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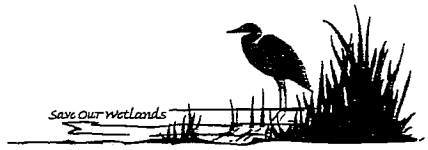

December 21, 2009

COPY
ORIGINAL DOCUMENT
SONOMA COUNTY WATER AGENCY
TO GUTIERREZ; ARMSTRONG; RISK MANAGER
POOLE, JLANC; PHELPS
DEC 22 2009

Via Certified Mail - Return Receipt Requested

CF/45-0-26 Northern California River Watch and Coast Action Group vs SCWA et al

Board Chair
Sonoma County Board of Supervisors
Sonoma County Administration Building
575 Administration Drive, Room 100A
Santa Rosa, CA 95403

Randy D. Poole, General Manager
Sonoma County Water Agency
404 Aviation Boulevard
Santa Rosa, CA 95403

Gary Locke -Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE ENDANGERED SPECIES ACT

Dear Board Chair, Mr. Poole and Secretary Locke:

NOTICE

The Endangered Species Act ("ESA") § 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator and the Secretary of Interior or Commerce. I am writing on behalf of Northern California River Watch and Coast Action Group, hereafter collectively referred to as "Noticing Parties", to notify the Sonoma County Board of Supervisors and the Sonoma County Water Agency hereafter collectively referred to as "VIOLATORS", of alleged violations of Section 9 of the ESA, 16 U.S.C. § 1538 with

respect to harm and unauthorized take of federally protected salmonid species in the Russian River, its tributaries, the Gualala River and its tributaries, the activities identified in this **Notice.**

After the expiration of the 60-day notice period, Noticing Parties intend to file suit in federal court against VIOLATORS to enjoin them, their agents and employees, from alleged violations of the ESA and/or regulations issued under the authority of the ESA. If prior to expiration of the 60-day notice period either the Sonoma County Board of Supervisors or the Sonoma County Water Agency is legally enjoined from further alleged violations of the ESA, that entity will not be named in the federal complaint.

Noticing Parties also give notice to the Secretaries of Commerce and Interior that after the expiration of the 60-day hold period, Noticing Parties will file suit in federal court to enforce the ESA, unless a Secretary has commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a); or, if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA alleged in this **Notice.**

STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B), it is unlawful for any person to TAKE an endangered species. Under ESA § 4(19), 16 U.S.C.§ 1532(19), the term "TAKE" includes to harass, harm, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. TAKE includes direct as well as indirect harm and need not be purposeful. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. § 687, 704 (1995). In fact, a TAKE may even be the result of an accident. See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

ESA § 9 is a strict liability statute, meaning that the illegal TAKING need not be intentional. Cumulative acts resulting in a TAKE are also actionable. Therefore, if water diversion in a habitat is caused by several entities rather than one, all entities may be prosecuted even if the act of one was insufficient to cause a TAKE. Attempting to cause almost any level of injury to an endangered species is also prohibited by law. TAKE is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can TAKE or attempt to TAKE any fish or wildlife. *Defenders of Wildlife v. Administrator*, EPA, 882 F.3d 1294, 1300 (8th Cir. 1989). Adverse habitat modification is a form of injury. The ESA § 9 prohibition on TAKE applies equally to threatened species. The ESA not only prohibits the acts of those parties that directly exact the TAKING, but also bans acts by a third party which bring about the acts exacting a TAKE. For instance, a governmental, third party entity pursuant to whose authority an actor directly

exacts a TAKING may be deemed to have violated the ESA. *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir.1997) See also *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998); *Sierra Club v. Yeutter,* 926 F.2d 429 (5th Cir. 1991).

The ESA has a broad citizen suit provision allowing any entity to commence a civil suit on its own behalf to enjoin any entity who is alleged to be in violation of any provision of the ESA or regulation issued under the authority thereof. A plaintiff can seek to enjoin both present activities which constitute an ongoing TAKE and future activities reasonably likely to result in a TAKE. See *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

FACTUAL BACKGROUND

De-watering of rivers and streams is occurring in Sonoma and Mendocino Counties and has been linked to agricultural activities. Agricultural activities commonly associated with agricultural development, and known to have adverse affects on creeks and rivers when approved without due regard for habitat needs of listed species, include well development, grading, scraping and planing of the landscape for water storage, drainage alteration, adverse impacts to lower order water courses, and impacts on peak and low flows in higher order water courses.

