



September 16, 2011

via email to commentletters@waterboards.ca.gov

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State Water Resources Control Board
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Subject: Comment Letter - Proposed Russian River Frost Regulation

To Chair Hoppin and the Members of the Board:

Wine Institute and the California Associate of Winegrape Growers appreciate the multiple refinements made in the September 1, 2011, revised draft Russian River Frost Regulation and resolution. However, we still have concerns about the effectiveness and implementation of the regulation. The following changes to the regulation would address some of those concerns.

“Reasonable Use” Language

Wine Institute, the California Associate of Winegrape Growers, and other commenters have noted that the State Water Board does not have sufficient evidence to make the legal finding that all diversions of water from the Russian River system for frost protection are “unreasonable” unless conducted in accordance with a board-approved water demand management program to reduce their instantaneous impact. The finding of unreasonable use or method of diversion has drastic legal consequences for all water users and the Board has an obligation to use its reasonable use authority more judiciously.

As you are no doubt aware, this finding has, unfortunately, served to work against the cooperative spirit that had existed between the Board and winegrape growers. Moreover, we are concerned that this finding could elicit a legal challenge and result in a setback for the considerable efforts that have been implemented to date to deal with frost protection.

Fortunately, the solution is simple: the Board need only to remove the sentence, “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 instantaneous impact” in the preamble paragraph, and the phrase, “is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be” from the second to last sentence of subsection (e). Removing this reasonable use language does not undermine the authority of the Board to adopt the regulation. Investigation of water use and the requirement to coordinate diversions is an appropriate exercise of the reasonable use

authority conferred on the Board by Article X, Section 2 of the Constitution and Water Code sections 100 and 275, and the regulation need not recite “reasonable use” to do so.

If the Board insists on including a reasonable use finding, the language should be revised to track the language in the preamble from the March 23, 2011 version that concluded a diversion harmful to salmonids was unreasonable if it could have been managed to avoid the harm, as follows:

Preamble, strike the last sentence: “~~Because a reasonable alternative to current water diversion practices exists, the Board has determined that these diversions are unreasonable unless conducted in accordance with a board-approved water demand management program to reduce their instantaneous impact.~~”

(e), amend as follows: “Compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River stream system for purposes of frost protection. A diversion of water that is harmful to salmonids is an unreasonable method of diversion and use and a violation of Water Code section 100 if the diversion could have been managed to avoid the harm. The diversion of water in violation of this 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 subject to enforcement by the board.

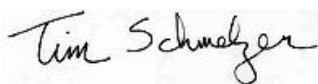
Definition of “Hydraulically Connected Groundwater”

Groundwater is a valuable tool to reduce the effects on streamflow of frost protection water use, and Wine Institute and the California Associate of Winegrape Growers appreciate the attempt to better define the term “hydraulically connected groundwater” as groundwater having an actual contribution to a reduction in stream flow. The definition would be improved by narrowing its application to instances where the groundwater pumping provides a significant, measurable contribution to a reduction in flow, rather than a hypothetical, immeasurable, or de minimus contribution, in a stream that supports or can support salmonid fishes.

Subsection (a), second sentence, revise as follows: “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 provides a significant, measurable contribution ~~contributes~~ to a reduction in stream stage to any surface stream that can support salmonids in the Russian River watershed during any single frost event.”

Thank you for your consideration of our comments.

Sincerely,



Tim Schmelzer
Wine Institute



John Aguirre
California Associate of Winegrape Growers