

**RESPONSES TO ENVIRONMENTAL COMMENTS
RECEIVED ON OR BEFORE SEPTEMBER 16, 2011
ON CHANGES TO THE PROPOSED
RUSSIAN RIVER FROST PROTECTION REGULATION
NOTICED ON SEPTEMBER 1, 2011**

SEPTEMBER 20, 2011

RESPONSES TO ENVIRONMENTAL COMMENTS RECEIVED ON OR BEFORE SEPTEMBER 16, 2011 ON CHANGES TO THE PROPOSED RUSSIAN RIVER FROST PROTECTION REGULATION NOTICED ON SEPTEMBER 1, 2011

Comment #1: The Draft EIR fails to adequately consider adequate reasonable alternatives. As stated above the proposed regulation is based on insufficient scientific data. The Board relies on such data to justify its reasonable alternatives as noted in its response to Comment 2.0.14. While the Board suggests it relied on over 28 alternatives, such alternatives are missing from the EIR. Therefore, there is no evidence that such consideration actually took place. (*Blake Mauritson, Aubrey Mauritson, Esq., Cameron Mauritson, and Don Wallace, Dry Creek Vineyard*)

Response: The commenter has misquoted the Response to Comment 2.0.14. The Board's staff response was "The Board evaluated a wide range of alternatives that were submitted and developed over a 28 month period and fully met the requirements of CEQA. The Board has held four workshops and a NOP Scoping meeting over the course of 28 months, and has solicited comments five times and accepted and reviewed all comments submitted during the 28 month time period." The alternatives considered by the Board are reasonable and sufficient. Comments that do not specifically address changes noticed September 1, 2011, do not require responses here.

Comment #2: Furthermore, as a recent Eastern District of California case notes, government officials have a responsibility to consider reasonable alternatives which not only protect the species, but also minimize the adverse impact on humans and the human environment. [Case 1:09-cv-00407-oww-DLB](#). The Board has simply failed to properly address such alternatives based on the lack of range of alternatives or the substance of such alternatives in properly addressing the adverse impacts to the human environment. (*Blake Mauritson, Aubrey Mauritson, Esq., Cameron Mauritson, and Don Wallace, Dry Creek Vineyard*)

Response: The commenter inappropriately relies on the cited case, which is a federal case involving application of the National Environmental Policy Act and as such is not pertinent to the current situation. Contrary to the unsupported assertions of the commenter, the alternatives considered in the Draft EIR and economic analysis adequately consider impacts to the environment and humans consistent with the project objective. The commenter fails to identify any particular deficiencies in the alternatives considered in the Draft EIR. As already stated in response to previously received comments, the State Water Board considered a number of reasonable alternatives to the proposed regulation in the Draft EIR, as required by CEQA. The Board is not required to "consider in detail each and every conceivable variation of the alternatives stated." (*Residents Ad Hoc Stadium Com. v. Board of Trustees (1979) 89 Cal.App.3d 274, 287-288.*)

Comment #3: Lastly, and as already addressed in previous comments, the alternatives provided by the Board are simply what it and other agencies consider insensitive environmental alternatives. Increasing groundwater production is frowned upon by the Board yet it endorses the measure in its own EIR. Water pumps are a highly contested issue in the Air Resources Control Board, recently requiring growers to replace old with the new, increasing costs exponentially. The Board fails to adequately address the financial and practical feasibility of wind machines and orchard heaters. Finally, the Board explicitly rejects a no-project alternative, even though it admits it is the "environmentally superior alternative." (*Blake Mauritson, Aubrey Mauritson, Esq., Cameron Mauritson, and Don Wallace, Dry Creek Vineyard*)

Response: Comments that do not specifically address changes noticed September 1, 2011, do not require responses here. These issues are fully addressed in the DEIR and Economic Analysis.

Comment #4: In its response to comments, the Board states, "Landowners who choose to discontinue frost protection altogether would likely explore other profitable crop options before selling and converting farm land to other uses". Response to Comment 8.0.4. The Response goes further to comment the "2010 Sonoma County Crop Report reports the following total values per acre of agricultural crops: Grapes = \$6,550; Vegetables = \$11,500; and Apples \$2,250". Response to Comment 8.0.4. It is unclear where these figures were derived from as they are not stated in the 2010 Sonoma County Crop Report.