Although a significant and continuing problem, VIOLATORS approved many of these activities in the absence of knowledge of how much ground and surface water is available, at all times of the year, to support planned and unplanned development.

Due to the actions and inactions of VIOLATORS, there are now at least 60,640 acres of vineyards in the Russian River watershed including Mendocino County, 70 percent of which are less than 300 feet from endangered species habitat. Likewise, well development is permitted or inadequately regulated by VIOLATORS in close proximity to critical habitat of the aquatic species which are the subject of this **Notice.**

As the National Marine Fisheries Service ("NMFS") stated in its letter of June 9, 2009 (NMFS Comments Premier Pacific Vineyards), "mortality of steelhead has been documented due to timber conversion and grading activities. . .". NMFS went on to say that the County and the landowner bear full responsibility of ensuring activities are in compliance with the Endangered Species Act and other applicable laws.

One example of the lack of adequate regard for listed species dependent upon adequate year round in-stream flows to survive, is VIOLATORS' continued consent to the planting of wine grapes in frost prone areas even subsequent to a 1997 report issued by the

State Water Resources Control Board ("SWRCB") identifying frost protection activities of vineyard practices as having adverse impacts on listed species of fish struggling to survive in the Russian River Basin and its tributaries. The report found that frost protection activities harmed listed species of fish including Coho, Chinook, and Steelhead. (As used herein the term "listed species" will refer to Coho, Chinook, and/or Steelhead unless otherwise designated or described).

Although this has been known since at least 1972 when the courts found that frost protection activities in the Napa River Basin were harmful to listed fish species, such frost protection activities in Sonoma and Mendocino Counties continue to occur and have increased over the years. In 2000, SWRCB staff referred to its 1997 report emphasizing that under certain conditions, adequate water is available for appropriation in the winter, but no water is available in the spring, summer or autumn without the risk of harming fishery resources. (Staff Report SWRCB 7/2000). In spite of these findings, VIOLATORS continue to approve more high impact agricultural and agricultural-related activities in proximity to critical habitat of listed species in the absence of knowledge of water availability for all activities associated with these developments, and without due regard for the cumulative impacts of such projects and activities on listed species.

VIOLATORS also allegedly fail to enforce and properly implement existing laws to protect listed salmon and Steelhead within their geographical boundaries. The Gualala River watershed and many tributaries of the Russian River including Felta Creek, Mark West Creek, and Green Valley Creek continue to experience large conversions of forests to vineyards. For example, hundreds if not thousands of acres of vineyards have recently been planted by a relatively few large landholders above the Wheatfield Fork of the Gualala River. That watercourse now has documented dry stretches which historically have supported Steelhead, rearing pools, and flows sufficient to keep baby salmon and Steelhead, also known as fry, secure until such time as they are proficient swimmers.

Agricultural interests have removed extensive amounts of vegetation, and planted vineyards on the slopes above the Wheatfield Fork and its tributaries. Such intensive agricultural activity is known to require substantial amounts of water. Noticing Parties allege that the known water needs of approved and unapproved vineyard activities are adversely affecting in-stream flows in the Wheatfield Fork in an unreasonable manner, resulting in complete loss of flows in several areas of the stream at certain times of the year. The Wheatfield Fork in recent times provided flows adequate to support juveniles of listed species until the time they make their way downstream to the sea to mature before their return migration to spawn. Streams that supported protected Steelhead and Coho only a few years ago, are now turning into deserts. The Wheatfield Fork is being especially hard hit. The habitat of listed species is being decimated. Where there were pools last year and the

year before, there is dried vegetation, hot exposed gravels, hot puddles, and in many instances a complete absence of the once abundant Steelhead and Coho. Recent studies correlate rapid and dramatic draw downs of flows in creeks with agricultural activities. (Kondolf, Deitch, and Merenlender 2006 & 2008; D. Hines, NMFS - April 29, 2009). According to the NMFS, rapid draw downs of water resources near potential or actual listed species' habitat have caused a TAKE of listed species such as Coho, Chinook and Steelhead.

In the Spring of 2008, fry of listed species were stranded near shore gravels in the main stem Russian River at Hopland and Felta Creek. In the Felta Creek watershed, over 200 acres are planted in grapes. This is a relatively small but very important critical habitat tributary for spawning Coho and Steelhead. Despite knowledge and warnings, it is alleged VIOLATORS improperly approved water supply development activities without due regard to the actual water available for all activities associated with the development, inadequately mitigated projects, conditionally approved projects where inadequate oversight of implementation of those conditions existed, and evidently approved too many water demanding projects without due regard for VIOLATORS' duties and responsibilities not to harm listed species.

