

Supplement to the Final Statement of Reasons for Rulemaking

PROPOSED RUSSIAN RIVER FROST PROTECTION REGULATION

Public Hearing Date: September 20, 2011

Agenda Item No. 16

Supplement Prepared: December 28, 2011

Background

On November 15, 2011, the State Water Resources Control Board (State Water Board or SWRCB) submitted the Final Statement of Reasons (FSOR) for the proposed Russian River Frost Protection Regulation to the Office of Administrative Law (OAL) for its review and approval. In the course of its review, OAL identified several points on which it desired additional clarification. While responses to each of these points can be found throughout the responses to comments, initial and final statements of reasons, and hearing transcript, in order to simplify OAL's review, the State Water Board is submitting this Supplement to provide a clear response to the points identified. The responses have been added to existing responses to comments, as identified below.

How does section 862, subdivision (a) interact with subdivision (d), and what is the basis for the three-year period in which groundwater diverters may only show a lack of hydraulic connectivity through the WDMP process?

Comment #C-15: 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? *(Mike Anderson, Mendocino County Farm Bureau)*

Response: Nowhere does the regulation text suggest that groundwater hydraulic connectivity is determined based on the "entire Russian River stream system". Measuring hydraulic connectivity to a portion of the Russian River stream system is consistent with the narrow definition contained in section 862, subdivision (a).

As explained at the September 20, 2011 Board hearing for this matter, the regulation, in section 862, subdivision (d), outlines the process through which groundwater pumpers may show that they are not diverting water that is

hydraulically connected to the Russian River stream system, as defined in subdivision (a). Subdivision (d) allows the governing body to submit criteria to the Deputy Director for exempting groundwater diversions that are not hydraulically connected to the Russian River stream system and a list of diverters that meet those criteria. During the first three years the regulation is in force, groundwater diverters may not independently be exempted from the regulation. During this period, in order for a groundwater diverter to be exempt from the regulation, the individuals or governing bodies administering WDMPs would need to develop the criteria for showing that participants in a WDMP do not meet the standard for hydraulic connectivity in subdivision (a). (See Reporter's Transcript, p. 100, line 9 - p. 101, line 11.) Although an individual groundwater diverter may be able to immediately present evidence of geology, pump capacity, and water levels based on their own confidential well log report and well drawdown test, the individual groundwater user will not have access to necessary stream stage data needed to demonstrate the lack of relationship between frost pumping and stream stage or to identify their individual contribution to cumulative reductions in stream stage. That information, however, will be collected via the WDMPs over the first three years of development. After three years, the individual groundwater diverter, as a participant in the WDMP, should be able to utilize this stream data and correlate that information with their groundwater extraction and present individual data for consideration. The State Water Board reasoned that a governing body administering a WDMP will have early access to all participants' confidential well log reports and stream flow data already progressively developed, and will be able to model the impacts of multiple groundwater pump tests to the stream flows, and in a shorter period of time, identify the criteria it deems appropriate to present to the State Water Board. The three-year requirement should ensure that individual groundwater diverters requesting exemptions from the regulation would satisfy the criteria developed for a WDMP for that area. The State Water Board has authority to consider determinations made by the Deputy Director.

Why doesn't the regulation identify the "criteria" necessary for a groundwater diverter to be exempted pursuant to subdivision (d)?

Comment #C-13: Hydraulically connected proof standards are needed. Subsection (d) allows an individual groundwater diverter to independently demonstrate that there is no hydraulic connection to the Russian River stream system in order to be exempt from the groundwater aspects of the regulation. The draft regulation does not specify or even hint what the criteria are for proving that there is no hydraulic connection. Without criteria each petitioner faces a subjective review by the Board staff and a subjective decision. Without basic criteria each petitioner will be forced to guess what might satisfy a demonstration that there is no hydraulic connection. That cost impact doesn't appear to be included in the economic analysis. Additionally, the lack of guidance to staff and petitioners will inevitably result in inconsistent determinations. Lastly, the Deputy Director for Water Rights is not required to exempt the diverter after even a

scientifically compelling demonstration. That person is authorized to exempt, but not required to exempt. (*Paul Kronenberg, Family Winemakers of California, Mike Anderson, Mendocino County Farm Bureau*)

