

**rrfrostregulation - Comments Russian River Proposed FROST Regulation**

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**To:** <rrfrostregulation@waterboards.ca.gov>  
**Date:** 4/4/2011 3:26 PM  
**Subject:** Comments Russian River Proposed FROST Regulation  
**CC:** Tom Howard <THoward@waterboards.ca.gov>, Jeanine Townsend <jtownsend@waterboards.ca.gov>  
**Attachments:** THoward4-4-11\_cmnts

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April 4, 2011

Thomas Howard, E.D.

State Water Resources Control Board

1001 I Street

Sacramento, CA 95814

Re: Comments on the Revised Frost Regulation

Dear Mr. Howard:

Thank you for the opportunity to comment on the State Water Resources Control Board's (SWRCB) revisions to the proposed frost regulations for the Russian River basin, California Code of Regulation Title 23, §862 et seq.

In 1972, the SWRCB determined that diversion of water for frost protection, when watercourses contain insufficient flows to meet all needs, represented an unreasonable method of diversion and use in Napa County. A water master was appointed. The SWRCB is now taking steps to responsibly accommodate frost diversions from the Russian River watershed by way of Water Demand Management Plans (WDMPs). Such an effort on the part of

the SWRCB is in many ways commendable.

What is relevant and very helpful but not expressly addressed in the proposed revisions to the frost regulation is the manner in which water in the past has been deficiently accounted. Given the rapid expansion of vineyards throughout Sonoma and Mendocino Counties in the last 40-years and given the precarious situation in which the present and future populations of wild anadromous fish find themselves, the state must begin to err on the side of conservation, and literally account for not only authorized diversions, but also known unauthorized diversions, estimates of riparian use, and reasonably foreseeable illegal diversions (vineyards with no pond storage and vineyards with no legal right to divert or store water).

Identification of the problem makes solving it much more straightforward. The opportunity now exists to incorporate the best available science and information gained over the intervening 40-years into a proper accounting of water use. By requiring meaningful data in WDMPs, there is the potential to create credible water budgets and to achieve substantial protections in a timely manner.

The last sentence in the preamble to the revised regulation creates unnecessary confusion. The harm to listed species due to a diversion for frost protection is not reasonable. The state must retain its authority and duty to call for no diversions when water supplies may be insufficient to meet all needs and refrain from condoning harm based upon a notion of inability to manage diversions.

#### Beneficial Uses

On at least equal footing with the enormous use of

fresh water supplies for frost protection activities, numerous other beneficial uses of the state's water exist. The proposed regulation, however only affirms the beneficial use of water for frost protection of crops. In order to avoid any confusion as to the relative importance of all beneficial uses, and if such a statement as to the beneficial uses of water for frost protection is to be included in this regulation, so must all other relevant beneficial uses. Other beneficial uses expressly called out in the California Code of Regulations are rare and endangered species habitat, wildlife habitat, fish spawning, cold-water habitat, and fish migration among several other beneficial uses applicable to anadromous fish species.

### Water Demand Management Plans

Under Section 862(b) and (c), the regulation must state, in order to make clear that the state's past practice of only accounting for known legal diversions is not what is being proscribed, that calculation of cumulative diversion rate must utilize reliable estimates of riparian uses, known illegal diversions, and reasonably foreseeable unauthorized diversions in the subject watershed. Such disclosure on the part of diverters will increase the accuracy with which the SWRCB and the resource agencies design protection levels. A meaningful analysis of all diversions will result in more accurate calculation of water budgets in critical habitat areas.

Water budgeting based only on known legal diversions is a tragically failed model and not supported by science. There is abundant information available, and it must be provided to the SWRCB by the diverters in any analysis of cumulative diversion rates. For example, diverters often know or can easily learn about the amount of cultivated acreage in a specific sub-watershed. Diverters must be required to utilize GIS, personal knowledge, and state and county records when conducting the inventories of ownerships that may need water for frost protection. Such information is basic to an adequate analysis of cumulative diversion rate.

Diverters must be required to show that no potential cumulative impacts will result from their operations in "dry" and "critically dry" years. These are the exact times, that Kondolf and Moyle warned about in 2001, when the temptations to exceed safe diversion amounts in order to protect capitol investments are very strong. These real pressures must be fully anticipated and planned for. Growers will benefit from making the appropriate management changes now.

In addition, the WDMP §862(c) must require diverters and appropriators to show a valid water right to use and store the state's waters. A WDMP that implicitly provides permission i.e. requires no proof of a water right, to continue an illegal or unauthorized diversion is improper. It is unfair to legal water rights holders and continues to place trespassers on the state's water above the protection of federally listed species.

The proposed regulation lacks the transparency necessary for effective enforcement. Delayed reporting §862(c)(5) unnecessarily squanders the ability of the SWRCB to carry out its mandate and to prevent harm to listed species. Adequate monitoring, as determined by the science applied by the resource agencies with expertise in fisheries protection, must be required and made publicly accessible in real time. The resource agencies have been calling for transparency for at least two years. It is an important part of an effective approach aimed at obtaining the compliance necessary to bring the last of the once magnificent coho and steelhead back from the brink of extinction. The likelihood of success, for which we all strive, increases substantially by requiring timely and meaningful monitoring. In addition, the public must receive Notice of all WDMPs submitted for approval §862(b) with a reasonable opportunity to comment.

The individual or governing body, in which administration and enforcement powers will be vested, is not described. Such a person or entity must be independent of industry. Private mutual benefit corporations, Resource Conservation Districts, and the

local governments do not qualify.

The revised proposed regulation clearly reflects many months of hard work on the part of staff. The effort is recognized and appreciated. Thank you again for considering our comments.

*Kimberly Burr*

Kimberly Burr, Esq.

On behalf of Northern California River Watch

cc: National Marine Fisheries Service

Department of Fish and Game

Alan Levine, Coast Action Group