Many projects VIOLATORS approved or failed to regulate include vineyard preparation activities such as land planing, scraping, and ripping of the land. VIOLATORS failed to properly plan to avoid impacts to listed species and failed to give adequate consideration of the cumulative impacts of their land use decisions on listed species, all of which have contributed to de-watering of the habitat to a such a low level as to create an unsustainable environment for listed fish species; in some cases creating a direct kill of fish and in other circumstances causing an indirect kill by contributing to an environment hostile to fish survival.

Protected species of fish were left stranded out of water in Felta Creek and at Hopland along the main stem of the Russian River in the Spring of 2009 (NMFS February 19, 2009, NOAA - June 27, 2008), at which time approved and/or unregulated agricultural projects and activities again withdrew water for purposes of frost protection, and de-watered the habitat to such a low level so as to create an unsustainable environment for listed fish species; in some cases creating a direct kill of fish and in other circumstances causing an indirect kill by contributing to an environment hostile to fish survival.

Biologists and knowledgeable members of the concerned public have witnessed a dramatic reduction in stream flows in the Wheatfield Fork which correlate best with anthropogenic activities under VIOLATORS' authority to regulate. The complete absence of water and protected Steelhead, where there were recently pools and Steelhead, indicates the habitat is being adversely modified resulting in a TAKE of hundreds of species which

face extinction. Continuing water diversion, and the failure of VIOLATORS to responsibly manage water resources and land use, have caused a TAKE and are a continuing threat of TAKE, of threatened and endangered listed species. Continuing agricultural practices such as water diversion, dramatic changes in the landscape including forest conversions, reservoir construction, drainage alternation, well and spring development and chemical use have caused a TAKE and are a continuing threat of a TAKE of threatened and endangered listed species. Frost pumping, a form of water diversion, is widespread. The harmful impacts on survival and recovery for listed species following frost protection pumping are well documented. The region's significant fisheries are near extinction. Water diverted from creeks and rivers for frost protection is widespread and the harmful impacts on salmonid survival and recovery well documented.

There are at least 1,778 miles of potential listed species habitat in the Russian River watershed. All of it is needed for the recovery of the Coho, Chinook, and Steelhead as described in recovery plans. VIOLATORS continue to approve large, water-consuming land use projects and activities which militate towards a worsening of the impacts on listed species.

In the Russian River basin, fry or young fish have been observed dead from sudden agricultural water draw down and stranding as have older fish known as "smolts". Fry emerge from their eggs/redds in April or May and have poor swimming ability. They are susceptible to stranding and take refuge in cobble substrates. Listed species' populations in critical habitat are at a very high risk of extinction due to frost protection irrigation as well as other farming practices as described below. (NMFS - Spring 2009 Power Point for SWRCB).

On stream and off stream reservoirs are a major contributor to salmonid fatalities. VIOLATORS have failed to protect listed species or their habitat by over allocating resources, consenting to improper use of land, or by failing to enforce existing regulations. Reservoirs and pumps authorized by VIOLATORS or otherwise operated with the knowledge of VIOLATORS, pull water from habitat of listed species. In addition to the thousands of permitted agricultural reservoirs, evidence suggests there are approximately 800 illegal reservoirs in the Russian River watershed. These reservoirs contribute to the habitat water draw down insofar as they are filled by way of diversions of flows (either by instantaneous draw down, or cumulative effects on stream hydrology) that would otherwise keep adequate flows in the watercourses.

VIOLATORS continue to approve activities harmful and potentially harmful to listed species in the absence of knowledge of how much water is available for use by present and future human and environmental needs. This **Notice** alleges VIOLATORS are guilty of acts

or failures to act, resulting in harm to and a TAKE of listed species. This **Notice** also alleges VIOLATORS are responsible for approving or failing to regulate the agricultural practices described herein, resulting in harm to and a TAKE of listed species.

The diversion of water from listed species' habitat occurs multiple times a year. Not all occurrences are due to frost. Statistics show that diversion is more extreme in dry years when fish are at greater risk. Diversion events do not always correlate with frost risk and over response appears to be increasing. There is clear documentation that these agricultural practices have and will continue to harm, harass or kill protected fish species.