The Board fails to cite any evidence of the likelihood growers could switch to other profitable crops before selling, other than apparently vegetables gross a higher dollar of value per acre than do winegrapes and apples gross a lower value per acre - an unverified and contestable statistic.

What is clear from the 2010 Sonoma County Crop report is winegrapes are the number one commodity in the County with a gross production value of \$390,448,300. Vegetables were the number 7 crop with gross production at \$8,212,200, two percent of the total value of winegrapes. Apples were the number 10 at \$4,169,300. See, http://www.sonoma-county.org/agcomm/pdf/2010_crop_report.pdf. The report also indicates there are 710 acres of vegetables and 56,522 acres of winegrapes.

The likelihood growers would switch from winegrapes to vegetables cannot be supported by the mere gross production value per acre, even if the number provided is accurate. First and foremost this number fails to consider costs involved with vineyard removal, increased water usage from implementation of row/vegetable crops, and the frost vulnerabilities of such crops. Secondly, as indicated above, vegetables only account for 710 acres compared to over 56,000 acres of winegrapes. Should vegetable crop acreage grow, the price received will decrease as supply increases. (*Blake Mauritsen, Aubrey Mauritsen, Esq., Cameron Mauritsen, and Don Wallace, Dry Creek Vineyard*)

Response: The per acre crop production values used in the cited response were derived by dividing the total crop revenue by the crop acreage reported in the 2010 Sonoma County Crop Report. The county totals reflect aggregated data that may not reflect the economic conditions for individual growers. For example, the referenced Crop Report states that 37,804 acres of red wine grapes produced gross revenues of \$244,717,100. Dividing the gross revenue by total acreage indicates a value \$6,473. UCCE reports that typical gross revenue for Cabernet Sauvignon wine grapes is about \$10,000.

Changes in crop production or land use is a complicated issue and growers decide to switch from one crop to another constantly for a number of reasons and profitability is only one of the factors. The variation in the reported annual crop acreage for each county illustrates the magnitude of the change. The fact that crops other than wine grapes are being grown in the watershed indicates that profitable crop alternatives exist. The total value of production was not cited in the response to provide an indication of the degree of profitability but only to support that other profitable alternatives exist. Regional profitability of principle crops are estimated and published by University of California Cooperative Extension ([.http://coststudies.ucdavis.edu/](http://coststudies.ucdavis.edu/)).

The economic analysis reported in the Form 399 shows that wine grapes acreage is projected to decline by 159 acres after five years. This relatively small shift in wine grape acreage is not expected to affect any commodity prices or the regional focus on “wine country” attributes.

Comment #5: The second Draft EIR again states (although slightly rephrased from the original Draft EIR) that water diverted not in accordance with Board’s WDMP will be unreasonable. Draft EIR, 9. This wording is no different than the original EIR stating all water diverted for frost protection from the period of March 15 to May 15 is per se unreasonable. The Board has no authority to make a broad sweeping determination one activity declared by the legislature as beneficial, is unreasonable per se without a sufficient case by case analysis. *(Blake Mauritsen, Aubrey Mauritsen, Esq., Cameron Mauritsen, and Don Wallace, Dry Creek Vineyard)*

Response: The Draft EIR was modified to reflect changes to the proposed regulation. As noted by the commenter, this particular change makes no substantive modification to the proposed regulation or the Draft EIR. As such, responses to prior comments raising this same point are responsive here, and no further response is required.

