

**COAST ACTION GROUP P.O. BOX 215 POINT ARENA, CA 95468**



An affiliate of the Redwood Coast Watersheds Alliance



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Comment: PROPOSED RUSSIAN RIVER FROST PROTECTION REGULATION -  
Comments on EIR – and – related documents.

### **General**

The State Board has taken significant steps with proposed actions to address issues related to diversion for frost protection on the Russian River. The proposed regulation will help limit effects from diversion for frost protection. It should be pointed out that stranding is not the only limiting factor aggravated by such diversion at low flows. The policy, regulation, and environmental document should address all cumulative effects and related aggravated limiting factors of cumulative diversion for frost protection.

Asserting a Water Demand Management Program to control and monitor such diversion is necessary and should be managed solely by a State Responsible Agency (State Board, Regional Board, or Department of Fish and Game).

The requirements and limitations required by the WDMP as set forth in the proposal, at a minimum, are justified and necessary. These requirements are currently not articulated in a precise manor – and thus, could use further refinement and definitions. The monitoring requirement should specify real time stream gauge monitoring as well as public access to all monitoring data.

Limiting the Season of Diversion is necessary (and should be consistent with State Policy to Manage Flows in Northern California Streams (AB-2121 policy)).

Diversion should not be allowed until the divertor has a valid water right (license) and has agreed to comply with the proposed policy.

**Proposed RR Frost Regulation EIR - Consistency with State Code and Policy – including Policy Maintain Flows in Northern California Coastal Streams).**

All historic comments by interested parties addressing relevant issue in the Proposed Russian River Frost Protection Regulation (Regulation) must be considered in the policy development and in the EIR.

Coast Action Group has previously submitted comments on Frost Protection and Flow Maintenance issues - Comments, November 6, 2009, and November 20, 2009. We trust that these comments are being considered in your review, rule making process, and related EIR.

We, again, would like to point out that the structure of any policy and rule making for diversion of water for frost protection should fall under State Water Resources Control Board Policy for Maintaining Flows in Northern California Streams. Diversion for frost protection, and issues related to such diversion, logically should fall under the general stream flow maintenance policy (this would include and not be limited to: Diversion season, cumulative effects analysis, group and sequenced diversion planning). Specific rules for controlling water use for frost protection are appropriate. However, the specific requirements and full context of the WDMP must be completely enumerated. Coast Action Group is re-submitting comments on flows policy (by attaching previous comments on flow maintenance policy - Comment: Instream Flow Policy - Northern California Streams, April 15, 2008) for your consideration in the rule making process. The EIR process should consider these documents and related discussion in the rule making process.

**Statement of Reasons**

Proposed regulation acknowledges problems with the fishery, listings, and responsibility to protect the beneficial use – cold water fishery. There is a failure to acknowledge the effect of diversion (for frost protection and other reasons) during low flow periods on limiting factors other than fish stranding (which results in direct mortality).

Diversion during low flows affects the habitat, health, and growth values associated with salmonid survival in all life stages. Limiting or reducing low flows can have the following adverse effects: limited flows can subject fish to predation, limited or low flows may be temperature impaired, limited or low flows may limit salmon migration and spawning needs, limited and low flows may reduce food production needed for salmon survival. Thus, all limiting factors related to flow reduction from diversion for frost protection should be noted.

Regulation should consider effects of diversion on tributaries and mainstem of the Russian River. Cumulative Diversion analysis (as stated in the Regulation) should include all diversions in the area being studied – including diversions from subsurface flows. For mainstem analysis of diversion practices, diversion by the urban contractors and the Sonoma County Water Agency must be considered.

The language on purpose should re- enstate the words “prevent harm” as diversion effects go beyond the effect of use leading to stranding.

Critical Stream Stage analysis is appropriate.

**In the case of the pollutant sediment:** Excessive sediment loads, and aggradation, beyond normal background levels effect stream function (habitat availability - pool depth, pool riffle complex, embedment, etc.). Excessive sediment loads also limit available surface water flows (a greater percentage of the flow is subsurface). Excessive sediment loads effect on surface flows can influence stream temperature (mostly during low flow periods), and water temperature in pools (lack of depth and temperature stratification). Thus, sediment loading contributes to issues in stream flow and habitat alteration. Conversely, lower stream flows from over use (too much diversion) contribute to the inability of the stream flow hydrograph to move sediment and aggregate through and eventually out of the system. Disturbance of the hydrograph, from diversion, limits stream function from creating holes (hole depth) and an appropriate pool riffle complex sufficient to provide the habitat values that are needed for salmonid survival.

