted in far less of an overall draw down from the river in spring 2009.

Most importantly, several new off stream storage ponds were funded and under construction by vineyard owners in the upper river basin during this same time. Off stream

storage is the most viable alternative source of water for frost protection. The cumulative effect of these projects resulted in the conversion of 721 acres of vineyards to off stream storage systems that previously relied on direct diversion for frost protection. The reduction in the rate of diversion from the river during frost season because of the conversion to storage was estimated at 87 cfs; more than compensating for the record breaking 83 cfs draw down that occurred on April 20, 2008.

Lower in the watershed in Sonoma County, the scope, frequency, and type of frost protection methods used is much different than in Mendocino County. Water is used less universally and diversions for frost protection do not affect the main stem of the Russian River due to geological differences in that part of the basin. In addition, the air temperatures do not drop as fast or as low – it simply does not get as cold. Only three tributaries of the thirteen in the middle basin frost protect at all. (AR 861, McIlroy, November 2009 AR Disc #5.) Because of these different conditions, MRSA focused on development of water use and conservation plans by growers in these tributaries. MRSA had begun mapping diversions in these tributaries and exploring diversion coordination between growers. The Sonoma County Farm Bureau and the Winegrowers Alliance's mandatory membership structure provided reasonable assurance of farmer cooperation and participation in the MRSA program. (AR Disc #5, Opatz testimony; *see also* Opatz testimony, January 2010, relating statistics on grower participation.) [6]

Of note, MRSA had taken measures to prevent the reoccurrence of salmonid strandings. At Felta Creek, the vineyard owner removed the diversion pump from the tributary. The grower built a water storage system supplied by off-channel ground water pumped through a well. The grower intended to use that water exclusively for frost protection in the future thus eliminating risk to salmonids. (AR 827; AR Disc #5.)

Matthew Deitch, PhD, hired by the Russian River Property Owners Association, evaluated the impacts on the Russian River from groundwater pumping in the Alexander Valley. Prior to the hearing in November 2009, the association had installed stream flow gages at the north end and south end of Alexander Valley to better understand the effect on the main stem of the river when diverting ground water for frost protection in that area. This monitoring showed that stream flow recession does not occur simultaneous with groundwater pumping associated with frost protection. (Russian River Property Owners Association, AR Disc #5 at 1:52.) The Association pledged to continue their study of aquifer regeneration and the effects of groundwater pumping on tributaries in Alexander Valley. The Association also voiced its support of MRSA and URSA.

[6] Laurel Marcus, a recipient of the 1993 State Government award and who is recognized in the fields of wetlands restoration and fish-friendly farming techniques, spoke on behalf of the California Land Stewardship Institute (hereafter "CLSI") on April 9, 2009, November 18, 2009, and January 10, 2010. She explained the climate and topographical differences between the upper Russian River basin (Hopland and north) and the middle and lower basins where water for frost protection is used far less widely and far less frequently. She also explained that there are frost zones in the different areas that call for different analysis. (AR Disc #5; AR 872-877.) She emphasized that the installation of Coyote Dam in 1959 changed fundamentally the river's channel and consequently its in-stream flow patterns. She testified there is an inadequate basis of data about current stream flow conditions to best understand how to protect the fish. She advocated for a more scientific study by non-biased professionals to assimilate the myriad of factors affecting stream flow in the different parts of the watershed, including tributaries. CLSI had committed to assisting the URSA and MRSA plans and urged the SWRCB to conduct further study before enacting the regulation.

I. The Adoption of Section 862

Prior to the January 2010 hearing, a proposed regulation very similar to the regulation ultimately adopted was released to the public. At the hearing the SWRCB made clear its intent at passing a regulation and forwarding it to the Office of Administrative Law. Thereafter, notice was given of the preparation of an Environmental Impact Report (EIR) with the SWRCB being the lead agency. (AR 1714.) A draft EIR was prepared and circulated in May 2011. (AR 2596.) The revised EIR was released in September 2011, after sufficient comment period. On September 20, 2011, Section 862 was passed unanimously by three members of the SWRCB..

Section 862 acknowledges that water used for frost protection is a recognized beneficial use under Section 671 of the California Code of Regulations. However, it states that there is a danger that high instantaneous demand for water for frost protection by numerous vineyardists and others may contribute to a rapid decrease in in-stream stage that could result in salmonid stranding. For this reason, Section 862 provides that as of March 14, 2012, all diversions of water from the Russian River watershed (with exceptions such as above Coyote Dam where salmon and steel head do not travel), including all ground water, is per se', an unreasonable use of water and prohibited. Pursuant to the regulation, water for frost protection can only be used if the diverter or groundwater user is participating in a Water Demand Management Program (hereafter "WDMP") that has been approved by the SWRCB. There are numerous conditions to approval of a WDMP which are discussed at length herein. Without an approved WDMP governed by a board capable of enforcing Section 862, and a corrective action plan to prevent salmonid strandings, using water for frost protection is forbidden. All water rights holders, including those holding riparian, overlying, and pre-1914 appropriative rights, are encompassed within the regulation. (The full text of the regulation is attached hereto.)

According to the SWRCB's analysis in the EIR, the cost of compliance with the regulation is significant. The SWRCB estimates that the initial capital cost for a 160-acre vineyard will range between $9,700 and $17,000. The annual costs will range between $3,000 and $4,000. However, capital costs for implementing any needed corrective actions for a 160-acre vineyard will range from $236,000 to $352,000 and annual upkeep costs will range from $26,000 to $36,200. (AR 2461.) The capital costs for a 40-acre vineyard range between $59,000 and $87,800 to implement a corrective action plan with annual maintenance costs ranging from $6,500 to $9,000. (AR 2462.)

Light Petitioners are riparian rights holders in an unnamed tributary of the Russian River. They filed formal objections to the proposed regulation throughout the agency-level proceedings. (AR 3094.) The Light Petitioners are certified organic grape growers and Dr. Light is a recognized conservationist having won the John Wesley Power Stewardship Award in 2005 from the Russian River Watershed Council. (AR 3094-3162.) RRWUE and the remaining named petitioners are a collection of riparian, pre-1914 appropriative rights holders, overlying users, and licensed or permitted appropriative rights holders located in Sonoma County. All Petitioners are vineyardists in the Russian River watershed. Petitioners are all holders of vested water rights who have been and are currently exercising those rights in the Russian River watershed.

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J. Procedural History

Section 862 was formally adopted by the SWRCB on September 20, 2011. (AR 5179-5184.) On October 19, 2011, Light Petitioners filed their petition for a writ of mandate in Mendocino County Superior Court seeking to invalidate the regulation. On October 20, 2011, RRWUE filed a similar petition for a writ of mandate in Sacramento County Superior Court. On November 14, 2011; SWRCB filed a motion to transfer the Light Petition to Sacramento County Superior Court in order to consolidate the two actions. Both sets of petitioners thereafter filed motions for a preliminary injunction or stay of the regulation pending litigation in the respective courts.

On February 2, 2012, Judge Frawley of the Sacramento County Superior Court issued an order denying the State's request to transfer and consolidate the two actions in Sacramento County. Instead, the court ordered the RRWUE petition transferred to Mendocino County and consolidated with the Light Petition in this court. Earlier that same day, this court issued an order granting the Lights Petitioners' request for a stay.

The court heard argument on June 28, 2012 and the court's decision follows.[7]

III. MEMORANDUM OF DECISION

A. Section 862 Is An Improper Exercise Of The Board's Authority

1. Standard of Review

Substantial briefing and argument was devoted to the appropriate standard of review. Respondent argued that this court's review is strictly a review of a quasi-legislative document. This court disagrees.

The standard of review to be applied in these matters is complicated by the fact that in adopting the regulation, the SWRCB was exercising both its quasi-legislative and quasi-judicial functions which invoke different standards of review.[8] "Although the two functions are merged under a single board, each has distinct attributes." *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d at 112 (hereafter "*SWRCB.*")

A legislative function involves the application of a rule in all future cases, whereas a quasi-judicial action is the determination of specific rights under existing law with regard to a specific fact situation. *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.App.3d 723. Section 862 is a new rule affecting all frost protection water users in the Russian River watershed regardless of the nature of their property right. (*See* §862(a).) As such, Section 862 must be viewed as a quasi-legislative document. However, when the SWRCB decides to modify an

[7] Respondent filed objections to Petitioners RRWUE Request for Judicial Notice of certain documents. The court ruled orally on the objection at the hearing in June and will not repeat that ruling herein.

[8] Water Code §174 gives the SWRCB both adjudicatory and regulatory authority.

existing water rights permit. it is exercising its quasi-judicial powers. (*Temescal Water Co. v. Dept. of Public Works* (1955) 44 Cal.2d 90, 100-106; *SWRCB, supra,* 182 Cal.App.3d at 113-114.) Section 862 also modifies existing appropriative licenses and permits by conditioning each of them on compliance with the regulation. (*See* §862(e)("compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River system for purposes of frost protection".)

In modifying existing water permits and licenses as provided in subdivision (e), the SWRCB was performing its adjudicatory function and review is governed under the provisions of Code of Civil Procedure §1094.5. (*Temescal Water Co., supra* at p. 100; *SWRCB, supra,* 182 Cal.App.3d at 113; *Mountain Defense League, supra,* at 113-114; *Bank of America v. State Water Resources Control Bd.* (1974) 42 Cal.App.3d 198, 206.)

Where an administrative agency acts in both its quasi-legislative capacity and its quasi-judicial capacity, and reaches the required determination in a single decision, review of that determination is conducted under the more stringent standard for quasi-judicial acts. *Mountain Defense League, supra,* 65 Cal. App.3d at 729. In *U.S. v. SWRCB, supra,* 182 Cal.App.3d at 114, the appellate court observed that the SWRCB had exercised its dual functions in a single proceeding but it had issued separate determinations reflected in two separate documents. It therefore applied the respectively applicable standard of review for the two decisions. Here, there is only one document wherein the SWRCB exercised both functions. Therefore, this court will apply the more stringent standard for quasi-judicial acts set forth in Section 1094.5.

Where Section 1094.5 applies, the inquiry "shall extend to the questions whether the [Board] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [SWRCB] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc. § 1094.5, subd. (b).) "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines the findings are not supported by substantial evidence in light of the whole record." (*Id.*, subd. (c).)

The trial court is authorized by law to exercise its independent judgment on the evidence when "the right or interest affected by the administrative decision is a 'vested' one." (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 721, quoting *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 914.)

> If the right affected is 'vested' the decision is reviewed by means of a limited trial de novo. There, the trial examines the record for errors of law AND exercises its independent judgment upon the weight of the evidence before the administrative agency with any further evidence properly admitted by the court. If, on the other hand, the right is not 'vested' the trial court's scope of review is confined to matters of law appearing on the record of the

> administrative proceeding, and accordingly its review of the evidence produced below is limited to a *determination of whether it is legally sufficient to sustain the decision.*

(*State Water Bd. Cases, supra,* 136 Cal. App.4th at 721) (emphasis in original.) Under either scenario, questions of law are subject to *de novo* review. (*Id.* at 722.)