Response: Section 862, subdivision (a) provides a clear and narrow definition of “hydraulically connected,” which is the standard the Deputy Director will apply when reviewing requests for exemption pursuant to subdivision (d). As noted at the September 20, 2011 Board hearing for this matter, criteria for meeting the standard would need to be developed on a site-specific basis because there are many physical differences among the tributaries and the main stems of the river system. There is no “one-size-fits-all” set of criteria that applies to all groundwater pumpers in the Russian River watershed. (See Reporter’s Transcript, response beginning p. 109, line 18.) The Deputy Director may consider a broad range of criteria in reviewing submittals purporting to show that a groundwater diversion is not hydraulically connected to the Russian River stream system. Specific information that may be considered in support of a request for a finding that a groundwater diversion is not hydraulically connected to the Russian River stream system could include, but may not be limited to the following:

- A Well Completion Report (as described in the Initial Statement of Reasons),
- The measured distance from the well to the nearest surface stream,
- The pumping rate for the well,
- Values for Aquifer transmissivity and storativity, either derived from a pumping test on the specific well or from a pumping test on a well with similar characteristics in the vicinity. (If a qualified professional believes that they can provide representative values for the aquifer parameters without conducting a pumping test, they could submit those values with adequate justification.),
- The occurrence of any confining conditions in the aquifer the well is drawing water from,
- Groundwater modeling to evaluate the effects of pumping on stream flow’
- An evaluation of the relationship between any reduction in flow in the surface stream due to pumping and changes in stream stage, and
- Any consistency or inconsistency of the water quality data for the surface stream and water pumped from the well.

Why does Section 862, subdivision (c) allow the State Water Board to revise a WDMP “at any time”?

Comment 1.1.4: It is not clear what is meant by "open exchange of information". Does this require public notice and the right of the non-grape growing and or wine industry public to provide meaningful and timely input? Or are the public

and other stakeholders excluded from timely participating in inter-agency correspondence? The ability of the wide range of stakeholders to participate in a meaningful and effective development of regulations, oversight, reporting and the values for this program can easily lead to distorted and invalid conclusions about the programs' effectiveness and protection of listed salmonids and their habitat. Exclusion of the public and stakeholders (including downstream water rights holders, fisheries, recreational and tourism interests, other non-grape agricultural interests, property owners, tribal, local, state and federal agencies, municipal water customers and ratepayers) from an active, timely and transparent participation in the WDMP process, implementation, reporting, administration, review and modifications will very likely lead to deteriorated conditions for listed salmonids, and likely lead to increases in stranding mortality and other damages to protected habitat. The DEIR fails to recognize and address these inherent problems and environmental impacts. Given the likelihood of additional harm to salmonids if the process and oversight is limited as proposed, the DEIR must analyze these impacts in a revised and recirculated DEIR. (*David Keller, Friends of the Eel River*)

Response: The proposed regulation requires, for some aspects of a WDMP, "an open exchange of information." The proposed regulation does not require that consultation with NMFS and DFG be publicly noticed. The proposed regulation also does not preclude the governing body from allowing other parties to participate.

The Board recognizes the importance of transparency, and public participation, and for this reason the proposed regulation provides for annual reporting to the Board. This reporting will be available to the public. The proposed regulation requires that the annual report "shall document consultations with DFG and NMFS regarding the stream stage monitoring program and risk assessment and shall explain any deviations from recommendations made by DFG or NMFS during the consultation process." This annual report is required to be submitted to the Board on September 1 of each year and the Board may require changes to the WDMP, including but not limited to the risk assessment, corrective and schedule of implementation, **at any time** (emphasis added). The regulation specifies that changes may be required "at any time" so that the State Water Board can respond quickly to instances of stranding mortality as a result of cumulative frost diversions rather than waiting until after the annual report is submitted. This reflects both the State Water Board's continuing authority over public trust resources and the fact that circumstances may change in such a way that the State Water Board must be able to respond appropriately. (See, e.g. Responses to Comments 1.1.46, 3.0.8.) In addition, public review of annual reports may highlight specific issues and the public may contact the Board to provide input to any changes to a WDMP recommended by the Board.