### **Impaired Water Body Status**

**The Draft EIR did a good job of impaired status analysis.**

The waterbodies (Russian River, Navarro River, and other north coast rivers listed on the States 303 (d) of Water Quality Limited Segments) are noted to be listed as impaired by sediment, temperature, and other pollutants. These water bodies are also flow impaired. Flow is not a pollutant. However, there is a relationship with the pollutants sediment, temperature, and nutrient concentrations with flow issues. Thus, the CEQA document being prepared must consider how current diversion practice may affect impaired status and how rule making will address controls for water use for frost protection, and general flow issues, in regards to desired outcomes from such rule making and legal responsibilities to protect all beneficial uses (including the cold water fishery) and move towards attainment of Water Quality Standards.

Environmental review of the proposed rulemaking must consider these factors - diversion effects on impaired status.

**Stream Flow Objectives:** The SWRCB has failed in setting Stream Flow Objectives on north coast streams. Stream flow objectives are necessary for managing the SWRCB Policy to Maintain Flows in Northern California Streams and also to effectively manage diversion of water for frost protection. This failure is one aspect of how SWRCB, as responsible agency, has not

meet the flow management obligations that are responsible for “Take” under the Federal Endangered Species Act.

**Isolated Instance:** It has been argued that this rule making is not needed as fish stranding is an isolated and infrequent occurrence - and - that it took a perfect storm of low rain years and extended periods of frost to create a situation where “Take” of endangered fish occurred. This argument is misleading. There are, and have been, numerous instances of “Take” - though not all documented by NMFS. It is true that in years where there is plentiful rain (depending on what summer and fall flows were), there may be less chance of a “Take” occurrence. This fact does not address the issue that many rain years are low and/or the timing of rain and frost occurrences - where the timing of such occurrences degrade flow and habitat conditions and may aggravate the possibility of “TAKE”.

### **The Case of Local Rule Making – Project Alternatives:**

The EIR did consider how the SWRCB will deal with situations where local rulemaking occurs - and how local rule making might be considered by the SWRCB as project Alternatives.

The Draft EIR and related documentation did state that the purpose of the Regulation was to preclude or avoid “TAKE” or stranding of fish. CAG recommends language to protect salmonids from “harm” be added to the purpose discussion. The Draft EIR notes that administration of Regulation by Authority other than a State Responsible Agency may not fit with the described purpose (this is a finding in the Draft EIR). It is added that the State, or the State Water Resources Control Board, may not relinquish its authority to an NGO (there have been recent court cases on this).

This quote (from Analysis of Alternatives – just prior to the Introduction) from the Draft EIR makes no sense at all:

*“From a CEQA standpoint, the environmentally superior alternative is the no-project Alternative. Among the remaining alternatives, the environmentally superior Alternative is the local stakeholder voluntary programs. Neither of these two Alternatives, however, fully meets the basic project objective of preventing salmonid stranding mortality.”*

It is true that none of the above alternatives in the quote meet the project objectives (project objectives must include, both, protection from stranding and from low flow habitat modification from diversions for water use for frost protection. The idea that the no-project alternative and/or stakeholder voluntary programs can be claimed environmentally superior has no foundation in logic.

The quote goes on to be logically challenged:

*“The proposed regulation and the alternative that requires real-time diversion monitoring and reporting both meet the project objective of preventing salmonid stranding mortality, but both are anticipated to result in more incidental*

*environmental impacts due to water diverters implementing best management practices in response to the regulation.”*

What evidence or logic would lead to the conclusion that real time monitoring could adversely effect salmon survival – or – incidental adverse impacts? What is the issue with the use of BMPs? Is not the WDMP based on management and science – and to include the use of BMPs to attain management goals. This wording or thinking just does not compute.

Recent history over the past several years has demonstrated the inability of local stakeholders and/or Sonoma and Mendocino County to deal with this issue. Allowing for management of the Regulation by any such group other than a State Responsible Resource Agency is assurance of failure to reasonably apply the Regulation (or any practices related to the Regulation).

Alternatives listed in Section 5.2/6.10.2 – Local Stakeholder Voluntary Programs – Alternative 2

Including: Russian River Frost Program, Russian River Property Owners. These NGOs may not be allowed to administrate the Regulation. They may participate in programs administered by the State Water Board in compliance with the Regulation and other State Code.

