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An affiliate of the Redwood Coast Watersheds Alliance



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State Water Resources Control Board,  
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**Comment:** Additional Comment at Public Hearing/Response to Comments Issues -  
PROPOSED RUSSIAN RIVER FROST PROTECTION REGULATION

## GENERAL

After reviewing the final wording of the Regulation and Response to Comments documents, we find it imperative to add these additional comments to the record. Documents and authorities referenced are either in the Administrative Record or readily available to the SWRCB and included in the file by reference.

## UNREASONABLE USE

Staff Report on the Russian River Watershed (1997) indicates:

- Cumulative diversion of water for frost protection can have a significant adverse effect on fish survival
- Similar situation in the Napa River (1972), and given the fact that there are alternatives (cost analysis showed slight increase in cost for alternative measures that were reasonably available), the SWRCB found that such water use that can reduce flows and effect fish survival is an unreasonable use of water.
- There has been no valid reason brought forward in this policy/regulation review and analysis that would not sustain a similar finding of unreasonable use and thus promote alternative methods of frost control where diversion need not occur

during low flow periods. Findings to change such a conclusion have not been presented. Yet, in the Response to Comments discussion water diversion (during low flow periods) may be deemed a beneficial use. Such a finding is not consistent with previous Board policy and findings and can not be supported by evidence in the file.

CONSISTENCY REVIEW (WATER CODE, State Flow Maintenance Policy (AB 2121), DFG CODE, AND FEDERAL ESA COMPLIANCE ( to "ensure" protection of mortality by from diversion for frost use).

CEQA requires that environmental review for a project (in the case promulgation of regulation for water use for frost protection on the Russian River) accomplish consistency analysis with relevant laws, policy, and regulation. This has not been fully accomplished in the environmental document.

- CAG had requested (in previous comments – noting that diversion of water for frost protection is a flow maintenance issue) that the Regulation be consistent with State Policy to Maintain Flows in Northern California Streams (AB 2121). In the Response to Comments Document – it was clearly stated “Comment Noted....” , and that the implementation of the Regulation would be consistent with this policy. However, nowhere in the Regulation is it stated that such compliance is mandated as part of the implementation process.
- CAG and other commentors (including DFG – Comment 1.3.14, 1.3.19) indicated that the Regulation must comply with the Federal and State ESA. Response to Comments indicated that Regulation is not responsible to meet ESA obligations, but is being promulgated to “ensure” that fish will not be stranded. First, management of diversion without regulation is causing harm and mortality. This is contrary to ESA legal obligation. Secondly, the Regulation and related consistency review must demonstrate how the Regulation will prevent mortality from diversion of water for frost protection (this includes demonstration the Regulation will “ensure” prevention or avoidance of such instances). It is a fatal flaw (abuse of discretion), under CEQA, for a responsible agency (in this case the SWRCB), to ignore the comments and recommendation of another responsible agency with authority and expertise in fishery protection (in this case comments and recommendations made by DFG and NMFS). It is not demonstrated in the Regulation or the Response to Comments how the word “ensure” is applicable (or will be actualized) in the implementation of the Regulation. Environmental analysis must disclose how the application of the word “ensure” will be applied.
- NMFS asks for monitoring and management (adaptive) to be in place to ensure that harm to salmonids does not occur (NMFS Comment 1.5.8). This recommendation implies the need for compliance to Federal statute and that monitoring should occur in real-time. (See also DFG Comment 1.5.11 and 12). If annual risk assessment is to occur (based on year end monitoring and reporting),

how can such risk assessment predict and protect for the future year without real-time monitoring results to work with?

- Note: The SWRCB has authority and responsibility to maintain the viability of the Beneficial Use : Cold Water Fishery.

## WDMP DESCRIPTION

CAG must agree with commentors from the grape industry and DFG (Comment 1.3.18:) that the description of what is entailed in the application of a WDMP, and what are the mandated constituent parts of a WDMP, is not fully disclosed. It is not clear how an WDMP will be consistent with State Policy to Maintain Flows in Northern California Streams and other applicable laws, policies, and codes.

## MONITORING (REAL-TIME MONITORING)

CAG, and other parties, requested real time monitoring as a performance guide and analysis tool. Response to Comments document indicates that year end reporting will be the guide to adaptive management and measuring performance. This means that there is no indication to the public, responsible agency, or the diverter that diversion controls are ensuring management of stage and flow sufficient to maintain fish survival. Management, after the fact does not fit with the goal of “ensuring” against the possibility of mortality from low flow diversion.

Response to comments states that DFG and NMFS will review and assess annual reports. The Response to comments also states that DFG and NMFS will make recommendations as to attributes of WDMP(s). It is not clear if NMFS and DFGs recommendations and/or annual review (after the fact assessment) have any authority in the process in WDMP development and or remedy for issue that is evident in an annual report. SWRCB claims final authority. So just how does this Regulation and monitoring regime fit with the needs and codes of other regulatory structure and the goal of “ensuring” avoidance of fish stranding?

## GROUND WATER EFFECTS

NMFS (Comment 1.9.8, 1.9.9) and the SWRCB generally supports control of pumping from well hydrologically connected to the instream flow. Such wells and related stream flow must be subject to stream flow analysis and control by setting flow targets and WDMP criteria and implementation plan.

Sincerely,

Alan Levine, for Coast Action Group