Protected Status and Habitat Needs

The evolutionarily significant units ("ESUs") of Coho, Chinook, and Steelhead that include the Russian River and Gualala River populations are federally listed species of fish protected under the ESA. The Central California Coast ESU of Coho is listed as endangered. The California Coastal ESU of Chinook and the Northern and Central California Coast ESUs of Steelhead are listed as threatened. All of the water courses identified in this **Notice** are habitat for the listed species.

Coho (*Oncorhynchus kisutch*) spend approximately the first half of their life cycle rearing and feeding in streams and small freshwater tributaries. Spawning habitat is small streams with stable gravel substrates. The remainder of their life cycle is spent foraging in estuarine and marine waters of the Pacific Ocean. Adult Coho migrate back from a marine environment into the freshwater streams and rivers of their birth in order to mate. They spawn only once and then die. Adults return to their stream of origin to spawn and die, usually at around 3 years old. Females prepare several redds (nests) where the eggs will remain for 6 to 7 weeks until they hatch. Critical habitat was designated on May 5, 1999 for the Northern California Coast ESU.

Chinook (*Oncorhynchus tshawytscha*) were listed as endangered in 1994. Juvenile Chinook may spend from 3 months to 2 years in fresh water before migrating to estuarine areas as smolts and then into the ocean to feed and mature. Critical habitat has been designated for the 9 listed Chinook. Chinook remain at sea for 1 to 6 years (more commonly 2 to 4 years), with the exception of a small proportion of yearling males called "jack salmon", which mature in freshwater or return after 2 or 3 months in salt water. Scientific studies shows that unless smolts reach a certain size before ocean migration, they have little chance of survival.

There are different seasonal (i.e., spring, summer, autumn or winter) "runs" in the migration of Chinook from the ocean to freshwater, even within a single river system. These

runs have been identified on the basis of when adult Chinook enter freshwater to begin their spawning migration. However, distinct runs also differ in the degree of maturation at the time of river entry, the temperature and flow characteristics of their spawning site, and their actual time of spawning. Freshwater entry and spawning timing are believed to be related to local temperature and water flow regimes. Adult female Chinook will prepare a redd in a stream area with suitable gravel type composition, water depth and velocity. The adult female Chinook may deposit eggs in 4 to 5 "nesting pockets" within a single redd. Spawning sites have larger gravel and more water flow up through the gravel than the sites used by other Pacific salmon. After laying eggs in a redd, adult Chinook will guard the redd from a few days to nearly a month before dying. Chinook eggs will hatch, depending upon water temperatures, between 3 to 5 months after deposition. Eggs are deposited at a time to ensure that young fry emerge during the following spring when the river or estuary productivity is sufficient for juvenile survival and growth.

On January 5, 2006, the NMFS listed 9 DPS of west coast Steelhead (*Oncorhynchus mykiss*) as threatened and one as endangered. Some of them had been previously listed between 1996 and 1998, but because of legal and other issues, all listings were reaffirmed and/or revised in 2006. They are a unique species. Individuals develop differently depending on their environment. While all Steelhead hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams, some stay in fresh water all their lives. These fish are then called rainbow trout. The Steelhead that migrate to the ocean develop a much more pointed head, become more silvery in color, and typically grow much larger than the rainbow trout that remain in fresh water.

Adults migrate from a marine environment into the freshwater streams and rivers of their birth in order to mate. Unlike other Pacific salmonids, they can spawn more than one time. Young animals feed primarily on zooplankton. Adults feed on aquatic and terrestrial insects, mollusks, crustaceans, fish eggs, minnows, and other small fishes.

The stream-maturing type (summer-run Steelhead in the Pacific Northwest and northern California) enter freshwater in a sexually immature condition between May and October and require several months to mature and spawn.

The ocean-maturing type (winter-run Steelhead in the Pacific Northwest and northern California) enter freshwater between November and April with well-developed gonads, and spawn shortly thereafter. Coastal streams are dominated by winter-run Steelhead, whereas inland Steelhead of the Columbia River basin are almost exclusively summer-run Steelhead. Adult female Steelhead will prepare a redd in a stream area with suitable gravel type composition, water depth, and velocity.

