



Russian River Frost Program

January 13, 2010

Via Email Only
commentletters@waterboards.ca.gov

Chairman Charles Hoppin
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: 1/19/2010 SWRCB Workshop on Russian River Frost Protection Draft Regulation

Dear Chairman Hoppin and Board Members,

The members of the Russian River Frost Program (Program) are highly disappointed with the SWRCB's staff draft regulation regarding water diversion practices from the Russian River for frost protection. This draft regulation does not in any way resemble the "hybrid" document that SWRCB staff were directed to construct following the November 18, 2009 workshop. This draft regulation does not give any consideration to the cooperative efforts by local growers or include any of the components proposed in the Russian River Frost Program that were brought before the Board. Although this is only a draft regulation, it is an undesirable starting point from which to continue the collaborative efforts to resolve the water use needs for both the agricultural community and the fishery resources. The proposed regulation developed by the Program and submitted to Board Chair Hoppin and Deputy Director Whitney in mid-December (attached) remains the preferred starting point for a Board regulation if that becomes necessary. The deficiencies of the staff's proposed regulation and benefits of the Program's proposed regulation are discussed in this letter.

Frost protection is a necessary, allowable, permitted and an established beneficial use of water¹. To declare that any diversion of water from the Russian River stream system is "unreasonable" is quite a stretch of an already loaded term. While there have been two allegations of frost diversion related-fish stranding, there is no evidence to support the presumption that all diversions for frost protection in the Russian River system are unreasonable. The Board therefore cannot meet its very high burden of finding the use of water unreasonable under Water Code section 100 and California Constitution Article X, Section 2.

¹ California Code of Regulations, Title 23, Sections 659 and 671

The draft regulation also dictates that any, "*water demand management program shall ensure that the instantaneous cumulative diversion rate does not result in a stream flow that is harmful to anadromous fish.*" There are no criteria for determining what would be considered to be a significant reduction in stream flow that is detrimental to anadromous fish and there is no defined process for diverters to demonstrate compliance with the criteria. Assuming that all diversions are detrimental while not providing a clear process for defining standards and establishing compliance is not compatible with developing a workable solution.

A concern about the proposed Russian River Frost Program that was raised by Chair Hoppin related to the lack of a governance element for diverters who are not involved with the Program. Since the November workshop, the outreach effort in both Mendocino and Sonoma Counties has continued in order to increase involvement with the Program. The Program is confident that it will achieve a critical mass from voluntary—not compelled—participation. Furthermore, because it may be impractical to include some isolated diverters in the Program, to demonstrate compliance with diversion criteria independent of a demand management program, the regulation must include diversion criteria and a process for allowing individual diverters to demonstrate compliance independent of a demand management program.

The staff proposal also appears to confuse the role of a program developed to administer a frost diversion management program with a traditional "watermaster" appointed to administer water rights adjudicated by a court water right decree. The Russian River system requires a resource management program that can assess potential frost diversion effects and identify and implement stewardship activities, namely, the Russian River Frost Program, and not an "*individual or governing body capable of resolving disputes*", which sounds like the role of a watermaster. The State Water Board is mandated by the Water Code to investigate violation of permit terms and conditions and unauthorized use; accordingly, the SWRCB is the only entity that should be "resolving disputes".

The Program has committed to implement an effective monitoring program. Stream flow gaging, groundwater levels, and cumulative frost diversions will be reported for tributaries with significant frost diversions. The staff proposal, however, would make the governing body responsible for implementing a monitoring and data reporting protocol on all diversions deemed significant by the SWRCB, on the main stem as well as any tributary that supports anadromous fish, and providing hourly, raw data feedback to the SWRCB. This proposed regulation would impose an unnecessary compliance burden on essentially all diversions despite the lack of evidence that frost protection causes a significant instantaneous impact in all reaches of the watershed.

Prior to the release of this draft regulation, the focus of the Program was to reduce the instantaneous demand of surface water diversions to avoid the correlated drawdown that was seen along the main stem of the Russian River and along Felta Creek in 2008. Now, the draft regulation is suggesting a far more overreaching constraint by including, "*the pumping of closely connected groundwater,*" under the terms of a significant diversion. The SWRCB has defined closely connected groundwater to be any groundwater that "*is pumped from areas described as subterranean flow or mapped active stream channels and associated alluvial deposits on maps prepared by Stetson Engineers, Inc-----.*" Adopting a regulation on groundwater based on data that has not been made available for public or scientific peer review, or even included in the SWRCB Draft Instream Flow Policy, is setting a precedent that will force water users to challenge the referenced Stetson maps in order to prevent misuse in other contexts.

Furthermore, the SWRCB has not proven that the features shown on the Stetson maps are subterranean streams over which the SWRCB has jurisdiction. The legal presumption is that water under the ground is percolating ground water unless there is a finding, either by the SWRCB or the courts that a subterranean stream exists. This draft regulation is an attempt by the SWRCB to secure new jurisdiction over groundwater sources that will affect a wide array of diverters, including municipalities, without an established legal basis. The regulation of groundwater goes above and beyond the initial scope of working toward a policy for reducing the instantaneous effects to surface diversions for frost protection water in the Russian River and in fact expands the regulatory authority of the SWRCB into all aspects of ground water within the state of California.