> The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with non-reviewability at one end and independent judgment at the other. Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum. Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, 'The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.'

(*State Water Bd. Cases, supra,* 136 Cal.App.4th at 722-23, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8) (citations and quotations omitted.)

Based on the foregoing, this court will apply its independent judgment in conducting its review of the SWRCB's exercise of its powers. The court uses its independent judgment in interpreting the various Water Code provisions at issue as well as the applicable case law and gives deference to the SWRCB's interpretation only if the SWRCB shows that such deference is warranted by the circumstances.

2. California Water Rights

It is a fundamental principle of water law in California that one may not withdraw water from its source without first acquiring "water rights." (§§ 102, 1052.) A "water right" is the right to *use* the water: to divert it from its natural course. *SWRCB, supra,* 182 Cal.App.3d at 100. The right of property in water is usufructuary, and it consists not so much of the fluid itself as the advantage of its use." (*Id.* at 100-102, citing *Eddy v. Simpson* (1853) 3 Cal. 249, 252.) The law is clear that one does not own water, but the right to its use. *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 554-555; *see generally* Hutchins, The Cal. Law of Water Rights (1956) pp. 36-38; 1 Rogers & Nichols, Water for Cal. (1967) p. 191.)

Once rights to use water are acquired, they become vested property rights. This is an important principle to have in mind in the instant case. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation. *SWRCB, supra,* 182 Cal.App.3d at 101, citing *Ivanhoe Irr. Dist. v. All Parties* (1957) 47 Cal.2d 597, 623, *rev'd. on other grounds in Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275; *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 752-754.

(a) Surface Water

Surface water consists of all water flowing above the surface or in subterranean streams flowing through known and defined channels. (Wat. Code §1200.) California operates under a hybrid system of water rights which recognizes both doctrines of riparian rights and appropriation rights. (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. All landowners bordering the stream are vested with a common ownership of the waters of the stream, and in times of shortage all riparians must share in the shortage proportionately. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 559-560.) Riparian rights are limited by the concept of reasonable and beneficial use, and they may not be exercised in a manner that is inconsistent with the policy declaration of Article X, Section 2, of the California Constitution. (*In re Waters of Long Valley Creek System* (1979) 25 Cal.3d 339.) Riparians have no rights to a specific amount of water. (SWRCB, 182 Cal.App.3d at104.)

The 1913 Water Commission Act created a Water Commission and provided a procedure for the appropriation of water for useful and beneficial purposes. Its main purpose was to serve as an orderly method for the appropriation of unappropriated waters. In 1923, the statutory procedure became the exclusive means of acquiring appropriative rights. Since then, anyone seeking to obtain an appropriative water right is required to file an application with what is now known as the SWRCB. (*Shirokow, supra* at 301; Wat. Code §1225.) In issuing appropriation permits, the SWRCB has two primary duties: 1) to determine if surplus water is available; and 2) to protect the public interest. (*SWRCB, supra,* 182 Cal.App.3d at 102.)

The doctrine of prior appropriation contemplates the diversion of water and applies to "any taking of water for other than riparian or overlying uses." (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [and cases there cited.) Under the prior appropriation doctrine, one who actually diverts and beneficially uses water obtains the continued right to do so, so long as the water is surplus to the needs of riparians and earlier, or prior, appropriators. (Wat. Code §1240; *Shirokow, supra,* 26 Cal.3d at 308.)

Appropriative water rights are divided into two general categories: pre-1914 appropriative rights and permitted or licensed water rights. Prior to the Water Commission Act of 1913, one could acquire the right to divert water by simply diverting it and putting it to use. (*Shirokow, supra,* at 308.) "These rights are referred to as "pre-1914 rights." They are not subject to the statutory licensing procedure set forth in the Water Code.

The California constitution protects appropriators, but only to the extent the appropriator is lawfully entitled to the water. (Art. X, §2.)[9] The rights not subject to the statutory appropriation procedures are narrowly circumscribed–they include only riparian rights and those which have been otherwise appropriated prior to December 19, 1914. *Shirokow, supra,* at 309.

As such, riparian rights are superior to appropriative rights. (*El Dorado Irrigation. District v. State Water Resources Control Board ("El Dorado")* (2006) 142 Cal.App.4th 937, 960-961.) Between appropriators, the rule is "first in time, first in right." *Miller & Lux, Inc. v. Tulare Lake Basin Water Storage District* (1933) 219 Cal.41, 46. The unique feature of the appropriative water rights doctrine is the priority system: those with more senior rights are entitled to fulfill their needs before a junior appropriator is entitled to use any water. (*El Dorado, supra,* at 960.)

(b) Ground Water

Ground water rights are divided into two categories: overlying and appropriative. Overlying rights are akin to riparian rights in surface water use and an appropriative ground water right is similar to an appropriative surface water right. In other words, overlying ground water rights are superior to appropriative ground water rights. (*City of Pasadena v. City of Alhambra,* (1948) 33 Cal.2d 908 926.)

A landowner overlying a groundwater basin has a right to use the percolating groundwater of the basin beneath his/her lands for reasonable beneficial uses on the overlying land. The right is based on the ownership of the land and is appurtenant thereto. No priority is given to one overlyer's rights as against any other overlyer, regardless of when the rights are exercised. (*City of Barstow v. Mojave Water Dist.* (2000) 23 Cal.4th 1224, 1240.)

As between overlying owners, the rights, like those of riparians, are correlative: each may use only his or her reasonable share when water is insufficient to meet the needs of all. Each overlying landowner must reduce his or her extractions proportionately when groundwater supplies cannot provide enough water for the cumulative, reasonable, overlying uses of each overlying landowner. (*Wright v. Goleta Water Dist.*, (1985) 174 Cal.App.3d 74, 84.) Absent court order or adjudication under statute, the overlyer's right to water extends to that which can be reasonably and beneficially used on the overlying land.

Groundwater appropriators are those who acquire rights to surplus water by virtue of use on non-overlying land, overlyers who use all or a portion of their groundwater on lands that do no overlie the groundwater basin, and overlying municipalities who uses all available groundwater for municipal purposes. (*San Bernadino v. Riverside* (1921) 186 Cal. 7, 25.) As between appropriators, however, the one first in time is the first in right, and a prior appropriator is entitled to all the water s/he reasonably and beneficially requires. (*Barstow, supra,* at 1241.)

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[9] Until the license is issued the Board may reserve jurisdiction to amend the terms of the permit. (Water Code §1394.) If the permit holder or license holder violates any of the terms or conditions or fails to apply the water to a beneficial purpose, the Board may revoke the permit or license. (Water Code §§1410, 1611.) In 1980, the SWRCB was given increased powers to enforce terms and/or conditions of a permit. (*See e.g.,* Water Code §1825)

An appropriative use of percolating groundwater has a lower priority than uses by overlying ground water users. The right to use water from a groundwater basin is, generally speaking, limited to surplus water in the basin *i.e.*, that beyond the reasonable and beneficial needs of overlyers.

(c) Reasonable Use and Beneficial Use

Superimposed on the basic principles defining water rights is the overriding constitutional limitation that water is used only as reasonably required for the beneficial use to be served. (Cal. Const. art. X, §2.) In 1928, the amendment to the state's constitution made clear that all water users, appropriators, and riparians are subject to the limitation that water use be reasonable and for a beneficial purpose. (*Peabody v. City of Vallejo,* (1935) 2 Cal.2d 351.) Article X, section 2, reads:

> It is hereby declared that because of the conditions prevailing in this State *the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented,* and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. *The right to water* or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and *shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section,* for the purposes for which such lands are, or may be made adaptable, *in view of such reasonable and beneficial uses*; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

(Emphasis added.)

The amendment declares: 1) the right to the use of water is to such water as shall be reasonably required for the beneficial use to be served; 2) such right does not extend to the waste of water; 3) such right does not include unreasonable use, unreasonable method of use, or unreasonable method of diversion of water; and 4) riparian rights attach to, but to no more than, so much of the flow as may be used consistently with the foregoing principles. (*Peabody, supra,* at p. 367; *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 749.)

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3. The SWRCB Acted in Excess of its Jurisdiction in Enacting Section 862

a) The SWRCB Exceeded Its Regulatory Authority in Enacting Section 862

As explained by the Supreme Court in *Shirokow*, the Water Commission Act and its amendments were subsequently codified in Divisions 1 and 2 of the Water Code. The powers of the original Water Commission with regard to the system of appropriation became vested in the SWRCB. (Water Code §179.) The Water Code and specifically Division 2, as expressed in Section §1050, is a legislative enactment in furtherance of the Constitution, article X, Section 2 (originally added in 1928 by amendment as art. XIV, § 3).

The *Shirokow* Court recognized that the Water Code articulates a policy consistent with that expressed in the 1928 amendment. "It provides that all water within the state is the property of the people (§102), the people have a paramount interest in the use of all water of the state (§ 104), and the state shall determine the manner in which the water of the state should be developed for the greatest public benefit (§ 105)." It further stated,

> These declarations of policy together with the comprehensive regulatory scheme set forth in section 1200 *et seq.* demonstrate a legislative intent to vest in the board expansive powers to safeguard the scarce water resources of the state.

(*Shirokow, supra*, 26 Cal.3d at 308-09.)

The context of the Court's statement is important to understand its scope. Here, in referring to the Board's "expansive powers" the Court was alluding to Water Code Section1200 and those sections following; and in particular Section 1201. Section 1200 gives the SWRCB power to grant, deny, or condition appropriative water rights, permits, and licenses in non-percolating water. [10] Section 1201 provides:

> All water flowing in any natural channel, *excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated*, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code. (emphasis added.)

"Section 1201 evinces an intention to declare the waters of the state to be subject to appropriation in so far as that can be done without interfering with vested rights." (*Shirokow, supra*, at 309, quoting *Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.) As stated succinctly in *Shirokow*, the water rights *not* subject to SWRCB's statutory appropriation procedure are riparian rights and those rights appropriated after 1914. "Any use other than those excepted is, in our view,

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[10] The broader issue before the Court in *Shirokow* was whether "prescriptive water rights" survived the 1913 Water Commission Act, and if so, whether they were in their own class of water "rights," or instead, within the class of post-1914 appropriative water rights and subject to the licensing and permitting jurisdiction of the SWRCB. The Court concluded that holders of prescriptive rights were subject to the jurisdiction of the SWRCB.

conditioned upon compliance with the appropriation procedures of division 2." (*Shirokow, supra* at 309.)

