

 UNITED
WINEGROWERS
for Sonoma County



September 16, 2011

Via email to commentletters@waterboards.ca.gov

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State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Comment Letter - Proposed Russian River Frost Regulation

To Chair Hoppin and Members of the Board:

United Winegrowers for Sonoma County is an organization of both winery and vineyard owners. We represent members countywide, with many owning property in the Russian River watershed.

Our interest is to have a program that works. Changes made to the September 1st version of the regulation and supporting resolution have moved the regulation in a positive direction. We hope you will consider making these additional changes: (See attachment A for proposed language.)

1. Diversion Data: Additions recently made to the State's water use reporting requirements can provide the diversion data needed to complete the Annual Report. Additionally, we envision participants in the Water Demand Management Program keeping a log on their premises of the hours, rate and volume for each frost event. If monitoring data records a signal or rapid decrease in stream stage under low flow conditions, event logs of program participants in the affected area would then be subject to review by the governing body or their experts.

2. Wells: We recommend adding "installation of groundwater extraction wells" to paragraph (4) as one of the alternative methods for inclusion in the governing body's Corrective Action Plan. The Draft EIR and the Economic Impact Statement (page 24, Table 4-11) analyzed the likelihood that drilling of additional groundwater wells is expected to be part of the solution as properly installed wells help reduce instantaneous demand.

3. Reasonable Use: A direct diversion of water for frost protection is and should remain a reasonable use if that diversion is conducted in accordance with a board approved WDMP.

As stated in (e), a diversion of water in violation of § 862 becomes then an unreasonable method of diversion and use and would be subject to enforcement by the board.

The issue of how to handle groundwater has been around a long time - evolving through decisions and actions taken by the Legislature, the Courts and this Board. Previously, the Board asked Professor Joseph L. Sax to study the history of California water law and determine the extent of the Board's jurisdiction over groundwater. His final report, "Review of the Laws Establishing the SWRCB's Authority Over Appropriations of Groundwater Classified As Subterranean Streams and the SWRCB's Implementation of Those Laws," was submitted January 19, 2002.

http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/groundwater_classification/docs/substreamrpt2002jan20.pdf

Professor Sax concluded he could not recommend proposing legislation to expand the Board's permitting authority over subsurface water:

To do so presents complex problems of fairness to those dependent on existing uses, and perplexing questions of implementation. (page 90)

Further Professor Sax concluded:

[T]he prospects for comprehensive legislative reform are therefore unpromising. (I do, however, wish to reiterate the observation made above ^{in footnote 287} that legislation improving the Board's information-gathering capacity, so that it can effectively fulfill responsibilities it already has under the Article X, §2 of the Constitution, and Water Code § 275, should unquestionably be on the legislative agenda.) (page 91)

As to the Courts, he noted that:

[T]here is one court decision, in a district court of appeal case, directly on point, though it did not involve groundwater. (page 84)

Additionally he found:

[T]hough the Supreme Court has not yet expressly addressed the question whether Water Code § 275 provides an independent source of jurisdiction over pumps of percolating groundwater, the holding of the IID case, along with the language of EDF I, and the Racanelli decision, are significant authority in favor of the claim that the Board can assert jurisdiction over percolating groundwater pumping to adjudicate and remedy claims that come within the scope of waste and unreasonable use covered by Water Code § 275. Such jurisdiction could be a powerful tool to deal with pumping that impairs instream flows needed to protect fish and riparian values, one of the major issues underlying complaints urging the Board to take a broadened view of its jurisdiction. (page 85)

Then and now, not everyone agrees with Professor Sax's conclusions:

First, on the substance of applying either the waste and unreasonable use doctrine or the public trust doctrine to percolating groundwater, the Report simply assumes that it is appropriate to use these doctrines to address the impairment of fish and wildlife values. This view – which is reflected in the IID II decision – effectively eliminates the balancing of competing uses of water under the public trust doctrine and the broad assessment of a variety of social considerations that is inherent in the waste and unreasonable use doctrine. Given the implicit repudiation of (at the very least) the tone of the IID II decision by the Supreme Court in City of Barstow v. Mojave Water Agency, 23 Cal.4th 1224, 1248 (2000), this conclusion seems contrary to the current direction of the Supreme Court. (David R. E. Aladjem, California Water Law & Policy Reporter -- July 2002 Groundwater Management in California: The Sax Report and Beyond." http://www.downeybrand.com/publications/articles/020701_saxreport.php

It would appear that the Board, through the September 1st version of the frost regulation, is headed into new and largely uncharted terrain. The Response to Comments and the Notice of Proposed Rulemaking cite numerous court cases making the case the Board has authority to take this action. The court in the Napa case found the Board had not exceeded its authority. (*State Water Resources Control Board v. Forni* (1976) 54 Cal.App.3). However, in the judge's ruling cited in Response to Comment 3.0.30, the reference is to "the direct diversion of water in the frost period." (Emphasis added.) The proposed frost regulation goes further and expands the field of play to include all water. Again, we cite Professor Sax's reasoning for not proposing the legislative route to expand the Board's permitting authority over subsurface water:

To do so presents complex problems of fairness to those dependent on existing uses, and perplexing questions of implementation.

We find his caution applicable to this regulation as well. The difficult task remains, as it has from the beginning for the Law, the Courts and the Board, to strike a workable balance among competing interests - historically among all water users, now among those and the fishery resource.

Thank you for this opportunity to comment.

Sincerely,

Bob Anderson
Executive Director

Attachment A: proposed language changes

Attachment A

STATE WATER RESOURCES CONTROL BOARD PROPOSED REGULATION

DRAFT Text of Proposed Regulation

Amendment to Division 3 of Title 23 of the California Code of Regulations

Add the following section:

§ 862 Russian River, Special.

Budding grape vines and certain other crops in the Russian River watershed maybe severely damaged by spring frosts. Frost protection of crops is a beneficial use of water under section 671 of this chapter. During a frost, however, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonids due to stranding. Stranding mortality can be avoided by coordinating or otherwise managing the use of frost water to reduce instantaneous demand.

(a) After March 14, 2012, the **direct** diversion from the Russian River stream system, including the pumping of hydraulically connected groundwater for purposes of frost protection from March 15 to May 15 **shall be limited to such water as shall be reasonably required for the beneficial use to be served if delivered using a frost system that is registered and in good standing** with a board approved water demand management program (WDMP), unless otherwise exempted in accordance with paragraph (c)(6).

(b) The purpose of the WDMP is to provide an assessment of how direct diversions for frost protection may affect stream stage and to coordinate the cumulative diversions of WDMP's participants to reduce instantaneous demand for frost water that may, if not otherwise managed, exceed allowable changes during low flow conditions and cause stranding mortality. The WDMP, and any revisions thereto, shall be administered by an individual or governing body capable of ensuring that the requirements of the program are met. Any WDMP developed pursuant to this section shall be submitted to the board by February 1 prior to the frost season.

(c) A WDMP shall include the following:

(1) Inventory of frost diversion systems: ~~The governing body~~ **Program participants** shall provide for each frost system:

(A) The name of the property owner;

(B) The location of the source of the frost water;

(C) The system's capacity;

(D) A map showing the acreage frost protected by water diverted from the Russian River stream system and acres frost protected by other means; and

(E) **Upon the governing body's request**, the rate of diversion, hours of operation, and volume of water diverted during each frost event for the year.

(2) **Stream stage monitoring program**: The governing body shall develop a stream stage monitoring program in consultation with National Marine Fisheries Service (NMFS) and California Department of Fish and Game (DFG). For the purposes of this section, consultation involves an open exchange of information for the purposes of obtaining recommendations. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired.