Comment #6: With respect to the DEIR, the SWRCB has effectively ignored all of our concerns about the environmental impacts, while at the same time making so many changes to it that we believe it must be recirculated. The changes excluding certain stream sections from the regulation and changes to the mitigation measures have created new environmental impacts that have not been examined or mitigated. *(Jesse Barton, Gallery and Barton Law Corporation, representing Williams Selyem)*

Response: Contrary to the assertions of the commenter, all previously submitted comments were responded to in the document entitled “Responses to Public Comments on the May 2011 Draft Russian River Frost Protection Regulation” released September 1, 2011. The commenter also does not identify any significant new information that was added to the Draft EIR. No stream sections were excluded from the proposed regulation and no changes were made to mitigation measures by any changes to the proposed regulation or Draft EIR since previously provided for public comment. The Draft EIR was modified only to reflect changes to the proposed regulation and to clarify several points identified as unclear by commenters, and none of these changes impact the Draft EIR’s environmental impacts analysis or conclusions.

Comment #7: Requiring data for “acres frost protected by means other than water diverted from the Russian River stream system” in the Water Demand Management Program inventory (Section c (1)(D)) will increase anti-diversion creep within the regulation. It will set a baseline from which the WDMP will ultimately force stream system diverters to use alternative methods regardless of the cost and the cross-media pollution that will occur in air quality. Using heaters and wind machines as alternatives transfer environmental impacts from water to the air basin. The regulation does not adequately address this cross-media impact, which is bad environmental policy. In fact, current frost protection methodologies have emerged from a shift away from air emissions that come from using wind machines and heaters. The Water Board should not adopt a regulation that causes new pollution impacts in order to mitigate potential stranding of salmonids. Lastly, there is a presumption in the DEIR that growers will be able absorb the cost of shifting to frost protection alternatives. *(Paul Kronenberg, Family Winemakers of California)*

Response: The DEIR appropriately assesses the proposed action on a programmatic level and does not impose any particular mitigation measures, instead relying on appropriate mitigation conditioning as project-specific approvals are required. Where there may not be project-specific

CEQA review or adequate conditioning of individual projects required in response to the proposed regulation, the State Water Board has determined that, to the extent that implementation of regulatory requirements and mitigation measures do not fully mitigate direct and indirect impacts, or are not deemed feasible by the agencies implementing or approving individual projects, the economic, social, and environmental benefits of the regulation outweigh any unavoidable adverse environmental effects. (See Pub. Resources Code, §§ 21002.1 and 21081; Cal. Code Regs., tit. 14, § 15093.)

The proposed regulation allows adaptive management as an avenue for taking corrective actions to solve any identified problems. This allows for a business to comply with the proposed regulation at the least cost. Appendix D to the Draft EIR contains a detailed economic analysis of the potential costs of implementing other frost protection alternatives. The change from “acreage served” to “acreage frost protected and acres frost protected by means other than water diverted from the Russian River stream system” does not have any effect on the analysis in the Draft EIR regarding the costs and impacts of these alternative frost protection methods.

Comment #8: 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. (*Alan Levine, Coast Action Group*)

Response: Frost protection is recognized as a beneficial use of water. (Cal. Code Regs., tit. 23, § 671.) The requirement that all water be put to beneficial use to fullest extent to which it is capable is different and in addition to the requirement that all water diversion and use be reasonable.

Comment #9: 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. (*Alan Levine, Coast Action Group*)

Response: The proposed regulation is consistent with the Policy for Maintaining Instream Flows in Northern California Coastal Streams and nothing about the regulation exempts any new appropriative water right from that Policy. It is not necessary that the proposed regulation state this, as there is no inconsistency between the proposed regulation and the Policy.

Comment #10: 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 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. *(Alan Levine, Coast Action Group)*

Response: The proposed regulation is consistent with the federal and state ESA and nothing about the regulation exempts any diverter from the separate ESA requirements or affects the authority of agencies tasked with enforcing the ESA. Contrary to the unsupported assertions of the commenter, no comments have been ignored.

It is not clear where the commenter’s use of the word “ensure” comes from. The proposed regulation does not use this term because, as explained in responses to other comments, neither the proposed regulation nor any other action taken by the Board can ensure that no listed species will be lost. Mortality to listed species can result from causes other than frost protection diversions. Causes may be unrelated to the diversion of water. The proposed regulation will, however, require that diversions of water for frost protection in the delineated geographic area and during the delineated time period be managed to prevent salmonid stranding mortality.