Many subsequent cases have also referenced the SWRCB's expansive powers in the arena of licensing and permitting of appropriative rights. Most recently, in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429, the Supreme Court stated.

> The SWRCB *regulates all appropriative water rights* [commencing with section 1200] acquired since 1914. An appropriative right is the right to take water from a watercourse that does not run adjacent to a landowner's property. Since 1914, all appropriative rights have been acquired through a system of permits and licenses that the SWRCB or its predecessor state entities have issued. Before 1914, appropriative rights were acquired under common law principles or earlier statutes. ***The Water Rights Division has no permitting or licensing authority over riparian or pueblo rights, or over appropriative rights acquired before 1914. The SWRCB does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held.*** *Ibid.* (emphasis added.)

Long before *Shirokow*, in *Long Valley Creek, supra,* 25 Cal.3d 339, the Supreme Court addressed to what extent the SWRCB has the power to define and limit future riparian rights pursuant to its statutory adjudication procedure under Water Code Section 2525. Unlike this case, in *Long Valley Creek* the appeal arose out of an adjudicatory proceeding to determine the rights of *all claimants* to the waters of the Long Valley Creek Stream System in Lassen, Sierra, and Plumas Counties. The stream system contained a 465-square-mile watershed, lying across the California-Nevada border. After the snow-melt runoff was depleted, there was only enough water to irrigate a small portion of the total irrigable land.

There had been prolific litigation among the various water claimants in the area since at least 1883. In the interest of resolving the conflicts that had generated such extensive litigation, nine claimants filed a petition in 1966 with the SWRCB for statutory adjudication under Water Code Section 2525 of all water rights in the stream system. Extensive investigation, public hearings, and argument was heard by the SWRCB before it entered its order determining and establishing the several rights to the water of the entire stream system.

One affected riparian rights holder appealed to the Superior Court the SWRCB's determination of rights in the stream system. For many years, he and his predecessors had irrigated 89 acres of their land. He also claimed prospective riparian rights in the creek for an additional 2.884 acres. The order of determination awarded him water for only the 89 acres as to which he was currently exercising his riparian rights; it extinguished entirely his claim as a riparian landowner to the future use of water with respect to the remaining 2.884 acres. He appealed the SWRCB's termination of his right to prospective use of the stream water.

In deciding the case, the Supreme Court recognized that a substantial body of case law concerning a riparian's prospective rights had developed in California as a result of private

lawsuits between various water rights claimants. Nevertheless strong policy concerns disfavored private litigation to resolve conflicting claims to water in a stream system.

> "T]here is a limitation inherent in the ability of private lawsuits to provide clarity, certainty, and security to water rights and water users. Thus, in *Meridian, Ltd. v. San Francisco,* (citation omitted), we stated that "This method of resolving controversies involving the rights of the users of water on the river is necessarily piecemeal, unduly expensive and obviously unsatisfactory." Our analysis of the nature of the prospective riparian right in this context therefore does not imply that the Legislature may not define or otherwise limit the scope of such a right, or delegate to the Board the authority to do so *in a statutory adjudication proceeding.*" (*Id.* at 348-49) (Emphasis added.)[11]

The last phrase in the quote is controlling: "our analysis of the nature of the prospective riparian right in this context therefore does not imply that the Legislature may not define or otherwise limit the scope of such a right, or delegate to the Board the authority to do so *in a statutory adjudication proceeding.*" This language does not indicate that the SWRCB was given regulatory power to define or otherwise limit the scope of prospective riparian rights generally or existing riparian rights. That regulatory authority lies exclusively with the Legislature and only then will it be upheld if it does not violate the constitution.

This limitation is consistent with the Supreme Court's stated expectation that in a typical adjudicatory proceeding there are hearings or investigation upon which to base findings of fact with regard to the particular individual riparian rights holder involved. "The statutory adjudication procedure involves a complex balancing of both public and private interests, with the final decree assuring certainty to the existing economy and reasonable predictability to the uses of water in a stream system." *Id.* at 354. The Court expressed approval for a heightened level of fact finding that is the function of an adjudicatory proceeding before the SWRCB could properly limit or further refine the scope of a particular riparian right. In other words, even in an adjudicatory proceeding, the SWRCB cannot issue a blanket decision limiting the rights of riparians throughout a particular water system without considering their individual reasonable needs, existing use, purpose, and specific plans for prospective use.

For these reasons, the Supreme Court in *Long Valley Creek* also concluded that the SWRCB's determination to extinguish the appellant-riparian's claim to the future use of water was unconstitutional.

This was consistent with the prior decision in *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 531.[12] In *Tulare, the Legislature* had enacted a blanket provision

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[11] The Court pointed to Water Code Section 2501, which states: "The board may determine, in the proceedings provided for in this chapter, *all* rights to water of a stream system whether based upon appropriation, *riparian right*, or other basis of right." Section 2769 further states that "the *decree shall in every case* declare as to the water right adjudged *to each party, the priority, amount, season of use, purpose of use, point of diversion, and place of use of the water ....*" (*Id.* at 348-49.)

[12] Article XIV section 3 was repealed on June 8, 1976. Article X section 2 was adopted on the same date and contains the identical language.

extinguishing unexercised riparian rights after ten years. That provision was then known as Section 11 of the Water Commission Act. The Supreme Court invalidated Section 11 because it was contrary to "the letter and spirit of the 1928 constitutional amendment." That amendment, while limiting the riparian as against an appropriator, to reasonable beneficial uses, expressly *protects the riparian not only as to his present needs*, but also as to future or prospective reasonable beneficial needs and those rights could not be terminated without making the necessary findings of fact. (*Id.* at 524.)

This is an important principle from *Tulare* that is very applicable to the case at bar. The Supreme Court was deciding how riparian rights holders should be treated in light of the then "new" constitutional amendment which limits all water users to the reasonable and beneficial uses. The Court discussed at length how that determination could be made.

> Under this new doctrine, it is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation. If the riparian is putting the water to any reasonable beneficial uses, it is now necessary for the trial court to find expressly the quantity so required and so used. A finding, such as that in the present case to the effect that the riparian requires a "reasonable" amount for such uses, under the new doctrine, is clearly insufficient and a judgment based thereon must be reversed. The trial court, under the new doctrine, must fix the quantity required by each riparian for his actual reasonable beneficial uses, the same as it would do in the case of an appropriator. The new doctrine not only *protects the actual reasonable beneficial uses of the riparian* but also the prospective reasonable beneficial uses of the riparian. (*Id.* at 524-25.)

Therefore, while the doctrine of reasonable and beneficial use is a limitation on water rights users, it is also a constitutional protection for riparians and others similarly situated to the actual reasonable and beneficial use of the water. And that determination is necessarily fact laden. The *Tulare* litigation was remanded to the trial court to make such findings about the riparians involved in that case.

Importantly though, in declaring Section 11 unconstitutional, the Supreme Court was also finding that even the Legislature cannot enact a blanket regulation extinguishing riparians rights to the reasonable and beneficial use of water when there have been no findings about the particular rights holders and their individual methods of use including the need for use of water in the future. Were it too do so, it would conflict with Article X, section 2.

The Long Valley Creek Court consequently declined to interpret the statutory adjudication authority in Section 2501, *et seq.*, as allowing the SWRCB to extinguish altogether future riparian rights.

> In light of [*Tulare*] we are reluctant to conclude that the Board may altogether extinguish a riparian's future claim when it has not been established that the imposition of other less drastic limitations on the claim would be less effective in promoting the most reasonable and beneficial use of the stream system. (*Id at 357-58.)*

Respondent suggests that *In re Hallett Creek Stream System* (1988) 44 Cal.3d 448, stands for the proposition that the SWRCB may "regulate" the rights of riparians with the same broad authority that it has to condition licenses or permits to appropriators. This court rejects that interpretation.

In *Hallett Creek*, the Supreme Court of California recognized expressly that the United States as a sovereign entity has the same riparian rights under California law as any other property owner. *Hallett Creek* involved unexercised riparian rights in a national forest. The Court reaffirmed that those riparian rights, even if unexercised (as in *Long Valley Creek*) cannot be extinguished. But, because they had not yet been exercised, the SWRCB could decide in the future that the particular unexercised riparian claim had lost its priority against other water rights holders including appropriative rights that were currently being exercised.

> In other words, while we interpret the Water Code as not authorizing the Board to extinguish altogether a future riparian right, *the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources.* (*In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 471) (emphasis added.)

The language appears in the context of deciding the SWRCB's adjudicatory, not regulatory, authority over *specific* previously unexercised riparian rights. It answers the query of how a previously unexercised riparian right might be treated as against previously exercised appropriative rights in the allocation and prioritization of water. The opinion also underscores that even in an adjudicatory proceeding, the Board must make findings about the "scope, nature and priority of the right [at issue]."

The principle of protecting the public trust does not expand the authority of the SWRCB to enact broad regulations such as Section 862. *Environmental Defense Fund Inc. v. East Bay Mun. Utility District ("EDF II")* (1980) 26 Cal. 3d 183, involved conditions placed on appropriative right permits granted previously by the SWRCB to the United States Bureau of Reclamation for the Auburn Dam. In that case, the Supreme Court, *inter alia*, reversed an earlier decision giving the SWRCB exclusive jurisdiction over proceedings to compel water agencies to reclaim waste water. The Court in *EDF II* concluded that giving the SWRCB and the courts concurrent jurisdiction over such competing adjudicatory claims was consistent with *Long Valley Creek*.

Importantly, the Supreme Court observed that the provisions of article X, section 2, are "self-executing" and the courts have traditionally enforced the proscriptions against unreasonable uses and unreasonable methods of diverting water. (*See e.g., Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351.)

The Court also recognized that the arena of water development, such as in the construction of dams, is a complex area of the law affecting not only the interest in additional water resources, but also the use of the particular waters developed and the potential harm which may occur to existing resources due to the new development. "In obvious recognition of our public policy to require water resources be put to beneficial uses and not wasted, the complexity of the problems presented, the numerous persons affected by water development projects and the necessity of continued regulation to meet changing circumstances, the Legislature has provided a comprehensive system for development, issuance, and administrative regulation of *appropriative water rights.*" (emphasis added.)

Although respondent suggests otherwise, there is no overarching "planning authority" giving the SWRCB any broader authority beyond its statutory authority to place conditions or limits on licenses given appropriators. The Board can do so either by way of regulation or adjudicatory proceeding. As evidence of this, Court stated in *EDF II* that

> In summary, and in the words of *Modesto Properties Co v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856, 860, the Legislature devised a plan which was commensurate in scope with [article X, section 2] and delegated to the board by the Water Commission Act the authority to protect the public interest *not only in the issuance of appropriative permits and licenses but also in their later administration.* As pointed out in our earlier decision in this case [citation omitted] the board 'has been granted broad authority to control and condition water use, insuring utilization consistent with public interest.' (Water Code §1257.) This authority includes protection of the environment. The [board's] powers extend to regulation of water quality and prevention of waste. (*e, g.*, Water Code §§ 100, 275.)."