This proposed regulation is contradictory to what was understood by diverters to be a collaborative approach to resolving the water needs for both agriculture and the fishery. It appears that the extensive effort made by diverters over the past year, resulting in a viable solution, has been ignored and the Program that was presented in November was not seriously considered by the SWRCB. The language in this draft is over reaching and does not fulfill what the SWRCB directed staff to draft following the November 18th workshop. This draft should be completely disregarded and actual consideration needs to be given to the ideas and solutions that were developed by the diverters. This draft regulation favors 'command and control' over resource stewardship. The high cost of compliance will take limited resources away from needed resource management activities proposed in the Russian River Frost Program.

The Program's proposed regulation is enclosed. Any regulation ultimately adopted by the SWRCB should include the following provisions that the Program currently embodies:

- Recognize the SWRCB's obligation to process applications and petitions and commit to expediting approvals for projects that reduce the instantaneous peak direct diversion demand for water during frost events.
- Recognize and support the Russian River Frost Program as the only feasible solution for managing the effects of frost diversions in 2010.
- Regulate diversions that have a significant effect on streamflow only. Do not start a conflict between all water users by asserting a SWRCB jurisdictional claim over groundwater.
- Exclude stream reaches such as the mainstem Russian River and mainstem Dry Creek that are not likely to exhibit acute effects from diversions for frost protection.
- Establish clear diversion criteria and a compliance process for diverters not participating in the Program.

Sincerely,

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Lex McCorvey
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RUSSIAN RIVER FROST POLICY
Discussion Draft

FINDINGS

1. Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frosts (generally March 15 to May 15). Water application is the most common and effective method of protecting new growth on grapevines from frost in the low lying regions in the Russian River watershed. Water is the only feasible method for reliably protecting vines against frost damage.
2. The economies of Sonoma and Mendocino County in general and of the wine industry in particular would suffer tremendous losses if vineyards were prevented from using water for frost protection.
3. During a frost and particularly during low flow periods, the high instantaneous demand for water for frost protection may cause a rapid change in stream stage.
4. In the spring of 2008, the Russian River was in a second year of drought. March 2008 was the driest March on record with no rainfall. Freezing temperatures occurred on 20 nights in late March and early April, requiring frost control measures to protect new growth on grapevines in low-lying valley areas. The 2008 frost season was the worst frost season in over 30 years. Typical frost events are radiation frosts where cold air sinks to low-lying areas and these areas are subject to frost damage. Advective frost events occur when a large air mass with freezing temperatures moves into a valley and frost damage occurs both in low-lying areas and on hillsides. Large areas of the Upper and Middle Russian River Watersheds are subject to severe frost temperatures of 27°F.
5. The National Marine Fisheries Service ("NMFS") in a February 2009 letter to the State Water Board alleges that two instances of salmonid stranding mortality on Felta Creek and on the mainstem Russian River near Hopland in 2008 were related to direct diversions for frost protection.
6. Grape growers and regional conservation, agricultural and water user groups have formed the Russian River Frost Program, a cooperative effort to address frost protection for the Upper and Middle Russian River Regions. The Program will reduce changes in stream flows from diversions for frost protection by implementing conservation actions that reduce instantaneous demand. Conservation actions include projects that reduce the volume of water used for frost control and projects that change the manner in which water for frost protection is obtained. The Program uses a watershed based approach to monitoring directed by an Independent Science Advisory Group. Watershed based monitoring will examine a variety of factors affecting stream flows including factors other than diversions for frost protection. Focused monitoring will therefore allow the Frost Program to direct its conservation actions to provide the greatest benefit to stream flow. The Science Advisory Group will provide direction and input regarding the factors to investigate and monitor and the selection of protocols for conducting such inquiries. The Science Advisory Group will evaluate the overall effectiveness of the Russian River Frost Program.
7. Water management actions have already been implemented to address the diversion-related factors alleged to have contributed to the two episodes of frost diversion-related stranding mortality. The Russian River Frost Program and cooperators implemented the following conservation actions to address frost water management affecting the mainstem Russian River: Pumping Coordination Protocol between Sonoma County Water Agency and Russian River Flood Control District (RRFC); funding for a new USGS gage at Talmage; enhanced phone-in frost forecasting system; installation of telemetric meters for RRFC customers; created a program of BMPs to conserve water through changes in frost methods and infrastructure and a BMP implementation verification process; and construction of new offstream storage ponds that will

reduce direct diversion demand by 87 cfs. For the tributaries, the Russian River Frost Program and cooperators helped the Felta Creek diverter to replace instream frost pump with an offstream pond recharged by a groundwater well, created a program of BMPs to conserve water through changes in frost methods and infrastructure and a BMP implementation verification process, and started tributary frost assessments on 15 tributaries.

