

DRAFT NOTICE OF PROPOSED RULEMAKING

TITLE 23. WATERS DIVISION 3. STATE RESOURCES CONTROL BOARD AND REGIONAL WATER QUALITY CONTROL BOARDS CHAPTER 2. APPROPRIATION OF WATER ARTICLE 22. PREVENTION OF WASTE AND UNREASONABLE USE

NOTICE IS HEREBY GIVEN that the State Water Resources Control Board (State Water Board or Board) proposes to adopt the proposed regulation described below after considering all comments, objections, and recommendations regarding this proposed action.

PROPOSED REGULATORY ACTION

The State Water Board proposes to add Section 862 in Chapter 2, Division 3, Title 23 of the California Code of Regulations (CCR). This section concerns water diversion practices for frost protection of crops in the Russian River watershed in Mendocino and Sonoma counties.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

The State Water Board will hold a public hearing on the proposed regulation at a Board Meeting starting at 9 a.m. on **September 20, 2011** in the Coastal Hearing Room on the second floor at 1001 "I" Street, Sacramento, CA. A map to the Joe Serna Jr./Cal-EPA Building and parking information are available at <http://www.calepa.ca.gov/EPABldg/location.htm>. The Joe Serna Jr./Cal-EPA Building is accessible to people with disabilities. Individuals who require special accommodations at the Joe Serna Jr./Cal-EPA Building are requested to contact Catherine Foreman, Office of Employee Assistance, at (916) 341-5881. Due to enhanced security precautions at the Cal-EPA Headquarters Building, all visitors are required to register with security staff prior to attending any meeting. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

Oral comments will be allowed and limited to 3 minutes or as otherwise allowed by the Board Chairman. Any person wishing to make a comment at the hearing will be asked to complete a speaker card available in the hearing room. Any written statements, arguments, or contentions related to the proposed regulation must be received by 12:00 noon on July 5, 2011. Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action. Written comments must be received by the State Water Board before the written comment period closes in order to be considered by the State Water Board before it considers adoption of the proposed regulation.

Comment letters may be submitted by email to commentletters@waterboards.ca.gov (if less than 15 megabytes in total size) or by fax at (916) 341-5620. Please indicate in the subject line: "Comment Letter – Proposed Russian River Frost Regulation." Written comments may also be delivered by mail to:

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

or hand-delivered to the following address:

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Couriers delivering comment letters must check in with lobby security personnel on the first floor of the Cal-EPA Building at the above address. Questions on comment submittal may be directed to Ms. Townsend, at (916) 341-5600.

To be added to the mailing list for this rulemaking and upcoming hearing, and to receive notification of updates to this rulemaking, you may subscribe to the Lyris list for public notices regarding Russian River Frost Protection on the State Water Board's website at:

http://www.waterboards.ca.gov/resources/email_subscriptions/swrcb_subscribe.shtml. Enter your name and e-mail address and check the box next to "Russian River Frost Protection" under "Water Rights Topics." You will receive a confirmation e-mail. You must respond to the confirmation e-mail or your name will be deleted from the mailing list. For assistance subscribing to the Lyris list you may also call Karen Niiya at (916) 341-5365. **Individuals who receive this notice from the State Water Board by mail or e-mail are already on the mailing list.**

AUTHORITY AND REFERENCE

Section 1058 of the Water Code authorizes the State Water Board to adopt the proposed regulation, which would implement, interpret, or make specific the following State statutes: Water Code Sections 100, 275 and 1051.5 and Section 2, Article X of the California Constitution.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Water Code section 1058 allows the State Water Board to make such reasonable rules and regulations as it may from time to time deem advisable in carrying out

its powers and duties. The purpose of the proposed regulation is to prevent salmonid mortality in the Russian River watershed due to the cumulative effect of instantaneous diversions for purposes of frost protection of crops in Sonoma and Mendocino Counties. During a frost event, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may cause a rapid decrease in stream stage that results in the mortality of salmonids due to stranding.

The proposed regulation would provide that water diversions from the Russian River stream system, including hydraulically connected groundwater, for purposes of frost protection from March 15 through May 15 violate the prohibition against the unreasonable diversion or use of water, unless water is diverted in accordance with a Board approved water demand management program, or water is diverted upstream of Warm Springs Dam in Sonoma County or Coyote Dam in Mendocino County.

In addition to its permitting authority, the State Water Board has a duty to protect, where feasible, the State's public trust resources, including fisheries. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . ." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 366-367.)