In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the state's highest court addressed the relationship between the appropriative water rights system (as summarily discussed above) and the public trust doctrine which operates to protect environmental and recreational values in navigable lakes and other water ways.

At issue was whether private plaintiffs could file suit directly, without first bringing an adjudicatory action before the SWRCB. The Los Angeles Water Department had been granted by the SWRCB appropriative water permits decades earlier. Plaintiffs sought to place limits on those permits, arguing the public trust doctrine required it. The Supreme Court's opinion was intended to guide litigation in U.S. District Court. The Court held that the private plaintiffs could file directly with the Superior Court as the courts have concurrent jurisdiction with the SWRCB over appropriative water rights disputes and plaintiffs properly could rely on the pubic trust doctrine in bringing their challenge.

The Court reviewed the evolution of the public trust doctrine in California and the law governing appropriative water rights. The two principles evolved independently of each other but both embody important values that make the law more responsive to "the diverse needs and interests of the State in the planning and allocation of water resources." (*Id.* at 445.)

> The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.[27] Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust. (*National Audubon Society*, at 446-47.)

In *National Audubon Society* the Court observed that the function of the SWRCB has evolved since1913. It has quasi judicial authority to decide competing water rights claims in specific stream systems whether they are riparian or appropriative. When it makes those decisions it must have in mind the state's duty as trustee of the public trust. It is also charged with comprehensive planning and allocation of water resources particularly in the areas of protecting water quality and providing for water resource development. Examples of these cases are *EDF II* which involved waste water reclamation and the Board's efforts to adopt new quality standards in the Sacramento-San Joaquin River Delta and *apply those standards to existing appropriative rights holders*, namely the United States Bureau of Reclamation and operators of the Central Valley Project. *National Audubon Society* made clear that the public trust doctrine gave plaintiffs standing and a legitimate cause of action. For purposes of this case, it serves as a reminder that among the State's duties is the duty to protect and preserve the environment; but *National Audubon Society* does not expand *the SWRCB's authority* in enacting regulations over riparians.

For purposes of this court's analysis, three relevant principles can be extracted from these decisions: 1) The SWRCB has adjudicatory and regulatory authority given to it by the Legislature to issue or reject applications for appropriative licenses and/or permits and in imposing conditions on appropriative licenses and/or permits *post hoc*; 2) article X, section 2, places tight constitutional limits on the SWRCB when adjudicating or regulating claims of riparians and overlyers (and pre-1914 appropriative rights holders); and 3) blanket rules or broad regulations, whether they be prohibitions, or limitations on rights to use water, do not withstand constitutional challenge when such rules broadly and uniformly affect groups of vested rights holders--in particular riparians, overlyers, and pre-1914 appropriative rights holders--absent specific and particularized findings as to how those individual rights are exercised or their access to water put to a reasonable and beneficial use is affected.

The present case is most like *Tulare*. Section 862, like the Water Act provision in *Tulare*, is a blanket provision uniformly limiting all riparian, overlying, and pre-1914 riparian rights holders in the Russian River watershed. In formulating Section 862, the SWRCB simply made a broad and unsupported finding that every water user in the watershed, when using water to frost protect, presented a risk to salmonids which in turn was an unreasonable method of use of water.

The crux of the problem is that there were no findings as to the particular water rights holders. At the administrative level there were no findings about the specific individual use or method of use by the riparian rights holders and to what extent that particular use poses a risk the salmonid population. There were no studies or findings by the SWRCB as to how the individual rights holders of riparian water rights in the Russian River watershed are exercising their respective rights or how that unique exercise would be affected by the regulation. Article X, section 2 protects as it does limit "*the actual reasonable beneficial uses of the riparian*" and the cases discussed herein require their uses to be closely examined before limiting them through regulation. They cannot be treated in a generically.

There are 533 rights holders using water for frost protection in this watershed. Some are located in the upper basin where the climate conditions and method of using water are different than in the lower and middle basin of the watershed. There is no legal basis to treat them the same; but there are many reasons to treat them differently. Those reasons were neither explored nor considered. The law is clear with respect to riparians, overlying users, and pre-1914 rights owners--*Long Valley* and *Tulare* require specific findings before extinguishing their right to use water.

The finding that using water for frost protection is an unreasonable method of use within the meaning of Article X, section 2 cannot be sustained because it is not supported by the necessary investigation and factual findings as to how the affected parties contribute to the harm to be avoided.

Considered together, *Hallett Creek, Tulare,* and *Long Valley Creek* show that the SWRCB does not have the legislative authority to enact a regulation and apply it to hundreds of water rights owners--including riparian, overlying, and pre-1914 rights owners--and prohibit them from exercising their vested rights to the water for a heretofore recognized beneficial purpose based on the record here.[13] The duty to protect the public trust does not justify a different result.

All the cases quoted by Respondent in its brief discussing the "expansive powers" of the SWRCB have a different context than that here. Those cases discuss the SWRCB's authority to issue or condition appropriative rights whether those conditions are imposed in an adjudicatory proceeding or by way of regulation. The cases do not make the same claim with respect to riparian rights holders. (*See U.S. v. SWRCB, supra* 182 Cal.App.3d 82; EDF *II, supra* 26 Cal.3d 183.) The plain language of Water Code Section 1201 supports this view as well.

Respondent quotes from *Hallet Creek* in its brief at p. 11, line 25. The quote is not authority for the regulation enacted here. The *Hallet Creek* Court was simply making clear that the SWRCB was not powerless in controlling the use or method of use by a riparian, absent a private claim. The Court pointed out that the SWRCB can itself *initiate a court action, seek legislation from the state legislature or apply to the executive branch for interim measures.* The Supreme Court gave examples where the SWRCB has sought recourse in the past with one of

[13] The Water Demand Management Program element of the regulation is discussed elsewhere in this decision. Had it conditioned their use on reporting diversion locations, methods of use, and/or diversion practices this court might be reaching a different result.

these three branches of government.[14] Here too, the SWRCB is not left without recourse. The SWRCB can pursue regulation of riparian rights in the Russian River watershed with the Legislature or it can file an injunctive or a declaratory relief action in the courts, as it did in *Forni*.[15]

b) The Board's Authority to Ensure that Water is Put to a Reasonable and Beneficial Use Does Not Provide Independent Authority to Enact §862 Because There Were No Specific Findings of Fact with Regard to the Affected Riparian Rights Holders.

The overriding principle governing the use of water in California is that such use be reasonable. (*Forni, supra*, at 750.) However, what is reasonable use or a reasonable method of use of water is a question of fact to be determined according to the circumstances in each particular case. (*Joslin, supra*, at 139; *Gin S. Chow, supra*, at 706.) As the Court stated in *Tulare Dist. v. Lindsay-Strathmore Dist., supra*, "[w]hat is a beneficial use, of course, depends upon the facts and circumstances of each case. *What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.*" (3 Cal.2d at 567) (emphasis added.)

Frost protection is a recognized beneficial use of water in California. (Cal. Code Regs. Tit. 23, §662.5.) Using overhead sprinklers for frost protection is the only effective method to protect crops in times of advective freezing. There is no adequate substitute. As grape production in Mendocino and Sonoma counties is a mainstay of the economy and job base, crop loss from frost can present devastating results. (See Findings of Fact, infra.) It is an abuse of discretion to find otherwise.

Petitioners argue that the SWRCB has exceeded its regulatory powers by declaring in Section 862 that frost protection, a previously recognized beneficial use, to now be an unreasonable use of water. They further object to prohibiting all divisions of water rights holders in the entire Russian River water shed from using water for frost protection absent a WDMP. They argue that whether or not a specific use or method of use is unreasonable is a factual inquiry and must be made on a case by case basis as to the individual user. They also argue that the courts have exclusive jurisdiction to make unreasonable use determinations. The Court agrees with the former argument and not necessarily the latter.

In *Joslin, supra, at* 139, the Supreme Court applied the tenet of particularizing "reasonable use" determinations in an appeal from an adjudicatory proceeding before the SWRCB. The Supreme Court held that the plaintiff gravel miners, while riparian rights holders, were not putting the water to a reasonable use by the taking of rock, sand, and gravel from the stream such that they

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[14] *Hallett Creek* arose from an adjudicatory action under Section 2525 brought by a private claimant in the Hallett Creek stream system. Once the SWRCB accepted the request for adjudication of rights, the United States filed a riparian claim to waters in Plumas National Forest which the SWRCB rejected. The United States then filed a notice of exception in Lassen County Superior Court resulting in the decision discussed herein.

[15] Section 275 does not give the SWRCB the power to itself enact a regulation with the scope of Section 862; it requires the Board to take action before the Legislature, the Judiciary, or the Executive.

could require the removal of an upstream dam. The Court reached this conclusion based on the facts in the record about the specific user, that user's method of use, and the effect on the stream.

In another appeal from an adjudicatory proceeding, the Court in *SWRCB, supra* at 129-130, approved the SWRCB's exercise of its authority to condition appropriative permit holders under Water Code Section 1200 to prevent the waste or unreasonable use of water. Section 1200 gave authority to condition the permits; and the duty to prevent waste, unreasonable use, or an unreasonable method of use was a legitimate reason for doing so. In conditioning the permits held by the U.S. Bureau of Reclamation and the Central Valley Protect, the SWRCB had held hearings and made findings as to these specific permit holders and their practices. In reviewing their practices the SWRCB concluded that changed circumstances in the Delta revealed "new information about the adverse effects" of those particular projects [permit holders] upon the Delta and that required revision to water quality standards."[16]

Section 862 is not limited to appropriative rights holders who are subject via Section 1200 to the jurisdiction of the SWRCB. The regulation here applies to riparian users, overlyers, and pre-1914 rights holders as well. While they too must abide by the reasonable use principle set forth in the constitution, their method of use cannot be declared unreasonable without the necessary factual findings about their specific use. Each riparian's use and method of use is unique. Facts such as place of diversion, volume, time of use, effect on the stream stage, and relationship to salmonid habitat must be considered before declaring the use of water by a riparian to be unreasonable.

This conclusion is reinforced by the actual language in the Art. X, section 2. The rule of reasonable use not only limits the rights of riparians and others similarly situated, but it also *protects the actual reasonable beneficial uses of the riparian* and the prospective reasonable beneficial uses of the riparian as well. (*Tulare, supra* at 524-25.) Their individual rights cannot be adequately protected when their individual uses were never examined.

The Russian River Watershed is large and diverse. (AR 3377.) The river flows for 110 miles through Mendocino and Sonoma counties before reaching the ocean. (AR 1715.) There are over 500 water rights holders and thousands of acres of vineyards affected by Section 862.