Alternatives listed in Section 5:3/6.10.3 – Adopt a Regulation Similar to the Sonoma County Vineyard Ordinance is also a non-starter. The noted Sonoma County Ordinance has no reasonable capability to comply with the purpose of the Regulation. Nor –is there staff, resources, or expertise to comply with the purpose of the Regulation.

For example; Sonoma County was considering local rule making in the form of a Frost Protection Ordinance. The proposed ordinance was to include rules (BMPs) for water use for frost protection and proposed monitoring and reporting. Legal standards caused the County to rethink the proposed ordinance language – omitting BMP and reasonable monitoring language. The Ordinance, plain language, says that all vineyards using water for frost protection must register with the County Ag Commissioner and participate in a comprehensive monitoring program. The issue is that what such a "Comprehensive" Program may look like? There is no definition or description of what is to occur in a "Comprehensive" monitoring program. Nor is real-time monitoring suggested. It is doubtful that Sonoma County would pass and manage an ordinance with language that required actions necessary to protect fish with a functional WDMP or monitoring that is transparent. This leads us to Alternative 5 (5.5/6.10.5) – real time monitoring.

I would suggest that NMFS, DFG, and the SWRCB work towards a definition of what such a "Comprehensive" monitoring program might look like - while making sure that such a program uses protocol that will provide useful results and that all monitoring data be available to responsible agency and the public on a real time basis. Validation of such a "Comprehensive" Monitoring Program must assure consistency with State Water Resources Control Board Policy for Maintaining Flows In Northern California Streams. Such process and consistency considerations should be considered by the EIR process. Please note that any local rule making would be subject to requirements of CEQA – with participation by the State Board.

**Alternative 5 listed in Section 5.5/6.10.5** – This Alternative calls for real-time monitoring. This meets the need for both, adaptive management capability needed for a flexible WDMP (and conformance with necessary with maintaining minimum stage levels as part of the WDMP) and for transparency (a stated goal in the Draft EIR) required by responsible agency and interested parties.

The Board is duty bound to take action by adopting regulation where “ *the regulation will operate to protect the environment by ensuring that water diversions for the purposes of frost protection are coordinated in a manner that the instantaneous cumulative diversion rate does not result in a reduction of stream stage that causes salmonid stranding mortality (p,55)*” And - to protect salmonids from harm – as this is in the public trust – and is a beneficial use that is reasonably feasible to protect under Cal Water Code and the mission of the State Board.

### **Assessment of Impacts – Section 6**

This section deals with the range of potential impacts that can occur when actions are taken to limit diversion from stream for frost protection. This section recognizes actions from groundwater use, wind turbin use, to water storage – and the related impacts of each action which are noted to be potentially significant. These potential impacts are noted. The implication of this discussion in the Draft EIR appears to make assuring salmon survival from improper diversion practices might hurt the enviroment more than just letting the streams dry up.

It should be pointed out that these practices (turbines, storage, and ground water pumping) are now in place and used. It would seem logical if proper land use considerations and measues used in application of alternative frost controls (including not planting in frost prone zones, water storage, wind, etc., with protection in place for resoures) that potential impacts can be minimized to less than significant levels.

In fact, where water is needed and absolutely necessary to protect grape vine buds in a frost situation, and if alternative frost protections is out of the question, water storage with diversion during high flows is a reasonable solutions (please review the Joint DFG/NMFS Guidelines) – a reasonable WDMP should consider this.

### **Consistency Review**

Under CEQA , the lead agency is responsible to review a project, or in this case rule making for consistency with other regulation – in this case Cal Water Code and Cal Fish and Game Code.

Please make sure that the Regulation is consistent with Fish and Game Code 5937:

*The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep*

*in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway .*

**Rule Making Should Include:**

Need for diverters to have a valid Water Right - before diverting for frost protection or storage for same or irrigation.

Allow only coordinated diversion - sequenced to protect minimum flows necessary to protect fish.

Under the WDMP - allow for storage is to filled by diversion during high flow periods - only.

Precondition to diversion - there should be real time flow stage monitoring and pump timing monitoring with public and agency access to the data. Any monitoring plans submitted by growers, groups of growers, or any County or Agency shall be assessed as to its effectiveness and transparency.

Period of allowable diversion should meet with standards set in SWRCB Stream Flow Maintenance Policy.

Encourage other solutions for controlling frost damage - without the need to use water.

Diverter compliance with such rulemaking by the SWRCB will not set unreasonable or extraordinarily costly standards for those growers subject to and threatened by frost occurrences. Reasonable compliance efforts should be able to attain the standards set by this rulemaking.

Sincerely,

For Coast Action Group