The stream stage monitoring program shall include:

(A) A determination of the number, type, and location of stream gages necessary for the WDMP to monitor and assess the extent to which program participants' frost diversions may affect stream stage and cause stranding mortality;

(B) A determination of the stream stage that should be maintained at each gage to prevent stranding mortality;

(C) Provisions for the installation, ongoing calibration, and maintenance of stream gages; and

(D) Monitoring and recording of stream stage at intervals not to exceed 15 minutes.

(3) **Risk assessment**: Based on the inventory and stream stage information described above, and information regarding the presence of habitat for salmonids, the governing body shall conduct a risk assessment that evaluates the potential for frost diversions to cause stranding mortality. The risk assessment shall be conducted in consultation with NMFS and DFG. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired. The risk assessment shall be evaluated and updated annually.

(4) **Corrective Actions**: If the governing body determines that diversions for purposes of frost protection have the potential to cause stranding mortality, the governing body shall notify the diverter(s) of the potential risk. The governing body, in consultation with the diverters, shall develop a corrective action plan that will prevent stranding mortality. Corrective actions may include alternative methods for frost protection, best management practices, better coordination of diversions, construction of offstream storage facilities, **installation of groundwater extraction wells**, or other alternative methods of diversion. Corrective actions may also include revisions to the number, location and type of stream stage monitoring gages, or to the stream stages considered necessary to prevent stranding mortality, or real-time stream gage and diversion monitoring. In developing the corrective action plan, the governing body shall consider the relative water right priorities of its participants and any time delay between hydraulically connected groundwater diversions and a reduction in stream stage. Individual participants shall implement corrective actions in accordance with the WDMP or cease diverting water for frost protection.

(5) Annual Reporting: The governing body shall submit a publically available annual report of program operations, risk assessment, and corrective actions by September 1 following the frost season that is the subject of the report.

The Annual Report shall include:

- (A) The frost inventory, **including a summary of** diversion data;
- (B) Stream stage monitoring data;
- (C) The risk assessment and its results, identification of the need for any additional data or analysis, and a schedule for obtaining the data or completing the analysis;
- (D) A description of any corrective action plan that has been developed, any corrective actions implemented to date, and a schedule for implementing any additional corrective actions; and
- (E) Any instances of noncompliance with the WDMP or with a corrective action plan, including the failure to implement identified corrective actions.

The report shall document consultations with DFG and NMFS regarding the stream stage monitoring program and risk assessment and shall explain any deviations from commendations made by DFG or NMFS during the consultation process. In addition, the report shall evaluate the effectiveness of the WDMP, and recommend any necessary changes to the WDMP, including any proposed additions or subtractions of program participants. Any recommendations for revisions to the WDMP shall include a program implementation plan and schedule. The board may require changes to the WDMP, including but not limited to the risk assessment, corrective action plan, and schedule of implementation, at any time.

(6) Exemptions: Diversions upstream of Warm Springs Dam in Sonoma County or Coyote Dam in Mendocino County are exempt. The governing body shall determine whether groundwater and surface frost water users not contributing a cumulative, instantaneous effect should be exempt from the WDMP and this section or be exempt from certain WDMP requirements including but not limited to corrective actions and/or diversion reporting. Any exemption criteria shall be submitted to the board by February 1 prior to the frost season. Proposed exemptions shall be deemed approved for the current frost season if the board does not take formal action on the proposed exemptions by March 14 of the current frost season. Provided, however, the governing body may determine based upon information collected pursuant to this subdivision that water users exempted from the WDMP must later participate in the WDMP.

(d) **Hydraulically Connected Groundwater**: The governing body shall develop criteria defining hydraulically connected groundwater giving considerable weight to a well's capacity to diminish appreciably and directly the stream stage of salmonid bearing streams during a frost protection event between March 15 and May 15.

(e) **Enforcement:** 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. 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. The board has continuing authority to revise terms and conditions of all permits that authorize the direct diversion of water for purposes of frost protection should future conditions warrant.