Vineyards located in the northern part of the watershed typically face more frequent and more severe frost events. The regulation nevertheless prohibits frost protection by water rights holders in the southern portion of the watershed even though they generally use considerably less water and use it at different times. There was no evidence presented that frost protection in the middle or lower basins of the Russian River created a draw down in the main stem of the river at all. The *instantaneous draw downs* that are a threat to the fish simply are not watershed wide.

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[16] The language in *SWRCB, supra*, at 130, which states: "the Board's power to prevent unreasonable methods of use should be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and project activities in order to objectively determine whether a reasonable method of use is manifested," has to be read in the context of the case. There the SWRCB decided to condition specific appropriative licenses on compliance with the new water quality standards. The SWRCB was not enacting a new rule or regulation affecting appropriative and non-appropriative rights holders alike.

There are no facts in the record from which to conclude all use of water within the watershed for frost protection is unreasonable.

Even users in the upper basin cannot be treated generically. Micro-climatic conditions differ depending on the widely varying topography. Whether a vineyard is located in a broad open area of the valley, or in a more narrow area, or in one with steep terrain greatly influences the frequency, severity, and duration of frost events. This in turn determines the need for water for frost protection and its volume. Not all vineyards have the same needs, the same uses, or experience the same frost events in the same way. Yet the regulation declares all uses unreasonable despite these differences. (AR Disc #3 2:10.)

The size of the vineyard or orchard also determines how much water is diverted. The amount of water clearly is a factor in determining an individual water user's impact on stream stage at any given time. Some vineyards consist of a very few acres *(e.g.*, at Felta Creek it was a four acre vineyard) and some consist of hundreds of acres.

The specific location of the individual diversions also determines the risk to the salmonid population. Not all diversions are located in areas that pose a risk to salmonids, even in the event of a frost. (*See* April 2009 hearing, AR Discs #2-4.). The two strandings that set in motion the proceedings leading up to Section 862 occurred in isolated places: one in the main stem of the river near Hopland and the other in a tributary in Sonoma County. (AR 3391.) NFMS estimated that roughly 30% of the salmonid habitat is within 300 feet of a vineyard. There was no evidence that the risk to the juvenile salmonid population is static throughout the 1485 square miles of the watershed.

Absent findings relating to the method of use, need for use, and anticipated future use of water for frost protection by individual riparians and non-riparians alike and some showing of a correlative risk to salmonids, it is improper to make a sweeping conclusion that each water rights holder who uses water for frost protection is using water unreasonably. *Tulare* and *Long Valley Creek System* support this conclusion. Because these factual findings were not made at the administrative level, this is a separate ground for invalidating the regulation.

Neither *Forni* nor *Imperial Irrigation District v. SWRCB* (1987), 186 Cal.App.3d 1160, calls for a different conclusion. Respondent argues that in *Forni,* 54 Cal.App.3d 743, "the Court of Appeal upheld a very similar frost protection regulation promulgated by the SWRCB . . . ." Respondent is incorrect. The Court of Appeal did not uphold the regulation in *Forni*; rather it reversed the trial court's order granting respondents' motion for summary judgment.[17]

Contrary to the present case, in *Forni* the SWRCB had not enacted a regulation sweeping riparians and overlying rights holders within its scope. Instead, the SWRCB filed an injunctive

[17] The Court of Appeal took some effort to make sure the opinion was not overly interpreted: "In conclusion, we wish to make it unmistakably clear that all we hold today is that appellant's complaint states valid causes of action for either injunctive or declaratory relief or both, and that the question of reasonable use or reasonable method of use of water constitutes a factual issue which cannot be properly resolved by a motion for judgment on the pleadings." (*Forni,* 54 Cal.App.3d at 754.)

claim under Section 275 trying to enforce a regulation directed at appropriative rights users to riparians. That regulation, Section 659, declared all water drawn from the Napa River for frost protection an unreasonable method of diversion. However, it further stated:

> No permits for the *appropriation* of water from the Napa River after March 15 of any year for frost protection shall be granted except to replenish winter storage and such permits shall not be granted until a water distribution program among the water users is established that will assure protection to prior rights. Regardless of the source of the water, the Board will retain jurisdiction to revise the terms and conditions of all permits issued for frost protection should future conditions warrant.

(Forni, supra, 54 Cal.App.3d at 752., n4) (emphasis added.) Section 659 on its face only applied to appropriative rights holders – an important distinction from the present case.

This distinction is more obvious by reading the Court of Appeal's rejection of a facial constitutional attack on Section 659. The Court concluded that the permit requirement affected only appropriators and "not the riparian owners whose right to use the water derives from their ownership of land rather than administrative authorization." Therefore, the Court of Appeal refused to declare Section 659 facially unconstitutional because it was susceptible to a constitutionally valid reading.

The Court in *Forni* therefore concluded that "properly construed, §659 [declaring frost protection in the Napa River Valley to be unreasonable] amounted to no more than a policy statement which leaves the ultimate adjudication of reasonableness to the judiciary." The appellate court further observed that trying to enforce Section 659 on riparian rights holders by bringing the declaratory relief action, was the "best proof that [SWRCB] did not consider the regulation and the policy declaration therein binding as to respondent riparian owners. . . ."

Here, Section 862 applies to all water rights holders including riparians, overlyers, and pre-1914 appropriative rights holders. Respondent does not argue differently. Section 862 is not susceptible to a constitutionally valid reading like the regulation in *Forni*. The statements in that opinion suggest that had the appellate court concluded the statement "declaring frost protection in the Napa River Valley unreasonable" was a regulatory revision of the law that also applied to riparian rights holders, the appellate court would have found Section 659 to be an unconstitutional.[18]

The case of *Imperial Irrigation District* also fails to support Section 862. That case involved an adjudicatory proceeding before the SWRCB brought by a private claimant, and in the course of that proceeding the Board had made detailed factual findings about the Irrigation District's wasteful practices. It was not a regulation sweeping hundreds of water rights holders into its scope. The proceedings to determine the Irrigation District's wasteful practices were far

[18] The Water Master for the Napa River testified in this proceeding on April 7, 2009. He emphasized that the core principle of the program which governs the Napa River is a court ordered minimum in-stream flow requirement. (AR Disc #3; 1:38.) Minimum in-stream flow requirements necessary to protect salmonids are conspicuously missing from the regulatory scheme in Section 862.

different than enacting a regulation simply declaring the practices of hundreds of water rights users to be unreasonable without ever exploring actual, individual uses or methods of use.

For these reasons and all the reasons discussed thus far, this court holds Section 862 to violate article X, section 2, of the California Constitution because the regulation exceeds the regulatory authority delegated to the SWRCB. In addition, its universal application to riparian rights holders, pre-1914 rights holders, and overlying users of groundwater without any specific findings showing a unreasonable use or method of use by the individual water rights holders undermines the validity of the regulation as well. As a separate ground, the Court finds that the SWRCB's duty to prevent the unreasonable use of water cannot, as a matter of law, justify this regulation in the absence of an examination into the uses, methods of use of the water rights holders affected.

Petitioners argue that only the courts can make "reasonable use" determinations. It is true that the courts have traditionally enforced the proscriptions against unreasonable uses and unreasonable methods of diverting water. (*See e.g., Joslin, supra,* 67 Cal.2d 132; *Peabody, supra,* 2 Cal.2d 351.) The appellate courts have made clear that the SWRCB can make such determinations in conditioning appropriative licenses whether in an adjudicatory proceeding or by way of regulation. The SWRCB can also limit the scope of a riparian right in an adjudicatory proceeding which necessarily involves fact finding as to the specific riparian affected. Whether or not the courts have exclusive jurisdiction over reasonable use determinations by riparian rights holders is not in line with the decisions discussed. For this reason, this Court is unwilling to accept Petitioners' premise as the law.

c) Section 862 Violates the Rule of Priority.

The "rule of priority" recognizes that riparian rights are superior to appropriative rights. (*El Dorado,* 142 Cal.App.4th at 960-961.) Between appropriators, the rule is "first in time, first in right." (*Miller & Lux, Inc. v. Tulare Lake Basin Water Storage District,* 219 Cal. at 46.) Those with more senior rights are entitled to fulfill their needs before a junior appropriator is entitled to use any water. (*El Dorado, supra,* at 960.) "[W]ater right priority has long been the central principle in California water law. . . . In the case of an overdraft, riparian and overlying use is paramount, and the rights of the appropriator must yield to the rights of the riparian or overlying owner." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 2000.) The rule of priority has been reaffirmed numerous times.

The importance of the rule of priority is most apparent when the natural or abandoned flows in the watercourse are not sufficient to supply all demands. During periods of shortage, principles of water policy often collide. When the doctrines of reasonable use or public trust clash with the rule of priority, the rule of priority must yield. (*El Dorado,* 142 Cal.App.4th at 964, 966.) However, "*every effort*" must still be made to preserve water right priorities. (*Ibid.*) (emphasis added.)

Section 862 prohibits all water rights holders from using water for frost protection unless a WDMP has been approved by the SWRCB and the diverter/grower is participating in the program. The WDMP must operate under a governing board. The governing board must, among other duties, establish a "corrective action plan" to prevent the stranding of salmonids. It further

provides: "the diverters shall implement corrective actions in accordance with the corrective action plan, or cease diverting water for frost protection." (§862(c)(4).)

Whether or not Section 862 respects adequately the rule of priority must be assessed by assuming there will come a time of extreme advective frost in a dry year with low humidity and low stream flow, thus presenting a risk to the salmonid population as well as to grape and pear crops. When and where along the watercourse this will happen is difficult to predict, but that was the scenario in 2008. Under such conditions, riparian and pre-1914 rights holders are entitled by law to exercise their rights to water first, and must share the water proportionately. Only then, if there is sufficient water remaining, will appropriative rights holders be able to exercise their rights, and only then in order of succession based on when their right was acquired.

Using water for frost protection is not efficacious unless used at the right time – applying water too late results in irreparable damage to the crop. (McGourty– AR Disc #2. "thirty minutes below 32 degrees" results in irreparable damage to the crop). Waiting too long to turn on the sprinklers or turning them off too soon will also result in crop loss that cannot be recovered. (AR Discs #2-3.) Section 862 favors staggered diversions, but staggered diversions in times of scarcity means some growers would not be allowed access to water at the time it is needed. This scenario portends conflict among users as well as conflict with the rule of priority. Section 862 provides no means of *enforcing* priority at a time when it will matter, likely in the middle of the night.

It is the duty of SWRCB to "make every effort" to protect the rule of priority. Even though it is a concern secondary to ensuring only reasonable use and protecting the public trust, it is still a core principle of the law and deserving of enforcement. In enacting Section 862, the SWRCB failed to provide for enforcement of the rule of priority as *City of Barstow* requires. Instead, the SWRCB foisted that responsibility off on newly conceived "governing boards" that may be "governing" one diverter or many diverters. Governing boards comprised of private citizens with conflicting interests lack true authority and are ill equipped to resolve those conflicts.