Comment #11: 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. 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? *(Alan Levine, Coast Action Group)*

Response: The proposed regulation does not limit or restrict the enforcement authority of other state and federal agencies as it pertains to the ESA. The proposed regulation would require real-time monitoring of stream stage. The risk assessment would review the real-time data on a yearly basis to evaluate the potential for frost diversion to cause stranding mortality. The governing body, upon review of the data, could suggest the implementation of corrective actions that may involve real-time monitoring of diversions, or other types of corrective actions to prevent stranding mortality. The commenter appears to be suggesting that Alternative 5 should be the recommended alternative. Under Alternative 5 the governing body would receive real-time diversion and stream stage monitoring data. The stream stage data would be posted in real-time on a public internet site. The governing body would have 36 hours to organize and post the diversion data, which was received in real-time, on a public internet site. However, Alternative 5 does not consider that there might be streams where the risk to salmonids is low due to flow conditions, channel morphology, or water demand. In these streams real-time

monitoring may not be necessary to protect salmonids from stranding and it would therefore be unreasonable to require all frost diverters to install real-time diversion and stream stage monitoring systems.

Comment #12: 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. Note: The SWRCB has authority and responsibility to maintain the viability of the Beneficial Use : Cold Water Fishery. (*Alan Levine, Coast Action Group*)

Response: The proposed regulation is consistent with the Basin Plan of the North Coast Regional Water Quality Control Board, and is intended to protect beneficial uses, including cold water fishery.

Comment #13: The modifications to the text of the Draft Regulation and the Draft EIR do not improve or cure any of the legal and other deficiencies identified by Golden Vineyards in its July 5, 2011 comment letter. For the most part, the State Board's responses to Golden Vineyard's comments simply express the State Board's disagreements with the comments without providing any specific factual or legal reasons for that disagreement. As such, the comment responses do not provide a reasoned, good faith analysis of the comments, nor do they directly address comments raising significant environmental issues, thereby failing to meet the requirements of law. Moreover, the changes made to the Draft Regulation and the Draft EIR do not address or cure the deficiencies identified by Golden Vineyards in the earlier comment letter. Indeed, each of the new revisions reflects the same deficiencies identified in our earlier letter. Thus, the comments contained in our prior comment letter are fully applicable to the latest version of the Draft Regulation and Draft EIR and are specifically incorporated herein by reference. (*Paul Spaulding III, Farella Braun and Martel, LLP*).

Response: Staff reviewed all of the responses to comments received from the commenter and found that the responses adequately addressed comments raising significant environmental issues and contained adequate factual, legal, and scientific reasoning. To further clarify the response to comment 1.9.5, the proposed regulation was modified to clarify what is meant by "hydraulically connected groundwater". The proposed change is, as identified in the September 1, 2011 noticed version of the proposed regulation: "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." All other comments previously submitted by the commenter have been adequately responded to in the Responses to Public Comments on the May 2011 Draft Russian River Frost Protection Regulation, dated September 2011.

Comment #14: The change of terminology of "harm" to "stranding mortality", after meeting with the Farm Bureau, has serious implications for the intended application of the ESA and the consequent effectiveness of the new regulations. With the change to the latter term, fish will have to die of exposure, but also have to be found. Otherwise, if the stream flow is diverted to a point where fish become weakened, trapped, or otherwise "harmed", this is an endangerment to their well being and their life. The original term should be maintained. (*Larry Hanson, Northern California River Watch and John Roberts, Atascadero Green Valley Watershed Council*)

Response: The changes to the DEIR noted by the commenters, were made to be consistent with the May 20, 2011 draft regulation. The change in terminology of “harm” to “stranding mortality” in the May 20, 2011 draft regulation is addressed in the response to comment 1.2.4 in the September 2011 Responses to Public Comments on the May 2011 Draft Russian River Frost Protection Regulation. At this time the Board is not aware of published studies or scientific research that indicates that flow fluctuations, as distinguished from the rapid decrease in stream stage from frost diversions, results in behavioral effects on juvenile salmonids when the effects of stranding and redd desiccation have been mitigated for.