The adult female may deposit eggs in 4 to 5 nesting pockets within a single redd. The eggs hatch in 3 to 4 weeks. Steelhead are capable of surviving in a wide range of temperature conditions. They do best where dissolved oxygen concentration is at least 7 parts per million. In streams, deep low-velocity pools are important wintering habitats. Spawning habitat consists of gravel substrates free of excessive silt. Critical habitat for 10 west coast Steelhead DPS was designated on September 2, 2005. Both the salmon and Steelhead require perennial aquatic habitat and adequate stream flows 24 hours a day 365 days a year in order to live.

ACTIONS ALLEGED TO TAKE PROTECTED SPECIES

Habitat Modification - Upland and Riparian Destruction

The species of fish which are the subject of this **Notice** spawn and mature in freshwater, migrate to the sea to finish growing and maturing, and then return to the creeks of their birth to spawn again. These anadromous fish, in order to survive long enough to migrate to the sea, require freshwater habitat that has year round flows, deep pools, adequate food, adequate shelter, and clean cold waters. Upland and riparian habitats associated with aquatic habitat are essential to maintain salmon and Steelhead populations through their life stages. They provide food and essential shade to cool the ambient air and protect the streams from the heating effects of solar radiation when thin shade or no shade canopy is available.

Maintaining the integrity of aquatic sites by protecting them from disturbance and supporting the normal functions of the aquatic habitat is critical and known to be an important factor in reducing water temperature and sedimentation of creeks. Loss and adverse modification of Class I, II, III, and IV streams, well development activities, water diversions, scraping of the land, and lined and unlined reservoir development as well as forest conversion are major contributors to the TAKE of these protected species. It is alleged VIOLATORS continue to fail to give due regard to the cumulative impacts of development on water resources, act or fail to act by allowing inappropriate development, water use, chemical use, timber conversion and other agricultural practices which assist and facilitate the TAKING of listed species.

Habitat Modification - Drastic Flow Reductions

Harmful diversions of water occur for several reasons, many of which are ongoing and relate back to poor planning and improper approval of ministerial permits and discretionary land use permits by the lead land use agency and the agency with the authority and duty to manage water supply in the Russian and Gualala Rivers. In addition, harmful flow reductions are a result of mis-management of the water supply by the agency with the

authority and duty to manage water supply in the Russian River. Fry of listed species utilize shallow gravels in order to be safe from predators, where they can grow and become proficient swimmers. Juvenile listed species spend a summer in the creek in which they were born and are completely dependent upon adequate flows, cool water, and deep pools for growth and survival in various life stages and in order to avoid predation.

As described herein, when the flows are reduced, water recedes from the gravels and young fish become stranded in place where they quickly die. Where pools are not drained entirely, they become warm and shallow exposing the smolts to overcrowding and predators. The rapid draw downs which have harmed and continue to harm listed species are associated with direct diversions from surface waters, pumping of wells in proximity to creeks, and approval of reservoir construction in the absence of proof of water right or claim, all of which have occurred and continue to occur due to illegal practices in violation of the ESA.

Some of these diversions are used to protect budding grapes from frost and are also used for heat protection and general irrigation practices. Noticing Parties allege that VIOLATORS, in the process of approving or failing to properly regulate more vineyard-related activities and thereby approving or failing to regulate frost protection or other water intensive practices, have allowed de-watering of habitats at a rate too rapid for the habitat to recover. This rapid de-watering constitutes a TAKE when the habitat can no longer provide a healthy or safe environment for listed species. Listed species die in the absence of water, are trapped in shallow warm pools or die due to sudden exposure to predators. Low levels of water due to agricultural practices creates unhealthy and often times lethal biological conditions such as nitrification and eutrophication. Stream flows of specific depth and volume are needed to sustain listed species in their various life stages. Spawning listed species need sufficient flows to migrate upstream to accomplish that task. Flows are needed to cover redds and newly hatched fish. Stream flow is needed for rearing purposes, to support food sources and access to food sources, and to allow movement to refuge to avoid predation. Flows also affect stream temperature that can cause thermal barriers, stress fish, induce disease and low growth rate, and induce predation.

The alleged practices of VIOLATORS are adversely affecting stream flows thus harming listed species as well as their habitat. Stream flows in many of Sonoma County's watercourses have been shown to be diminished and interrupted by alleged diversions for frost protection and irrigation. In some cases there are diversion-induced dry sections of streams which until recent times have never been seen before. These stressors, related to low flows, end up producing smaller smolts. Small smolts have a very high rate of mortality in the ocean. Habitat modification due to decreased flows often times happens dramatically in a short period of time – as short as several hours, and leaves fish stranded and dead or seriously stressed, inhibiting survival and growth.

