

July 5, 2011



Via email to [commentletters@waterboards.ca.gov](mailto: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 Members of the Board:

The Russian River Water Conservation Council (“Council”) is a California non-profit mutual benefit corporation (501(c)(5)) formed to educate agricultural water users on environmentally sensitive water use for frost protection purposes and to coordinate water users and manage water demand within the Russian River watershed. The Council appreciates that the State Water Board is in a difficult position; the Board faces political pressure to adopt a regulation to address assumed conflicts between frost and other water use and salmonids, but the Board lacks the necessary water use, hydrologic and biological information necessary to identify and regulate actual problems. Unfortunately, the Board has for the most part ignored the input of the agricultural community and has moved forward with a proposed regulation that relies on hollow bureaucratic verbiage intended to appear meaningful while providing no practical guidance that would make the regulation a workable, effective program for addressing real-world frost protection and stream flow needs. As drafted, the regulation is counterproductive and will stifle local grower efforts to cooperatively identify and manage resource conflicts. The Council provides these comments on the proposed regulation and Draft Environmental Impact Report (DEIR) with the goal that Board will defer adoption of the regulation or amend the regulation to include a phased implementation approach that offers both practical guidance and a fair opportunity for growers and state and federal resources agencies to cooperatively assess and manage identified problems.

Embrace and Foster Local Voluntary Efforts. The Council believes that the most effective and timely approach for managing frost protection water diversion and use and protecting Russian River streams is through local grower initiated and undertaken efforts. The Council has demonstrated that self-governance and voluntary action is far more effective than the prescriptive yet vague State regulation. For example, the Council was a driving force behind the development of the Sonoma County Frost Protection Ordinance (Sonoma County Ordinance), the first of its kind in the State, and the phased monitoring and reporting program for the ordinance negotiated with the State Water Board, National Marine Fisheries Service, Department of Fish & Game, Sonoma County, and other organizations and individuals. The Sonoma County Ordinance is reaping dividends through a frost protection system inventory and stream flow monitoring less than seven months after the Sonoma County Ordinance was enacted, or about the same amount of time it took the State Board to prepare an EIR for the regulation. Similarly, in Mendocino County as part of the Upper Russian River Stewardship Alliance (URSA), growers and water managers obtained funding for and began construction of offstream reservoirs that collectively reduce the peak direct diversion demand on the Upper Russian River by 87 cfs during the short period of time that spanned the first Board frost workshop in April 2009 and the second workshop in November 2009. These efforts are just two examples of the substantial accomplishments of growers to manage frost protection - accomplishments that have occurred in absence of a State regulation.

Phased Implementation Approach. What is most frustrating about the proposed regulation and the draft EIR is that the growers efforts are summarily dismissed as inadequate (despite their real accomplishments) and that the proposed regulation, a proposal that lacks objective performance standards and clear process, is declared as the only solution acceptable to the Board. The proposed regulation is not self-executing. Growers have no idea what an acceptable water demand management plan (WDMP) is because the standard, “a reduction of stream stage that causes salmonid stranding mortality”, is undefined. The standard and WDMP requirements are vaguely worded because the Board does not know what they mean either. The lack of standards and overbroad presumption of harm and unreasonable use (discussed below) are direct attacks on growers that will elicit legal challenge rather than resource management.

The only rational solution to this problem is to restructure the regulation around logical phases, such that the Board utilizes existing local efforts that are acquiring the information of water use, stream flow and salmonids requirements before the Board imposes prescriptive regulatory requirements on growers. The monitoring and reporting program of the Sonoma County Ordinance negotiated with the resource agencies is a phased approach that the Board should adopt in a regulation. The following sections identify specific flaws in the proposed regulation and Draft EIR that should be addressed.

Develop Specific Diversion Criteria and Stage using Results from Monitoring Results. The DEIR and proposed regulation do not define what “a reduction of stream stage that causes salmonid stranding mortality” actually is. The Board’s Draft EIR acknowledges that protective stream stage information is not currently known and varies from stream to stream. (DEIR p. 15.) The Board is correct that information will be obtained through studies of actual streams conducted by the growers. (DEIR p. 15.) The Board dedicates so little discussion of the stream stage stranding standard that the implication is that this information is readily known or ascertainable; in fact, it will require considerable study over multiple years to obtain a meaningful baseline of stream flow and salmonids information to even begin discussion of appropriate stream stage standards. Natural flow rescission and stranding, hydrogeomorphic factors, and non-frost diversion effects are a few of the unknown factors that are crucial for management of our streams. The regulation must also acknowledge that cooperative grower efforts are already underway to acquire the baseline information and that these efforts should be supported rather than impeded by conflicting requirements. Only once this baseline information is acquired and interpreted can we develop specific water diversion criteria. This substantial effort is anticipated to span a period of at least three years.

