



# Mendocino County Farm Bureau

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Affiliated with the California Farm Bureau Federation and the American Farm Bureau Federation



September 16, 2011

Jeanine Townsend  
Clerk of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-2000

Via Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

RE: Comment Letter- Russian River Frost Regulation Regulation

Dear Board Members,

The Mendocino County Farm Bureau (MCFB) is a member of the Russian River Frost Program (RRFP), a two-county coalition of agricultural organizations formed in 2009 to address water management issues in the Russian River Watershed, including the use of water for frost protection. MCFB would like to submit the following comments on the Russian River Frost Regulation and Response to Comments from MCFB's comments submitted in July 2011. MCFB also supports the comments submitted by the California Farm Bureau Federation and those submitted on behalf of a grower coalition by Jesse Barton.

*Because a reasonable alternative to current practices exists, the Board has determined these diversions are unreasonable unless conducted in accordance with a board-approved water demand management program to reduce their insimaneous impact.*

*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 regulation declares that water diversions for frost protection are unreasonable unless performed in a coordinated manner through a Board approved WDMP. The SWRCB have not provided performance standards in which diverters or a WDMP can determine what stream stage is necessary to prevent "stranding mortality". The Main Stem of the Russian River has guidelines under D1610.

If the State Water Board's objective is to prevent salmonid stranding mortality than ALL water users who divert water during the frost season (March 15-May 15) need to be included in the regulation, not just agricultural diversions. Only frost water diversions are being declared unreasonable and no consideration is given to impacts from other diversions. The SWRCB should address the impacts on salmonids from non-frost diversions.

**Comment 1.3.5:** The regulation declares that water diversions for frost protection are unreasonable unless performed in a coordinated manner through a Board approved WDMP. The requirements of the WDMP have been in question over the last year or so and have been expanded in the latest draft regulation language. Although the language in the current draft regulation has clarified some concerns, the burden to quantify the water needed to satisfy the "no salmonid stranding" component of the regulation still remains with the agricultural industry. The fisheries agencies have not provided performance standards in which diverters or a WDMP can determine what stream stage in each tributary is necessary to prevent salmonid mortality. The mainstem of the Russian River has guidelines under D-1610. The main goal of this regulation is to prevent salmonid stranding mortality, but the research has not been adequately performed to develop standards for such a complex watershed. In fact, on page 3 of the regulation, the words "sound science" were removed when describing what the risk assessment component of the WDMP should be based on. The WDMP, and therefore the agricultural industry, is being asked to quantify the extent of the possibility for salmonid stranding, develop a standard for preventing salmonid mortality, provide self-policing of violations to a standard that has yet to be created and financially support this entire process. The Board is looking to enforce non-compliance, when there are very grey compliance standards available. This is a guilty until proven innocent approach that will be very difficult to satisfy. (Mike Anderson, Mendocino County Farm Bureau)

*Response: (p 41) The proposed regulation provides that the governing body, in consultation with the NMFS and DFG will make the determinations of the stream stage that should be maintained at each gage to prevent stranding mortality. The commenter considers this a burden, but the Board considers it an opportunity for growers, through the governing body, to be involved.*

*The Initial Statement of Reason for the proposed regulation identified an approach for determining the required stream stage. It also identifies that if that approach is too restrictive on frost diversions, a lower stage could be established if coupled with management of diversions. This management of diversions may be limited to control the rate at which the stream stage reduced. The NMFS and DFG continue to analyze potential alternative methodologies.*

**The sentence, "It also identifies that if that approach is too restrictive on frost diversions, a lower stage could be established if coupled with management of diversions", still leaves concern. The concern lies with the fact that the diversion criteria that are being proposed from NMFS and DFG seem not to be based on any existing criteria that these agencies have used within the Russian River Watershed in the past such as those utilized under D1610. The words, "a lower stage could be established", do not explain what the process is for appealing the determination of stage level if indeed the established stage levels within the regulation are overly restrictive on frost water diversions.**

*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.*

**Comment 1.9.7:** The frost events of 2008 that are being used as the basis for the regulation were based on surface water diversions. The regulation has proposed to not only regulate the use of surface water for the purposes of frost protection, but has also included hydraulically connected groundwater. The first question that has to be asked is, "what is considered to be hydraulically connected groundwater?" The term hydraulically connected groundwater is vague and exceeds the jurisdiction of the Board to regulate. The regulation should exclude diversions from groundwater. Pumping groundwater does not result in an instantaneous effect on stream flow, and should be encouraged as a tool for reducing peak surface water demand during frost events. *(Mike Anderson, Mendocino County Farm Bureau)*

**Response:** The Board has no evidence to support that the reduction in stream flow and stage recorded at the USGS Hopland Gauge was the result of only surface diversions. The drop in stream stage and flow was a cumulative impact likely resulting from several diversions, including groundwater diversions. Although groundwater pumping may not have an instantaneous impact on surface flows, under certain conditions the near instantaneous impact of this pumping could be significant. The Board does encourage groundwater pumping as an alternative to surface water diversions, but groundwater pumping needs to be evaluated along with surface water diversions as part of an overall Water Demand Management Program. The Board also acknowledges that the term "hydraulically connected" is broad and may include pumping wells that do not have a substantial effect on surface flows. The State Water Board will consider modifications to the proposed regulation to clarify what is meant by hydraulically connected groundwater for the purposes of the regulation.