The only reference in Section 862 to the rule of priority is in subdivision (c)(4), which provides in part, "the governing body, in consultation with diverters, shall develop a corrective action plan *that will prevent stranding mortality*." "In developing the corrective action plan, the governing body shall consider the relative water right priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage."

This minor reference is insufficient. This watershed encompasses more than 500 water rights holders representing numerous diverters and thousands of acres of grape production. The regulation contemplates a myriad of governing boards of varying sizes and concerns spanning the watershed. It is not hard to foresee that there will be no overlap between WDMPs and likely little or no coordination. Setting up a private governance scheme as envisaged by Section 862 is insufficient to maintain the rule of priority. The regulation neither requires that senior rights will be enforced over junior rights, nor does it contain an effective mechanism to enforce those rights.

This is not a trivial concern. The rule of priority remains a vested right of all priority rights holders throughout the water system, and therefore, it is of vital importance to them. The rule is meant to provide certainty to a water rights holder that they will have access to water put to a reasonable and beneficial use in accordance with their priority, in times of scarcity. If the rule of priority is diminished or ignored, that certainty vanishes. Water Code Section109(a) declares that

"the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights." The rule of priority gives definition to the right held by the owner. It is a rule of substance: riparian rights have value, as do senior appropriative rights, and the rule of priority protects that value among those who own such rights *and* those that wish to acquire them. Failing to enforce the rule diminishes the value of the water rights held by users throughout the watershed and may turn future planning for the "efficient use of water" on its head.

Respondent argues that Section 862 does not provide the governing boards with any enforcement power: "the governing boards will not be required to enforce the corrective action plans." (Respondent's brief at p. 19.)[19] If Respondent is correct then there is no provision for the enforcing the rule priority at a time when it really may matter to avoid crop loss. Respondent's argument renders meaningless the mere mention of the rule of priority in the regulation.

Respondent also argues that concerns about the rule of priority only arise if a corrective action plan is necessary. Given that the birth of this regulation was a time of water scarcity, and given the broadly stated objective of preventing salmonid strandings, it is implausible to conclude that any WDMP will be approved without a corrective action plan.[20]

For these reasons, this court concludes that Section 862 is invalid because it fails to provide for enforcement of the rule of priority.

d) Section 862 Improperly Delegates Agency Authority to the Water Demand Management Program Governing Boards.

As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Sacramento Chamber of Commerce v. Stephens* (1931) 212 Cal. 607, 610; *Webster v. Board of Education*, (1903) 140 Cal. 331, 332 (duties of the board of education are legislative and quasi judicial in their character and the general rule is that such duties cannot be delegated).

Public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action. (*Klevesahl v. Byington*, 1 Cal.App.2d 671, 676; *Mechi v. Lyon Van & Storage Co.* (1940) 38 Cal.App.2d 674, 682.) Merely administrative and ministerial functions may be delegated to assistants whose employment is

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[19] Section 862 suggests otherwise: Subdivision (b) requires the governing body to be "capable of ensuring that the requirements of the program are met." Without having the force of law, it is hard to imagine any WDMP governing board having this capability.

[20] Section 862 requires that each WDMP must, in conjunction with the Department of Fish & Game and the National Marine Fisheries Service, prepare a risk assessment document that evaluates the threat of salmonid stranding in its area of oversight from frost diversion. (§862(c)(3).) If a threat of stranding is perceived, then a corrective action plan must be prepared. There is no definition of "threat" or "risk" in the regulation and little guidance for growers to accurately predict or determine if a correction action plan is necessary and what financial investment must be made to avoid it. But, based on the drastic consequence of being unable to use water for frost protection if none is in place, it defies logic to argue that many WDMPs will chose to forego such a plan.

authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. An administrative board cannot legally confer upon its employees authority that under the law may be exercised only by the board. (*Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396; *see also House v. Los Angeles County* 104 Cal. 73, 79; *Holley v. County of Orange*, 106 Cal. 420 *Vita-Pharmacals, Inc. v. Board of Pharmacy*, 110 Cal.App.2d 826, 830-831.)

Petitioner RRWUE argues that the SWRCB improperly delegated authority to the governing boards of the WDMPs. As noted in section 3(c), *supra*, Respondent argues that the boards are not given any true enforcement authority in Section 862, and therefore, there is no improper delegation. (*See* Respondent's brief at p. 19, lines 13-19: "neither is any governing body being required to enforce the regulation if a diverter refuses to operate consistent with an approved WDMP. That responsibility will fall on the State Water Board.") Civil Code Section 3542 requires all interpretations to be reasonable. In this case, a common sense reading of Section 862 in the context of the longstanding agricultural practice at issue leads to a different conclusion than that posited by Respondent.

Section 862 prohibits all diversions of water for purposes of frost protection between March 15 and May 15 unless done in accordance with a SWRCB-approved WDMP. (§862(a).) The WDMP "*shall* be administered by an individual or governing body *capable of ensuring* that the requirements of the program are met." (§862(c))(emphasis added.) The governing body must 1) conduct an inventory of the frost diversion systems in its area in conjunction with other government agencies.; 2) establish a stream stage monitoring program; 3) assess the risk of salmonid stranding from frost protection by diverters under its administration; 4) develop and implement a corrective action plan that "will prevent stranding mortality." (*See also* subdivision (c)(4).) These are duties imposed on the governing boards and if not fulfilled, its members will be denied water for frost protection. Diverters shall implement the corrective action plans "or cease diverting water for frost protection." (§862(c) (1)-(4).) This is obviously a grave consequence given that using water to frost protect is essential to crop preservation in many areas within the watershed.

The governing boards must plan for a time of water scarcity in times of freezing weather. To do so adequately, Section 862 requires the governing board to perform all of the functions described **and** "*be capable of ensuring that the requirements of the program are met.*" (§862(b).) (emphasis added.) Section 862 envisages water development management plans of substance, specificity, and enforcement capability. If the WDMP does not have sufficient force to it, or if the governing board does not have apparent control over its members, then the SWCRB will not approve the WDMP and all of its members will be prohibited from using water during frost season. A facile plan will be rejected.

Governing boards will have to set conditions to access to water such as building storage ponds or reservoirs at considerable individual expense. (See AR 854 – range of cost to construct storage ponds $47,000-$529,000.) Or, the governing board may simply require participants to reduce diversion volume across the board (maybe eliminating diversions by junior appropriative rights holders). Or, governing boards may order staggered diversions which will increase the risk of frost kill to some diverters. The board may compel removing acreage from production. The board may require the installation of expensive technology for monitoring purposes. (AR 2461 – estimates of initial capital investment per 160 acre vineyard ranges from $9600-$17,000; capital

investments for corrective action plans range from $236,000-$352,000.) These are not ministerial functions. These are conditions historically set by the SWRCB

Faced with the hazard of non-approval and the consequence that carries, no governing board will run the risk of non-approval by the SWRCB. The regulation is intended to reduce water used for frost protection and it anticipates WDMP governing boards giving full force and effect to that aim. The private governing boards will necessarily either be given enforcement powers by its members (or otherwise risk denial of a WDMP) or chose to take enforcement action over the water rights holders under its authority. Governing boards predictably will compel members to take specific action whether it is an investment in infrastructure or a curtailment of water use—these are powers previously reserved for the SWRCB. There is no precedent for a private group of water users determining when another water rights holder's access to water will be conditioned, limited, or eliminated altogether.

Truly fundamental issues should be resolved by the Legislature. (*Kugler v. Yocum* (1968) 69 Cal.2d 371.) Declaring the use of water for frost protection an unreasonable use of water is a fundamental shift in water policy in this state. Arguably, that decision should be made by the Legislature. Even if the SWRCB is empowered to make such a declaration, it cannot then delegate its power to enforce the conditions of water use to private "governing boards" that are purely a concoction of the regulation. The variations in the nature and value of the water rights held and the exposure to crop loss are matters too diverse and too important to expect private governing boards to properly prioritize, condition, or enforce. Whether or not a grower should be required to build a storage reservoir, drill a well, or curtail production due to the risk to the salmonid habitat is the job of the SWRCB precisely because of the vested right affected.

The multitude of mini, private water governments mandated by Section 862 is also an invitation to run afoul of due process. As the United States Supreme Court has observed in similar circumstances, "t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. ..." (*Carter v. Carter Coal Co.* (1935) 298 U.S. 238, 31. *See also Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1.)

The court finds Section 862 to be invalid because it improperly delegates SWRCB's authority to private WDMP governing boards.[21]

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[21] Petitioners also argue that SWRCB improperly delegated authority to the Deputy Director for Water Rights to exempt diverters from Section 862's requirements. Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is no authority to delegate acts discretionary or quasi-judicial in nature. (*Schecter v. County of Los Angeles*, 258 Cal.App.2d at 396.) The authority given to the Deputy Director in Section 862(d) is limited to approving WDMP criteria to exempt groundwater users or directly approving exemptions requested by groundwater users. An exemption can be granted only if it is proven that the groundwater at issue is not hydraulically connected to the Russian River stream flow. This decision appears to be a ministerial function given the basis for the determination is set forth in the regulation itself.

e) The Composition of the Board On September 20, 2011, Is Not a Basis to Invalidate the Regulation.

Light Petitioners assert that "a regulation making fundamental changes in water law cannot legally be adopted by a three person board that does not contain a lawyer with water law expertise." (Light Petitioner's Brief at p. 32, lines 25-26.) In support of this argument, Light Petitioners rely upon Water Code Section 175 which sets forth the basis of the SWRCB. Specifically, Light Petitioners point out the SWRCB is to be made of five members, one of which is required to be an attorney who is qualified in the fields of water supply and water rights. Respondent counters that Light Petitioners waived this claim by not raising it in the underlying administrative proceedings, and in any event, the regulation was passed by the statutorily-required three member quorum of board members. (Respondent's brief at p. 20, lines 7-15.) The court denies relief on this claim because, even assuming Light Petitioners have not waived this claim, there is insufficient evidence in the record to support it.

Water Code Section 175(a) establishes the existence of a five member board, with each member appointed by the Governor. When a vacancy occurs, the Governor is to immediately fill the position.[22] (Water Code § 177.) Four of the five board members are to possess specialized experience, including one California-licensed attorney "who is qualified in the fields of water supply and water rights." (Water Code § 175(a).) "Three members of the board shall constitute a quorum for the purpose of transacting any business of the board." (Water Code § 181.)

The core of Light Petitioners' complaint is that the SWRCB lacked an attorney with the statutorily-required expertise. However, Light Petitioners fail to cite to any information in the administrative record establishing that fact. The court will not accept mere assertions outside the record as a basis to invalidate the regulation. However, in this case, the court determines such a fact would not result in the relief sought.