In this case, application of the reasonable use doctrine requires consideration of the benefits of diverting water for purposes of frost protection, the potential for stranding mortality to occur, and the diverters' ability to frost protect without causing stranding mortality by coordinating or otherwise managing their diversions to reduce instantaneous demand. If properly managed, high flows during wet winters may provide enough water to meet human needs and prevent stranding mortality. A number of other management tools also exist that can be used to reduce the instantaneous demand for water during frost events. Given the potential impact to salmonids and the availability of feasible alternatives to simultaneous diversions from the stream, uncoordinated, unregulated diversions of water from the Russian River stream system for purposes of frost protection are unreasonable.

The proposed regulation would require any water demand management program to be approved by the Board in order to ensure that the program will effectively reduce the instantaneous demand on the Russian River stream system during

frost events to prevent stranding mortality. The regulation would require the water demand management program to be administered by an individual or governing body capable of ensuring that the goals of the program will be met. In addition, the program would be required to include the following: (1) an inventory of the frost diversion systems within the area subject to the program, (2) a stream stage monitoring program, (3) an assessment of the potential risk of stranding mortality due to frost diversions, (4) development and implementation of a corrective action plan if necessary to prevent stranding mortality, and (5) annual reporting of program data, activities, and results.

FISCAL IMPACT ESTIMATES

Mandate on Local Agencies or School Districts: The proposed regulation requires that any water demand management program be administered by an individual or governing body capable of ensuring that the requirements of the program are met. The proposed regulation does not impose a mandate on local agencies because the regulation does not require the governing body to be a local governmental agency. The program could be developed and administered by an individual, non-governmental organization, or other private entity. However, local government agencies may choose to administer the water demand management program on a voluntary basis.

If a local government agency chooses to oversee the water demand management program, the estimated costs for administering the program is \$452,007, which includes the costs for developing and maintaining a frost diversion system inventory, installing and maintaining stream stage gages, conducting a risk assessment and updating it annually, and preparing an annual report.

Additionally, a local agency that provides water to its customers for frost protection purposes may be subject to the proposed regulation. Accordingly, such an agency could incur the costs of participating in a water demand management program. The cost to an agency of participating in a water demand management program will largely depend on the acreage served. The cost can range from \$60 per acre to \$2,197 per acre and is dependant on whether or not corrective actions will need to be taken. However, the local agency's customers who divert water from the Russian River for purposes of frost protection are likely to bear these costs directly, in which case there would be no cost to the local agency. Even if costs are incurred by a local agency, they would not be subject to state reimbursement pursuant to Government Code section 17500 et seq., for two reasons. First, any costs incurred as a result of the regulation do not fit the definition of state mandated costs because they would not be incurred as a result of a regulation implementing a statute enacted after 1975. (See Gov. Code, § 17514.) Second, the regulation does not require local agencies to undertake a new program or provide a higher level of service in an existing program. Rather, the regulation would apply equally to all frost

diversions, irrespective of whether the diverter is a local agency, an individual, or a private entity, and therefore the costs of compliance are not unique to local government. (*See County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58.)

Cost or Savings to any State Agency: There are two State agencies that will incur a fiscal cost as a result of this regulation, the California Department of Fish and Game (DFG) and the State Water Board.

- **Total estimated cost to DFG - \$130,000** - The proposed regulation requires that participants consult with DFG while developing and implementing their water demand management program. Consultation would be required for developing a stream stage monitoring program and conducting a risk assessment of potential stranding mortality due to diversion operations. It is estimated that DFG will need one PY in order to carry out consultations with participants. The total estimated cost to DFG is \$130,000.
- **Total estimated cost to State Water Board - \$260,000** – Adoption of the regulation will create an additional work load for staff at the State Water Board's Division of Water Rights (Division). Staff at the Division will need to review and approve all water demand management programs that are developed by participants. Additionally, staff will need to review annual reports and approve any proposed changes to the program. Staff will also be needed to review and approve requests for exemptions from the regulation for participants claiming to be pumping groundwater that is not hydraulically connected to the Russian River stream system. It is estimated that the Division will need to dedicate two PY's to accomplish this additional workload. The total estimated cost to the Division is \$260,000.

Other Non-discretionary Cost or Savings Imposed on Local Agencies: With the possible exception of the costs to local agencies described above, the State Water Board has determined that no non-discretionary cost or savings would be imposed on local agencies.

Cost or Savings in Federal Funding to the State: The State Water Board has determined that there is no cost or savings in Federal funding to the State.

ECONOMIC IMPACT ESTIMATES

Statement of Significant Statewide Adverse Economic Impact Directly Affecting Business: Businesses, primarily vineyardists, that divert water for frost protection use in the Russian River watershed will be affected by the proposed regulation.