VIOLATORS are aware that the de-watering of habitat occurs in the spring when grape growers use creek water, reservoirs filled by withdrawals from creeks and rivers, and nearby stream wells to wet the vines and buds in order to protect them from fluctuations in temperatures associated with the area in which the grapes were allowed to be planted. De-watering also occurs in the summertime when temperature fluctuations place the grape crop in a tenuous situation due to its susceptibility to heat. VIOLATORS are also aware there are feasible alternatives to activities which risk TAKE such as wind machines, better vine placement, and crop insurance.

A riparian owner is subject to the doctrine of reasonable use, which limits all rights to the use of water to that quantity reasonably required for beneficial use, and prohibits waste or unreasonable use or unreasonable methods of use or diversion. (Sec. 3, Art. XIV, Const. of Cal.; *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 Pac. 2d 486; *Tulare Irr. Dist. et al v. Lindsay Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 Pac. 2d 972; *Rancho Santa Marqarita v. Vail*, 11 Cal. 2d 501, 81 P. 2d 533). Storage of water is regulated and improper storage can harm protected species.

Authorized Land Use Impacts

Regulated agricultural practices, whether authorized or not, have harmed and continue to harm listed species by compromising the integrity of the riparian vegetation through clearing, intrusions of tractors, people, domesticated animals, and chemicals. Healthy, functioning riparian areas provide the food source for fish as well as providing shelter and shade. The removal and thinning of the canopy of this riparian zone has harmed and continues to harm listed species. Such degradation of this riparian zone has caused and continues to cause increase runoff rates, decrease in recharge rates, and erosion, leading to sedimentation of critical spawning gravels.

In addition to harm caused by degradation of the riparian zones, it is alleged VIOLATORS approve and fail to regulate numerous detrimental agricultural operations resulting in the plowing under of lower order watercourses essential to the health of listed species. Class II, III, and IV streams provide additional clean water in a natural flow regime to the creeks and aquifers, provide food for listed species in the Class I streams below, and act as conduits for surface flows, increasing percolation to feed the aquifer, and at the same time reducing the amount of erosion that would otherwise occur if the flows were dispersed over bare ground. The impacts of VIOLATORS' alleged improper approvals and failure to regulate development practices result in harmful high impact logging, scraping, and ripping of hillsides and other natural areas and upslope of sensitive habitats; well, reservoir and spring development; water diversions; construction of numerous lined ponds (further preventing adequate recharge of aquifers) and poorly reviewed wineries and bottling plants

(consuming enormous amounts of water for production and cleaning). All of these impacts have impacted and continue to have significant, cumulative impact which has already resulted in harm to the listed species of fish identified in this **Notice** which are on the verge of becoming extinct in large part due to over- appropriation of water, waste, and excessive use of water.

Conversions of Forests

VIOLATORS' alleged failure to properly regulate and review conversion of forests to industrial agriculture, especially near streams and on slopes, have changed microclimates from cool to hot. The winter rains are no longer adequately absorbed into the aquifer to be released slowly back into the creeks in the summer, but rather runoff at increased rates increasing flows in the creeks in the rainy season, endangering fertilized eggs of listed species remaining in the redds, and killing fry. The shade needed in the summer is removed and soils become hotter than normal resulting in higher ambient air temperatures. The complete or substantial transformation of wooded and forested areas to industrial vineyards associated with the alleged activities of VIOLATORS has a very significant adverse affect on recharge of the groundwater needed to replenish stream flows over the hot summer months.

Chemical Use

Pesticides, herbicides and fertilizers used by approved and under-regulated agricultural interests, run off the land and cause potential and actual harm to listed species and their habitat. Many of the chemicals used contain endocrine disruptors shown to harm listed species. Agricultural spraying and irrigation run off have caused and continue to cause the transport of chemicals into creeks and streams. Because listed species are immersed in the water their entire life, they are especially vulnerable to the introduction of pollutants into their habitat.

LIABILITY OF VIOLATORS

Sonoma County Water Agency

The Sonoma County Water Agency ("Agency"), controls water releases from Lake Mendocino into the Russian River. In the Spring of 2008 and 2009, the Agency improperly controlled releases resulting in flows so low that significant numbers of rare and listed species were killed. This direct TAKE of species protected under the ESA violates Section 9 of the ESA. California Water Code Appendix Section 53-3.6 requires the Agency and its governing Board "to do any and all acts necessary" to furnish water for beneficial uses. The

Agency, for example, is empowered to compel owners of any structures which shall obstruct the free flow of water to remove such structures (Sect. 53-3 (g), and to engage in fisheries habitat restoration (Sections 1 and 2 of Stats. 2001, c. 107 (California A.B.38)).