Here, both sides agree that Section 862 was adopted by three members of the board. (AR 5178.) The Court concludes this met the threshold for a quorum as required by Water Code Section 181. Further, the attorney board member was not required to participate in the vote because the statute does not set forth which individual board member(s) must be present to create a quorum. Rather, the statute permits a quorum to consist of *any* three board members. (*Id.*) Accordingly, Light Petitioners' complaint that this specific regulation was adopted by a three member vote that did not include an attorney with water rights expertise—even if true—would not be violative of the Water Code, and therefore, would not constitute a basis to invalidate the regulation.

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[22] Light Petitioners assert in their reply that the attorney board member's term expired sometime prior to July 5, 2011. There is no claim the Governor failed to fill this vacancy as required by law.

B. The Agency's Declaration of Necessity for Section 862 Was Not Supported by Substantial Evidence Within the Meaning of Govt. Code §11350(b)(1).

1. Standard of Review

Petitioners argue that there was no established necessity for the regulation within the meaning of Government Code Section 11350. Section 11350(a) provides, in relevant part:

> Any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure... .The regulation or order of repeal may be declared to be invalid for a substantial failure to comply with this chapter . . . .

Subdivision (b)(1) provides that a regulation may be declared invalid if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

Judicial review for "substantial evidence" involves a determination of whether the agency decision was rational in light of the relevant evidence in the record. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-72.)

> "'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. 'Substantial evidence ... is not synonymous with 'any' evidence.' Instead, it is 'substantial' proof of the essentials which the law requires.' The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.' (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651) (citations omitted.)

2. There Was Not Substantial Evidence Presented to Support a Watershed-Wide Regulation.

Petitioners argue that the voluntary compliance programs known as the Russian River Frost Program, MRSA, and URSA, obviated the need for the regulation. Prior to passing Section 862, the URSA program had made tangible improvements to the overall functioning and management of the upper portion of the watershed. MRSA members had installed stream and diversion monitoring equipment and organized the funding and construction of water storage facilities in several different private vineyards. The volume of water set aside in these storage ponds more than offset the stream flow decrease experienced in 2008. The development of new protocols between SCWA and the RRFP&WCID increased dramatically the effectiveness of compensatory releases in times of severe advective frost. The MRSA program properly targeted frost protection practices in tributaries because there was no evidence of harm to the in-stream

flow of the main stem of the Russian River in Sonoma County from frost protection. MRSA also proved that the risk previously posed at Felta Creek had been eliminated.

The SWRCB rejected the establishment of URSA/MRSA and their umbrella organization known as the Russian River Frost Program as a substitute for regulation. SWRCB's reasons for doing so are stated at AR 3865-66, to wit, the plans did not adequately provide for water conservation in tributaries nor did the programs have the ability to ensure full compliance by diverters in the voluntary programs.

Though this court may disagree with the SWRCB's judgment about the potential effectiveness of MRSA or URSA or the Russian River Frost Protection Program, an agency's determination that voluntary efforts are insufficient to accomplish the stated objective of the regulation does not appear to be a proper ground under the substantial evidence test to declare invalid under Government Code Section 11350(b), an otherwise properly enacted regulation.

While there is no basis to declare the regulation invalid for failing to adopt the voluntary programs as a substitute for regulation, there is also is no basis to ignore what the programs had accomplished between May 2008 and September 2011 that served to reduce the risk to juvenile salmonids. Viewing the record of evidence as a whole to determine if there is substantial evidence to support the need for the regulation, the Court must consider these tangible improvements in the watershed that would serve to accomplish the objective of the regulation.

To be specific, steps taken in Felta Creek completely eliminated the possibility of strandings occurring at that location again. The vineyard operator removed the pump and the diversion and will rely on ground water for frost protection in the future. Private vineyard owners in the upper basin collectively invested $2,460.000 to build storage reservoirs that reduced demand for water from the river by 86.6 cfs. (AR 854.) In other words, this volume of water would no longer be diverted from the river for frost protection. Substantial reduction in demand obviously reduces risk to salmonids in times of scarcity. More and better situated gages were installed to allow SCWA to be better informed as to when to release water from Coyote Dam. It is an abuse of discretion to not study the effect these concrete steps would have on the river and the aim of protecting salmonids before the regulation was adopted. The changes in the upper basin of the water shed obviously would have a direct and positive effect on stream flow in the future and failing to study the extent of that impact was an abuse of discretion.

These improvements to the watershed alone may not be a basis for invalidating the regulation. But these improvements were never factored in by the SWRCB in their determination that a watershed-wide prohibition on using water for frost protection was necessary.

Faced with solid evidence of meaningful improvements, the weakness of the remaining evidence upon which to find a need for a watershed-wide prohibition to prevent salmonid strandings is magnified. The watershed is large and varied. There are variations in climate and topography. Some areas frost protect more frequently than others. Some use more water than others to frost protect. Some users frost protect in some years and not in others. Some frost protect in areas where there is no showing of a risk to the salmonids. Some use water to frost protect in areas where there is known salmonid habitat. The point is there is not enough factual data to demonstrate the need for the prohibition throughout the river basin.

The same observation is true with respect to ground water users. Ground water users draw water from aquifers. *No evidence was presented* showing temporary water depletion in aquifers causes a reduction to in-stream flow from the main stem of the Russian River. Ground water users were swept into the regulation without any factual basis to show their individual practices are linked to salmonid strandings.

There is overwhelming evidence of significant variations within the watershed justifying the need for more study and/or more tailored drafting. The general declaration that frost protection may pose a risk to salmonids might be acceptable if supported by facts or logical inferences, but they show just the opposite. NMFS reported there are 60,640 acres of vineyard in the Russian River watershed. (AR 233.) Of the total potential salmonid habitat, 25% is within 300 feet of a vineyard. NMFS also stated that 70% of all vineyards are within 300 feet of salmonid habit. (AR 233.) NFMS acknowledged that "adjacency does not necessitate an impact, but one study estimated 30% of tributaries are affected." (AR 234.) NMFS also told the SWRCB that it is unknown how many vineyards irrigate for frost protection and it is also unknown "the proportion of vineyards that rely on surface water diversions." (AR 234.)

These figures indicate that NMFS has some idea where salmonid habitat and vineyard propagation overlap, yet the regulation was not customized to fit this area of convergence. The EIR acknowledges that most salmonid habitat lies in tributaries and not in the main stem of the river, but the SWRCB failed to limit the regulation to the area(s) where the risk of harm is truly present. (AR 3865-66.)[23]

The Biologic Opinion for Water Supply, Flood Control Operations and Channel Maintenance, published in 2008 by the U.S. Army Corp of Engineers in consultation with the NMFS for use by SCWA and RRFC&WCID, recommended ramping rates that result in river stage changes of one inch or less per hour to protect steelhead fry and two inches or less per hour to protect juveniles. (AR 4586-4588; 4759-60.) The total stage reduction measured at the Hopland gage on April 20, 2008, was 2.76 inches over 7.5 hours, or .37 inches per hour. The most severe event occurred on April 21 when the river stage dropped 3.6 inches over 10.5 hours, or a rate of .34 inches per hour. The draw downs on April 20 were not in excess of current NMFS guidelines for water channel management on the Russian River – in fact they were far below it. In light of the evidence that the draw downs from frost protection in 2008 did not result in violations of NMFS own guidelines, the necessity for the regulation, as enacted, must be questioned.

The absence of meaningful study to decide the minimum in-stream flow requirements in the main stem and tributaries of the Russian River in order to protect salmonids is a glaring omission in the record. The Water Master for the Napa River testified that the court ordered minimum in-stream flow requirements in the Napa River serves as the primary building block for determining water use by grape growers in frost season. NMFS Assistant Regional Administrator

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[23] The academic studies that were submitted (AR 5620, 5627 and 5644) are instructive generally to the phenomena of salmonid stranding and the reasons for it, but only one speaks to the relevant region. "Hydrologic Impacts of Small Scale Instream Diversions for Frost and Heat Protection in the California Wine Country" studied the impact of diversions for frost and heat protection in two tributaries in the Russian River watershed. The data and conclusions reinforce the observation that the risk of juvenile salmonid strandings is most acute in tributaries.

for Habitat Conservation Program in California testified that "it is very important to have minimum in-stream flow criteria achieved, if we can do that we can protect the fish." (AR Disc #5, 2:48.) Section 862 was enacted without making such a determination, leaving no specific standard to accomplish the objective.

Petitioners argue that the two incidents of salmonid strandings did not show the requisite necessity for the regulation. It is relevant that there were no other documented salmonid strandings either in 2008 or during the frost seasons of 2009, 2010, or 2011. This court also rejects NMFS posit that thousands of fish were stranded. The NMFS analysis was fundamentally flawed because it was not based on facts or data but on conjecture and speculation. (*See* note 5, *supra*.) Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*Roddenberry, supra*, at 651.) The NMFS model is based on conjecture; not inferences based on fact or logic and cannot be considered.

Though speculation is not permitted, rational inferences are appropriate. Based on the severity of the conditions in the spring of 2008, mistakes in water management by SCWA, as well as frost-related diversions, it would be unreasonable to conclude these strandings occurred in isolation. The existence of some strandings in salmonid habitat on the morning of April 20, 2008 is a logical basis to infer there were others--we simply do not know the severity or the location of presumptive strandings.

The rational conclusion to be drawn from the limited documentation is that further study is needed to draw refined geographical correlations between diverting water for frost protection and risk to juvenile salmonids. This is especially true when so many positive changes have been made to improve the watercourse since 2008. Guess work or instinctual reactions cannot be a basis to declare, as a matter of law, that using water for frost protection is a waste or an unreasonable method of use of water system-wide.

After releasing the initial draft of Section 862, SWRCB chairman admitted that insufficient data or information was available to conclude that every diverter or groundwater user posed a risk to the salmonids. (AR Disc #7 – 2010 workshop, 16:00) Instead he stated, "our intention is to develop data that is helpful to us." Section 862 goes much further than developing data: it declares the use of water for frost protection to be unreasonable throughout the entire watershed. "Unreasonable" has an important legal meaning that has been discussed previously. [24] Enacting a regulation of the breadth and scope of Section 862 before developing a sufficient scientific or fact-driven analysis to conclude the regulation is necessary to eliminate the harm, is not acceptable.