Overbroad Regulation of Groundwater, Presumption of Unreasonable Use Must Be Deleted.

The State Board’s early draft regulations would have applied to the diversion of “interconnected” or “closely connected” groundwater as delineated in the Stetson report that draws hydrologic conclusions using a jumble of geological maps. Commenters correctly cited flaws in an approach that would draw legal hydrologic presumptions from geologic maps, and instead of seeking better information about well pumping effects the Board proposes a regulation that would apply to all groundwater pumping in the watershed with no guidance on how a groundwater pumper can demonstrate pumping would not affect streamflow. This is an egregious example of a bureaucratic “dodge” of an important issue. The Board should embrace watershed’s ample groundwater resources as a solution for frost protection, and not a target of regulation.

Similarly, the Board contrives an argument that all frost water use is presumptively unreasonable under the reasonable and beneficial use doctrine in the absence of evidence of actual impact. The sole biological basis for the regulation is two cases of stranding that, if in fact were caused in whole or part by frost diversions, have been fixed. The Council is not stating that there is no potential for frost water diversions to impact stage; instead, the Council is stressing that water use, stream flow, and salmonids habitat impacts are too complicated to dismiss as a singular problem (frost water use) with a singular solution (regulation).

As drafted, the regulation posits an irrefutable presumption that frost water use adversely affects stream stage and that the regulation of frost water use will result in “protective” stream

stage for salmonids. This presumption is contradicted by evidence in the administrative record that Sonoma County Water Agency failed to meet its minimum stream flow obligations on the mainstem Russian River during the April 2008 stranding incident. And yet Sonoma County Water Agency reservoir releases and water diversions are not addressed in the regulation. Unless the overbroad regulation of groundwater and presumption of unreasonableness are deleted from the regulation growers will be forced to litigate these issues in order to have a fair opportunity to demonstrate compliance with law.

Narrowly Tailor the Regulation to Address Actual Problems and Support Ongoing Cooperative Water Management Efforts. Although these resource issues are incredibly complicated, the most practical pathway for examining and managing the issues is now clear. Separate cooperative efforts in Mendocino and Sonoma counties have developed unique management approaches tailored to known resource problems and management opportunities. The water management needs in Mendocino County are fairly well known and the local effort there is focused on building infrastructure to reduce instantaneous demand. On the other hand, the knowledge of water demand and stream flows in Sonoma County are not well known, so the Sonoma County Ordinance was enacted to ensure that every frost water user is accounted for and regulatory tools are in place to ensure participation and acquire needed information about water demand and stream flow. The grower community is presently engaged and working on solutions. The regulation must support these efforts and not impede them with unclear and overly burdensome requirements that are not tailored to address the known resource problems.

Proposed Phased Implementation Plan. The State Board's proposed regulation does not include a timeline for compliance with its numerous requirements. It would be impossible for a water user to comply with the proposed regulation upon enactment because certain preliminary steps, such as water diversion inventory and stream gaging, must occur before developing a complete WDMP. The State Water Board should adopt the following phased implementation approach to allow water diverters, the WDMPs, and resource agencies the opportunity to implement the regulation's components in an orderly and step-wise fashion:

2012 – All growers participate in the Sonoma County Ordinance or URSA; collect frost protection system inventory; develop stream gaging plan to be implemented over three-year period; review 2012 data for existing stream gages; convene technical workshops to identify information needs and to prepare study plan.

2013 – Begin reporting frost water diversions to Sonoma County Ordinance monitoring and reporting body or URSA; review 2013 data for existing stream gages; begin installation of new stream gages; identify funding to implement study plan; convene

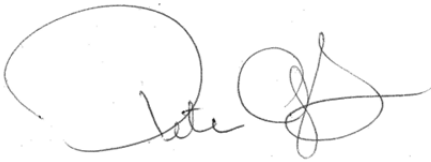
workshops or prepare white papers on proposed water diversion and stream stage criteria; begin identifying high priority water management actions.

2014 - Identify and develop action plans for high priority water management actions; continue installation of stream gages; begin implementing study plan; identify water users that do not significantly affect stream stage and that should be exempted from WDMPs; prepare and submit WDMPs to State Board.

2015 – State Board adopt water diversion and stream stage criteria; revise WDMPs if necessary and implement.

The Council appreciates the Board’s consideration of these recommendations and support for the grower community’s management efforts.

Regards,

A handwritten signature in black ink, appearing to read "Pete Opatz", written in a cursive style.

**Pete Opatz**

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