Beneficial uses of the Russian River and its tributaries include spawning, reproduction, early development, and critical habitat for listed species. Through the Agency's improper management of the Russian River basin, Lake Sonoma, and Lake Mendocino water supply, a direct TAKE of listed species has occurred for at least the last 2 years. Water levels in the Russian River have been allowed to drop below required levels needed to support listed species. Many of the rare individuals of the species perished in exposed gravels. Through its operations, the Agency failed "to do any and all acts necessary" to furnish water for beneficial uses during frost protection activities. It failed to release required adequate supplies of water resulting in adverse habitat modification and a TAKE of listed and protected species. In addition, the Agency has failed to restore fisheries habitat which has been subjected to increased demands for water managed by the Agency, failed to identify and remove structures which obstruct the free flow of water, and failed to avoid and prevent a TAKE of protected species as required.

As a result of the Agency's action and inaction, there has been repeated TAKE of Coho and Steelhead in violation of the ESA. Properly issued permits, proper supervision and adequate enforcement will lead to proper management of in stream flows. VIOLATORS have not managed the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water.

Sonoma County Board of Supervisors

The Sonoma County Board of Supervisors ("County"), is also the directing board of the Agency and is thus directly responsible for the Agency's policies and procedures. In carrying out its duties as the lead land use agency, the County must comply with laws governing the protection of endangered and threatened species. In regulating public or private activities, local governments in California are required to give major consideration to preventing environmental damage. Improper approval by the County of numerous forest conversions, vineyard estates including wineries, bottling plants, and water supply development has nevertheless resulted in significant environmental damage. Adverse habitat modification has harmed and killed species of fish listed as rare under the federal ESA in both the Russian River and Gualala River Basins. Although required to do so, the County has failed to "prevent the elimination of fish and wildlife species due to man's activities, insure that fish and wildlife do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities." The fact that the rivers, tributaries, and groundwater resources in Sonoma County are

experiencing de-watering and over draft, and that listed species are thereby being harmed and killed, reflects directly on the County's failure to plan and to mitigate for adverse cumulative environmental impacts. The County has allegedly violated the ESA by failing to prevent significant, adverse, cumulative environmental impacts to listed species.

Agricultural practices approved by the County have harmed and continue to harm listed species by compromising the integrity of the riparian vegetation, by clearing, by the intrusions of tractors, people, domesticated animals, and chemicals into, and in close proximity to, habitat of listed species. Clearing and stripping of the landscape in Sonoma County for the installation of large vineyards and their attendant operations is regulated and authorized by the County through the review and approval of development permits. Well and reservoir developments associated with vineyards, wineries, and wine factories must be permitted by the County. All such activities have significant impacts on water supply in watersheds by increasing demand significantly over large geographic areas.

In addition, the County routinely reviews, comments upon, and approves conversion of mature forests to vineyards and wine factories. Although required to avoid significant direct and indirect adverse, cumulative environmental impacts where feasible, and to refrain from TAKING protected species, the County continues to permit off stream storage, reservoir construction, grading, clearing, and stripping of natural vegetation in close proximity to creeks and rivers, and continues to permit large water depleting projects, and piecemeal development of wells, vineyards, and conversions. The County has issued permits for wells, vineyards, wineries, wine factories, reservoirs, clearing of vegetation, and forest conversions without due regard for listed species' habitat and the potential harm to that habitat.

Properly issued permits and effective enforcement by VIOLATORS will limit the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water.

VIOLATIONS

ESA § 9

ESA § 9 prohibits the TAKE of protected species. The acts, operations, and failure to act properly on the part of VIOLATORS has resulted in a TAKE of protected species which includes harm to habitat. The alleged TAKE of protected species has occurred in the Russian River watershed and its tributaries and the Gualala River watershed and its tributaries and is alleged to be the result of actions and inactions of VIOLATORS related to land use and water supply management activities.