Instead of gathering the specific factual data itself, the SWRCB has implemented a regulation requiring private individuals to do this work at their own cost. The private individuals will then submit this information to the SWRCB in the form of potentially hundreds of separately

[24] Both the Chairperson of the SWRCB and a SWRCB voting member of the Board made statements during the hearings acknowledging their finding that frost protection is an unreasonable method of using water was simply a way to acquire regulatory control over farmers in the Russian River watershed. They further acknowledged the finding was "offensive" and implied that they knew using water in this manner was a necessary component of viticulture. (AR Disc #2 at 1:39; AR Disc #7 at 0: 11; AR Disc #2 at 2:57.) Regardless, to make the finding there has to be substantial evidence to support it, not just a desire to regulate.

filed WDMPs, which may be approved or denied at the discretion of the SWRCB. The problem is further compounded by the by the lack of any identifiable standards in the body of the regulation to guide either the governing boards or the SWRCB in developing and/or approving a WDMP. The law requires the SWRCB to draft a regulation when there is substantial evidence showing the necessity for it--not to draft a regulation mandating private individuals to gather the evidence necessary to support the regulation in the first place.

A thorough review of the record leaves this court finding only a tenuous basis for the regulation as enacted. The determination by the SWRCB that Section 862, as drafted, is reasonably necessary to effectuate its purpose is not supported by substantial evidence and for that reason the Court declares the regulation invalid under Government Code Section 11350(b)(1).

C. CEQA Claims

Petitioners raise a number of factual challenges to the adequacy of the EIR eventually adopted by the SWRCB. These challenges need not be addressed because the court has found 862 to be invalid on various different grounds. The court will, however, address the issue of whether the SWRCB proceeded in a manner required by law in enacting §862.

1. Standard of Review

On a writ of mandate in CEQA actions the trial court reviews the administrative record for "a prejudicial abuse of discretion." (Pub. Resources Code, § 21168.5; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1371.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code § 21168.5; *Sunnyvale, supra,* 190 Cal.App.4th at1371.) "Judicial review of these two types of error differs significantly...." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435(*Vineyard*).) The Court reviews de novo whether the agency employed the correct procedures or properly interpreted CEQA's requirements, "we accord greater deference to the agency's substantive factual conclusions." (*Ibid.; Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277, 119 Cal.Rptr.2d 402 (*Fat*).) "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' " (*Vineyard, supra,* at p. 435.) See also *Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549, 556-57

a. The Resolution and the Regulation Were Validly Adopted.

Petitioners argue that the SWRCB did not proceed in a lawful manner on September 20, 2011 when the regulation was enacted. Petitioners argue that the Board moved to adopt the regulation without adopting the underlying resolution and final EIR.

Petitioners are correct that at the time the formal motion was made by member Spivy-Weber to adopt the regulation, she did not also move adoption of the accompanying resolution accepting the final EIR. (AR 15069.) Moments later, the only three members of the board present

voted unanimously in support of the motion as made. The chairperson then adjourned the meeting. Within minutes and while the video taping equipment was still running, a staff person clarified with all members present that the motion was to adopt "the resolution with the changes to the Regulation [sic]." (AR 5152.) The staff person could be seen and heard asking the question and chairperson responded in an audible manner that it was and Ms. Spivey-Weber could be seen nodding in an affirmative manner. (see AR Disc 10 24:00 – end.)

While not procedurally perfect, by referring to the transcript and watching the video including the context of the entire discussion that took place on September 20, 2011, it is apparent that the board members intended to adopt the resolution with the changes to the regulation. The record is not reasonably susceptible to a different interpretation.

Petitioners have not provided any authority that would support a finding that the resolution and regulation were not validly adopted under the circumstances present. Therefore the court declines to make such a finding.

CONCLUSION

For all the reasons discussed herein, this Court grants Petitioners Writ of Mandate and declares invalid Section 862.

IT IS SO ORDERED.

Dated: September 26, 2012

Ann Moorman
Judge of the Superior Court

STATE WATER RESOURCES CONTROL BOARD
REGULATION

Text of Regulation

Amendment to Division 3 of Title 23 of the California Code of Regulations

Add the following section:

§ 862 Russian River, Special.

Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frosts. Frost protection of crops is a beneficial use of water under section 671 of this chapter. During a frost, however, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonids due to stranding. Stranding mortality can be avoided by coordinating or otherwise managing diversions to reduce instantaneous demand. Because a reasonable alternative to current practices exists, the Board has determined these diversions must be conducted in accordance with this section.

(a) After March 14, 2012, except for diversion upstream of Warm Springs Dam in Sonoma County or Coyote Dam in Mendocino County, any diversion of water from the Russian River stream system, including the pumping of hydraulically connected groundwater, for purposes of frost protection from March 15 through May 15 shall be diverted in accordance with a board approved water demand management program (WDMP). For purposes of this section, groundwater pumped within the Russian River watershed is considered hydraulically connected to the Russian River stream system if that pumping contributes to a reduction in stream stage to any surface stream in the Russian River watershed during any single frost event.

(b) The purpose of the WDMP is to assess the extent to which diversions for frost protection affect stream stage and manage diversions to prevent cumulative diversions for frost protection from causing a reduction in stream stage that causes stranding mortality. The WDMP, and any revisions thereto, shall be administered by an individual or governing body (governing body) capable of ensuring that the requirements of the program are met. Any WDMP developed pursuant to this section shall be submitted to the board by February 1 prior to the frost season.

(c) At a minimum, the WDMP shall include (1) an inventory of the frost diversion systems within the area subject to the WDMP, (2) a stream stage monitoring program, (3) an assessment of the potential risk of stranding mortality due to frost diversions, (4) the identification and timelines for implementation of any corrective actions necessary to prevent stranding mortality caused by frost diversions, and (5) annual reporting of program data, activities, and results. In addition, the WDMP shall identify the diverters participating in the program and any known diverters within the area subject to the WDMP who declined to participate. The WDMP also shall include a schedule for conducting the frost inventory, developing and implementing the stream stage monitoring program, and conducting the risk assessment.

(1) Inventory of frost diversion systems: The governing body shall establish an inventory of all frost diversions included in the WDMP. The inventory, except for diversion data, shall be completed within three months after board approval of a WDMP. The inventory shall be updated annually with any changes to the inventory and with frost diversion data. The inventory shall include for each frost diversion:

(A) Name of the diverter;

(B) Source of water used and location of diversion;

(C) A description of the diversion system and its capacity;

(D) Acreage frost protected and acres frost protected by means other than water diverted from the Russian River stream system; and

(E) The rate of diversion, hours of operation, and volume of water diverted during each frost event for the year.

(2) Stream stage monitoring program: The governing body shall develop a stream stage monitoring program in consultation with National Marine Fisheries Service (NMFS) and California Department of Fish and Game (DFG). For the purposes of this section, consultation involves an open exchange of information for the purposes of obtaining recommendations. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired. The stream stage monitoring program shall include the following:

(A) A determination of the number, type, and location of stream gages necessary for the WDMP to monitor and assess the extent to which frost diversions may affect stream stage and cause stranding mortality;

(B) A determination of the stream stage that should be maintained at each gage to prevent stranding mortality;

(C) Provisions for the installation and ongoing calibration and maintenance of stream gages and

(D) Monitoring and recording of stream stage at intervals not to exceed 15 minutes.

(3) Risk assessment: Based on the inventory and stream stage information described above, and information regarding the presence of habitat for salmonids, the governing body shall conduct a risk assessment that evaluates the potential for

frost diversions to cause stranding mortality. The risk assessment shall be conducted in consultation with NMFS and DFG. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired. The risk assessment shall be evaluated and updated annually.

(4) Corrective Actions: If the governing body determines that diversions for purposes of frost protection have the potential to cause stranding mortality, the governing body shall notify the diverter(s) of the potential risk. The governing body, in consultation with the diverters, shall develop a corrective action plan that will prevent stranding mortality. Corrective actions may include alternative methods for frost protection, best management practices, better coordination of diversions, construction of offstream storage facilities, real-time stream gage and diversion monitoring, or other alternative methods of diversion. Corrective actions also may include revisions to the number, location and type of stream stage monitoring gages, or to the stream stages considered necessary to prevent stranding mortality. In developing the corrective action plan, the governing body shall consider the relative water right priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage. The corrective action plan shall include a schedule of implementation. To the extent feasible, the corrective action plan shall include interim corrective actions if long-term corrective actions are anticipated to take over three years to fully implement. The diverters shall implement corrective actions in accordance with the corrective action plan, or cease diverting water for frost protection.

(5) Annual Reporting: The governing body shall submit a publically available annual report of program operations, risk assessment, and corrective actions by September

1 following the frost season that is the subject of the report. The report shall include:

(A) The frost inventory, including diversion data.

(B) Stream stage monitoring data.

(C) The risk assessment and its results, identification of the need for any additional data or analysis, and a schedule for obtaining the data or completing the analysis.

(D) A description of any corrective action plan that has been developed, any corrective actions implemented to date, and a schedule for implementing any additional corrective actions.

(E) Any instances of noncompliance with the WDMP or with a corrective action plan, including the failure to implement identified corrective actions.

The report shall document consultations with DFG and NMFS regarding the stream stage monitoring program and risk assessment and shall explain any deviations from recommendations made by DFG or NMFS during the consultation process. In addition, the annual report shall evaluate the effectiveness of the WDMP, and recommend any necessary changes to the WDMP, including any proposed additions or subtractions of program participants. Any recommendations for revisions to the WDMP shall include a program implementation plan and schedule. The board may require changes to the WDMP, including but not limited to the risk assessment, corrective action plan, and schedule of implementation, at any time.

(d) The governing body may develop and submit for the Deputy Director for Water Rights' approval, criteria, applicable to any participant in its WDMP, for identifying groundwater diversions that are not hydraulically connected to the Russian River stream

system. The governing body may submit to the Deputy Director a list of groundwater diverters that appear to meet these criteria and could be exempted from this section. The Deputy Director is authorized to exempt the listed groundwater diverters, or identify the reason for not exempting the listed groundwater diverters. Beginning three years from the effective date of this section, if an individual groundwater diverter can independently demonstrate to the satisfaction of the Deputy Director that the diversion is not hydraulically connected to the Russian River stream system, the Deputy Director is authorized to exempt the groundwater diverter from this section.

(e) Compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River stream system for purposes of frost protection. The diversion of water in violation of this section, including the failure to implement the corrective actions included in any corrective action plan developed by the governing body, is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be subject to enforcement by the board. The board has continuing authority to revise terms and conditions of all permits that authorize the diversion of water for purposes of frost protection should future conditions warrant.

NOTE: Authority cited: Section 1058, Water Code.
Reference: Section 2, Article X, California Constitution; and Sections 100, 275 and 1051.5, Water Code.

PROOF OF SERVICE

Case: **SC-UK-CV-G -11-0059127-000 - LIGHT, RUDOPLH VS. CALIF STATE WATER RESOURCES**

Document Served: **PROOF OF SERVICE FOR ORDER GRANTING PETITION FOR WRIT OF MANDATE IN CONSOLIDATED ACTIONS**

Service date: **September 26, 2012**

I, Frances Proteau, am a citizen of the United States of America and employed by the Superior Court in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within entitled action.

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By: _____
Frances Proteau, Deputy Clerk