8. The Russian River Frost Program made a presentation of the features of this program to the Board at the Board's November 18, 2009 Frost Protection Public Workshop.
9. The Russian River watershed is a variable and complex physical system. There is no uniform solution for frost protection that will work for every diverter in the Russian River watershed.
10. The Board finds that the Russian River Frost Program offers a feasible and practical approach for addressing frost protection issues in the Russian River watershed. The Board also finds that the Russian River Frost Program is likely to provide an environmental benefit more quickly and at less cost than the Board could accomplish through regulation of individual diversions.

POLICY STATEMENT

It is policy of the Board to encourage methods of frost protection that reduce the direct diversion of surface water from streams including the diversion of water from wells and from reservoirs, and to identify criteria for reducing the instantaneous effects of direct diversions on stream flow.

It is the policy of the Board to expedite review and approval of petitions to change existing water right permits and licenses and applications for new water right permits where the petition or application will facilitate reduction of the instantaneous peak demand for water during frost events.

It is the policy of the Board to support cooperative efforts by grape growers to address frost protection effects as an alternative to regulation of individual water diversions by the Board.

The board shall implement this policy by commencing a public rule making process to accomplish the following: expedite review and approval of petitions to change existing water right permits and licenses and applications for new water right permits to change the manner and timing of diversion; encourage direct diverters to participate in a regional frost protection program; and establish guidelines for diverters who do not participate in the Russian River Frost Program.

POLICY IMPLEMENTATION

(a) **Concise Summary of Findings and Policy.** Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frosts (generally March 15 to May 15). Water application is the most common and only feasible effective method of reliably protecting new growth on grapevines from frost in the low lying regions in the Russian River watershed. During a frost and particularly during low flow periods, the high instantaneous demand for water for frost protection may cause a rapid change in stream stage. It is policy of the board to encourage methods of frost protection that reduce the direct diversion of surface water from streams including the diversion of water from wells and from reservoirs, and to encourage cooperative efforts to manage diversions for frost protection. The board shall implement this policy by: expediting review and approval of petitions to change existing water right permits and licenses and applications for new water right permits to change the manner and timing of diversion; by encouraging direct diverters to participate in a regional frost protection program; and by establishing guidelines for diverters who do not participate in a regional frost protection program.

(b) **Expedite Approvals.** The board shall expedite review and approval of petitions to change existing water right permits and licenses and applications for new water right permits where the petition or application will reduce the instantaneous peak direct diversion demand for water during frost events, including but not limited to: change a direct diversion from a stream channel to a diversion of surface water by well; change a direct diversion to a diversion of surface water to offstream storage; expansion of storage; addition of new offstream storage; and addition of new season of diversion to offstream storage.

(c) **Diverters Participating in Russian River Frost Program.** The board recognizes the Russian River Frost Program is a feasible and practical approach for addressing frost protection issues in the Russian River watershed. Commencing in 2010, water users diverting water for frost protection in the Russian River Region may demonstrate compliance with this regulation by participating in the Russian River Frost Program, as described in the November 10, 2009 program summary, and as may be revised in the future in consultation with the Board. The Russian River Frost Program shall provide the board with a 2010 implementation plan by February 15, 2010, consult with the board and other resource agencies during the 2010 frost season, and provide a report on the effectiveness of Program following the 2010 frost season. The board will evaluate the effectiveness of the Program after the 2010 frost season and may recommend changes to the Program. The Program will provide annual reports to the board thereafter.

(d) **[version d1] Technical Process to Develop Guidelines for Diverters Not Participating in Russian River Frost Program.** The board shall convene a public technical process for developing recommended guidelines to address instantaneous rates of direct diversions of water for direct application and for reservoir refill for frost protection purposes for diverters not participating in the program defined in subsection (c).

(d) **[version d2] Guidelines for Diverters Not Participating in Russian River Frost Program.** The board recommends that the direct diversion of surface water for direct application or reservoir refill for frost protection purposes from the Russian River watershed from March 15 to May 15 conform to one of the following guidelines:

(1) Diversion from the mainstem Russian River and mainstem Dry Creek that is coordinated with Sonoma County Water Agency and Russian River Flood Control and Water Conservation Improvement District to ensure flows in the mainstem Russian River and mainstem Dry Creek meet or exceed any

applicable minimum flow requirements that Sonoma County Water Agency and Russian River Flood Control and Water Conservation Improvement District are required to maintain; or

(2) Direct diversion from a tributary stream where the diversion for a single frost protection event is not predicted to [ver 2a - cause a substantial dewatering of the wetted stream bed within 48 hours of diversion] [ver 2b - cause a reduction of stream stage greater than the natural diurnal fluctuation in stage at the point of diversion within 48 hours of diversion] [ver 2c - cause a change in stage no greater than (*X rate, unit, etc.*) per hour].

(e) **Groundwater.** The use of percolating groundwater for frost protection is not subject to this regulation.

(f) **Enforcement.** Frost diverters who do not participate in the program defined in subsection (c) or conform to guidelines in subsection (d) may be subject to enforcement proceedings.