In April of 2008, law enforcement of the NMFS was notified of two episodes of fish stranding mortality: Steelhead fry perished along the mainstream Russian River near Hopland, and Coho fry died in Felta Creek, a tributary to Dry Creek, which empties into the Russian River. Similar impacts were documented on Maacama Creek, a tributary of the Russian River. Although a repeat of this biological disaster was predicted and regulatory agencies were warned to take immediate steps to prevent such harm, the fish kills occurred again in the Spring of 2009 as the result of approved and unregulated agricultural activities. Biologists have also documented unprecedented draw downs in the Gualala watershed which track with large changes in the landscape including conversions of forests to vineyards.

Agricultural practices are required by law to be conducted in such a manner so as to avoid impacts to listed species. The improper approvals and failure to properly regulate agricultural practices by VIOLATORS as described herein have harmed listed species. In Sonoma County, thousands of acres of water consuming, recharge depleting and land clearing activities have occurred less than 300 feet of listed fish habitat, critical habitat, and potential habitat. Water development and water supply activities continue to be approved, or improperly regulated, by the lead land use agency in Sonoma County without due regard for the impacts on listed species or their habitat. VIOLATORS improperly approve individual projects often without due regard for the impact on listed species or their habitat. Such activities as described herein have resulted in and continue to result in a direct and indirect TAKE of the listed species.

VIOLATORS are in violation of ESA § 9, 16 U.S.C. §1538, if they have engaged in the activities described herein that TAKE protected species. It is alleged that VIOLATORS' approvals and failure to properly regulate land use and water supply have repeatedly killed, threatened and endangered listed species. It is expected that frost and heat protection activities for crops will continue. Permit approvals for vineyards in proximity to actual and potential habitat will continue. These activities including water supply development and use must be conducted in a manner which will not harm listed species. Moreover, vineyards are associated with intensive chemical use which contributes to the degradation of important aquatic habitat and movement corridors, negatively impacting listed species and their food sources as well. These harmful activities are continuing in nature. VIOLATORS must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of protected species.

In addition to other remedies, VIOLATORS must stop activities which likely contribute to the loss of year round, cold, clean water essential for the migration, reproduction, rearing, safety, food, survival and recovery of listed species.

ESA § 10

Noticing Parties allege VIOLATORS have not applied for an incidental TAKE permit under ESA § 10, 16 U.S.C. § 1539. VIOLATORS do not fall within the category of those permitted to incidentally TAKE endangered species such as research scientists or restoration experts. Acts, operations, and failure to act properly on the part of VIOLATORS has resulted in the unpermitted TAKE of protected species which includes harm to habitat.

IDENTIFICATION OF ENTITIES BRINGING NOTICE

The entities bringing this **Notice** are Northern California River Watch and Coast Action Group identified collectively throughout this Notice as "Noticing Parties".

Northern California River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California. It is located at 500 North Main Street, Suite 110, Sebastopol, CA 95472, Telephone and Facsimile 707-824-4372, Email:US@ncriverwatch.org.

Coast Action Group is an organization dedicated to the protection of fishery and water quality resources on the north coast of California. Coast Action Group has a history of actions supporting the protection of fish, forest, and water quality resources dating back to 1990. Coast Action Group exists in order to protect fish and wildlife through state and federal water laws. It comments on issues of statewide concern in order to protect in-stream flows and water quality. It is currently participating in meetings and on a task force attempting to deal with important issues which affect listed species of Coho salmon and Steelhead trout. Coast Action Group is located at P.O. Box 215, Point Arena, CA 95468, Telephone 707-882-2484, Email: alevine@ mcn.org.

CONTACT INFORMATION

Noticing Parties have retained legal counsel to represent them in this matter. All communications with respect to the issues raised in this **Notice** should be addressed to the following counsel:

Jack Silver, Esquire
Law Office of Jack Silver
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707-528-8175

CONCLUSION

The violations as set forth in this **Notice** affect the health and enjoyment of the members of Noticing Parties who reside, work and recreate in the affected area. Noticing Parties and their respective members use these watersheds for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, hiking, photography, nature walks, restoration activities, and the like. The health, property rights, use, and enjoyment of these areas by the members of Noticing Parties are specifically impaired by the violations of the ESA as alleged herein.

Noticing Parties believe this **Notice** sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter, Noticing Parties intend to file a citizens' suit under the ESA against VIOLATORS to enjoin them from violations of the ESA and/or regulations issued under the authority of the ESA.

During the 60-day notice period, Noticing Parties are willing to discuss effective remedies for the violations described in this **Notice.** However, if VIOLATORS wish to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period. Noticing Parties do not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

Jack Silver

JS:lhm