It is projected that affected businesses will need to monitor and maintain records regarding the rate of diversion, hours of operation, and volume of water diverted during each frost event. Businesses would report the data to the individual or governing body that is administering the water demand management program. The individual or governing body would install and monitor stream gage information and prepare annual reports. Business would be required to implement corrective actions if data indicates potential risk of salmonid stranding mortality exists.

The State Water Board has made the initial determination that the adoption of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The State Water Board has considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (2) Consolidation or simplification of compliance and reporting requirements for businesses.
- (3) The use of performance standards rather than prescriptive standards.
- (4) Exemption or partial exemption from the regulatory requirements for businesses.

Cost Impacts on Representative Persons or Businesses: The State Water Board estimates that the initial capital costs for a 160-acre vineyard to comply with the proposed regulation would range from \$9,600 to \$17,000 and the annual costs would range from \$3,000 to \$4,700. Capital costs for implementing any needed corrective actions for a 160-acre vineyard would range from \$236,000 to \$352,000, with annual costs ranging from \$26,000 to \$36,200.

Effect on Creation or Elimination of Jobs within California: The State Water Board has determined that the proposed action will initially reduce region-wide employment by 4 jobs and by 18 jobs within five years. The State Water Board estimates the proposed action will increase employment by an equal amount of jobs because it anticipated there will be an increased need for products and services for frost protection.

Effect on Creation of New Businesses or Elimination of Existing Businesses: The State Water Board has determined that the total direct cost of the proposed regulation represents a reduction in income to vineyardists but an increase in economic activity to firms providing services and products for frost protection therefore there is no net loss in aggregate welfare. Additionally, the regulation requires adaptive management as an avenue for taking corrective

actions to solve any identified problems. This allows for a business to comply with the regulation at the least cost and therefore the State Water Board assumes that it is highly unlikely that a business would be eliminated as a result of complying with the regulation.

Effect on the Expansion of Businesses Currently Doing Business within California: The State Water Board has determined that the proposed action will cause an increase in economic activity to firms providing services and products for frost protection, such as consulting services, sales of wind machines or orchard heaters, and construction of offstream reservoirs. The estimated increased economic activity associated with these services and products is estimated to be \$6 million.

Effect on Small Businesses: The State Water Board estimates that the initial capital costs for a 40-acre vineyard to comply with the proposed regulation would range from \$2,400 to \$4,000 and the annual costs would range from \$750 to \$1,140. Capital costs for implementing any needed corrective actions for a 40-acre vineyard would range from \$59,000 to \$87,880, with annual costs ranging from \$6,500 to \$9,000.

Business Report: The proposed regulation requires annual reporting of water demand management program data, activities and results. In the absence of the proposed regulation, businesses could continue to divert water for frost protection use in a manner that causes stranding mortality of salmonids, a public trust resource that is in danger of extinction. Accordingly, it is necessary for the health, safety, and welfare of the people of the state that the proposed regulation apply to businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5, subdivision (a)(13), the State Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The State Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation at the upcoming hearing or during the written comment period.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, DRAFT ENVIRONMENTAL IMPACT REPORT, AND TEXT OF PROPOSED REGULATION

The State Water Board has prepared an Initial Statement of Reasons for the proposed action. The Initial Statement of Reasons includes the specific purpose of the regulation proposed for adoption and the rationale for the State Water Board's conclusion that the regulation is reasonably necessary to carry out the purpose for which the regulation is proposed. The State Water Board has also prepared a Draft Environmental Impact Report that contains an analysis of the potential environmental impacts of the proposed action. The Initial Statement of Reasons, Draft Environmental Impact Report, the express terms of the proposed regulation and all information on which the proposal is based are available from the agency contact person named in this notice.

The rulemaking file is available for inspection and copying throughout the rulemaking process at the State Water Board's Division of Water Rights Records Unit, 1001 I Street, 2nd floor, Sacramento, California. Key documents from the rulemaking file will also be published and made available on the State Water Board's internet website. This website address is:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/

AVAILABILITY OF CHANGED OR MODIFIED TEXT

Following the public hearing, the State Water Board may adopt the proposed regulation as originally proposed, or with nonsubstantial or grammatical modifications. If the State Water Board makes modifications that are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least fifteen (15) days before the State Water Board adopts the regulation as modified. A copy of any modified regulation may be obtained by contacting Karen Niiya, the primary contact person identified below. The State Water Board will accept written comments on the modifications to the regulation for fifteen (15) days after the date on which they are made available.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, a copy of the Final Statement of Reasons may be obtained by contacting either of the persons listed below. A copy may also be accessed on the website mentioned above.

ADDITIONAL INFORMATION

Inquiries concerning the substance of the proposed action may be directed to:

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or

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