MCFB continues to support the statement that the frost events of 2008 that are being used as the basis for the regulation were based on surface water diversions. The regulation has proposed to not only regulate the use of surface water for the purposes of frost protection, but has also included hydraulically connected groundwater. There is a lack of evidence demonstrating that frost protection groundwater pumping contributes to the immediate streamflow reductions that are alleged to strand salmonids. The term hydraulically connected groundwater is still vague and exceeds the jurisdiction of the Board to regulate. The regulation should exclude diversions from groundwater.

*Inventory of frost diversion systems: (d) Acreage frost protected and acres frost protected by means other than water diverted from the Russian River stream system.*

This entire regulation is based on the use of water for the purposes of frost protection. How are, "acres frost protected by means other than water", relevant to this regulation?

*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 SWRCB does not give adequate consideration of water right priority in this regulation. The governing body does not have the legal authority to determine priority of right in the administration of the WDMP.

*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 ground water 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.*

**What are the criteria used to determine if a single groundwater diversion is not hydraulically connected to the Russian River stream system? Why would a groundwater diverter have to demonstrate that they are not hydraulically connected to the entire Russian River stream system and not just the portion of the stream system that their diversion is located by? Why are all groundwater diversions included in the regulation for the first three years and then there is an opportunity to receive an exemption? Is there an appeal process for a groundwater diverter to the SWRCB if there is a discrepancy in the determination made by the Deputy Director?**

*The diversion of water in violation of this regulation 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 is subject to enforcement by the board.*

The SWRCB is relying on its authority pursuant to Water Code section 100 to prevent the waste and unreasonable use of all waters of the state as a basis for the regulation of frost water diversions in the Russian River watershed. However, a single letter from NMFS describing two instances of fish stranding allegedly due to frost water use is not substantial evidence sufficient to demonstrate that every existing frost water diversion in the Russian River watershed is *per se* unreasonable. The law provides specific standards for determining whether a particular use is unreasonable and each water user has the right to be heard regarding whether their individual diversion is in fact unreasonable.

*Comment 1.10.11: The SWRCB should justify why it is necessary to include the entire Russian River watershed, an area comprised of over 1,485 square miles, in the regulation [October 27, 2010 Notice of Preparation] when the alleged strandings occurred in two isolated areas. There is simply no rational relationship between the strandings that are alleged to have occurred in Hopland or on Felta Creek and water diversions in unconnected or unrelated tributary watersheds. We recognize the SWRCB is adopting this regulation in order to prevent*

*strandings from occurring in the future, but the regulation should be directed more toward those locations where strandings have been shown to occur, and where they are likely to occur based upon habitat requirements, rather than locations that are extremely unlikely to be involved in stranding events. (Mike Anderson, Mendocino County Farm Bureau; Jerry Reedy, Reedy Vineyards; Jesse Barton, Gallery and Barton Law Corporation)*

*Response: It is not correct to suggest that strandings occurred in only two isolated areas – only two fish strandings were reported by NOAA, with sufficient evidence and reasonable inferences supporting the conclusion that the two reported stranding incidents are unlikely to be isolated occurrences.*

Based on the information that has been distributed by NMFS and related “assumptions” or “reasonable inferences” that have been used by NMFS to expand upon the purported number of juvenile salmonids that may have been stranded in 2008, MCFB continues to support the statement that this regulatory process is based off of two stranding events.

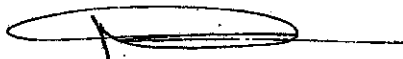
#### **Summary of Main Concerns**

The Russian River Frost Regulation is concerning for a number of reasons. The proposed regulation would: regulate all water used for frost protection in the Russian River Watershed including pre-1914, riparian, licensed, permitted and groundwater; would declare all diversions for frost protection unreasonable unless and until the water is diverted pursuant to a Board approved water demand management program; is not based on sound science; includes water users that have no detrimental effect on salmonids; provides little consideration for the priority of individual water rights; ignores other water users in the watershed such as domestic or municipal; will require detailed data collection; and will result in significant costs on agricultural operations within the watershed. Even more concerning is the fact that the proposed regulation is based upon an unprecedented and justified assertion of the Board’s authority under the reasonable use doctrine, ostensibly for purposes of regulatory convenience and in order to avoid the takings clause.

#### **Conclusion**

MCFB encourages the Board to reconsider the regulatory approach. The proposed regulation is based on a number of claims that have not been substantiated and the February 2009 NOAA letter lists two incidents that have both been addressed. In terms of enforcement, current law such as the Endangered Species Act and Fish and Game Code exists that can be used if necessary. MCFB instead supports the development of non-regulatory collaborative, cost effective and productive solutions to allow for Russian River water to be used both for farming and the fishery.

Sincerely,



Mike Anderson  
President