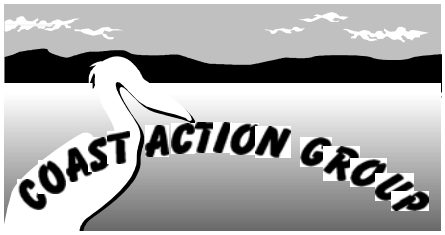

COAST ACTION GROUP P.O. BOX 215 POINT ARENA, CA 95468

November 20, 2009

Clerk of the Board
State Water Resources Control Board
Division of Water Quality
P.O. Box 100
Sacramento, CA 95812-0100

Comment: Additional Comments (post Work Shop) to consider recommendations for actions regarding water diversions for the purpose of Frost Protection - and - State Board Policy to Maintain Flows in Northern California Coastal Streams

GENERAL

These comments are made in light of new information that was offered to the Board at the Workshop of November 18 dealing with water use for frost protection - and, thus, are made in addition to previous comments made by Coast Action Group on the above noted subject(s).

New information and concepts dealing with the frost protection and stream flow issue must be considered by the Board for policy development. The discussion below is offered for the Board consideration and policy deliberation and should be made part of the record of issues to be addressed.

On November 6, 2009 (in previous comments on flow maintenance policy to the Board), CAG entered into the record significant discussion and recommendations. In light of the new information (discussed below), nothing has changed in regards to these policy inputs by CAG.

Please enter these comments into the record of both frost protection policy considerations and instream flow maintenance policy considerations.

NEW ISSUE DISCUSSION

Proposed Self Governance by Diverters

Diverters offered to the State Board Self Governance plans that claimed to address flow issues related to water use for frost protection. Both the National Marine Fisheries Service and the

California Department of Fish and Game gave unequivocal testimony to the fact that the fine elements needed to address issues and provide enforceable and measurable outcomes sufficient to protect salmonids were not extant in these proposed plans. And, in fact, continued operations without sufficient standards being set by the State Board would allow a situation to continue with the very high risk of "TAKE" of salmonids as **a** likely outcome. Both, NMFS and DFG asked the State Board to proceed with the development of regulatory policy that would assure protection of the beneficial use of the cold water fishery. While these two responsible agencies did not offer new wording for such policy they made it clear that accounting for water use was among the many factors that must be included in such policy development.

In relation to the plans proposed by the diverters claims were made that were questionable and not supported by fact.

- There was claim of coordinated efforts that would realize necessary protections. This claim is insupportable as the documents allow for voluntary participation of "willing" parties - with no enforcement mechanisms. This hole in comprehensive compliance makes these plans less than enforceable.

- There was claim that necessary and effective BMPs are now in place to deal with issue. This is not the case as BMPs are yet to be developed and/or approved by regulatory agency. Policy or plans can not be deemed effective or called comprehensive until necessary BMPs are in place, approved by responsible agency, and deemed sufficient and operable.

- The proposed plan(s) were based on future actions, including MOUs, that had not fully been described or available for review by responsible managing agency or other concerned parties.

The above noted planning flaws would yield a system of governance that was not enforceable and possibly lacking in the necessary attributes needed to address the flow issues related to frost protection water use. The proposed self governance plan(s) went on to claim that all past problems were identified and fixed, thus reoccurrence of "TAKE" would not be possible. This claim is not consistent with the testimony offered by NMFS or DFG. In fact, the diversion self governance proponents claimed that the incidence was a fluke, related to a "perfect storm" of facts - including: several successive dry years, sedimentation, and abnormal frost events. Not only is this claim inconsistent with NMFS and DFG testimony (continued take is probable with out emergency regulation), the claim denies the effects of overuse during frost events (and for irrigation) and its potential to adversely effect salmonids in all life stages. This denial of responsibility puts in question the availability of the diverters and their intent to take sufficient action necessary to protect beneficial uses.

The diverters discussion of options for solving the frost protection (and possibly irrigation issue) included the use of wastewater. This option has not been fully investigated and is unlikely to be useful for many years. Wastewater is pollutant laden and use of same on saturated soils for frost protection poses threat to surface waters. This threat must be addressed and is subject to NPDES

permitting process. Thus, there is much more work to be accomplished on this option before it has merit.

The option of controlled releases to mitigate frost protection use from Lake Mendocino by the Flood Control District (as presented by Sean White) also has issues that are significant and have not been considered. (See further discussion of this issue - below).

Monitoring and reporting of actions proposed by proponents of the diverters plan(s) are not sufficiently robust or transparent in terms of providing adequate information to the SWRCB, other managing agencies, and other concerned parties.

CAG would argue that the only viable solution (if water is absolutely necessary for frost protection) is off stream storage that is only diverted according to set policy (NMFS/DFG Guidelines) and with staged diversion controlled so as to not adversely effect the hydrograph - and - only diverted by parties that hold water rights and license to divert.

NEW INFORMATION

Presentation my Matt Deitch clearly demonstrated that near stream pumping from wells (in alluvial aquifer - of the Russian River) did have some effect on stream flow. State Board staff has indicated that they believe this to be the case. The effects noted by the Deitch presentation showed a much smaller diversion effect than that of direct diversion - but still there is an effect. This indicates that the degree of effect on flows by all near stream diversion pumping at the same time for frost protection purposes is unknown at this time - but may be significant.

The implications of unknown quantities, and related cumulative instantaneous withdrawal by all the near stream users that are hydrologically connected to the surface water flows and should be licensed and regulated are varied and many. None of the proposed diverter's voluntary plans considers the impacts of such use. Though the individual diversion of one near stream well for frost protection may have a deminimis impact of instream flow at a particular moment in time, cumulative diversion by many (hundreds) of near stream wells in the entire Russian River corridor in a similar time frame can have significant impacts on flow. However, since many of these near stream diverters claim "percolating ground water" and are not licensed or under a diversion permit or accounted for in any water budget (as the Board Chair notices, you must account for the water use), the SWRCB has no real data on total use or effects.

While it is probably a fact that the near stream diverters by well have a lesser affect on stream flow from their pumping than the instream diverters, the potential total use (accounting of all diversion) must be factored in to policy considerations. It should be pointed out that this factor is not considered in the Flood Control Districts timed release program to mitigate for frost protection use. Without such consideration, the efficacy of the timed release proposal as a total problem solution can be challenged. Mr. White has previously provided information indicating that guesswork and inaccuracy of releases and timing of releases may be a (significant) issue - yet to be resolved. Ill timed releases and over-release pulses not only may not solve the problem, such releases may cause damage.

It must also be recognized the use of water for irrigation by the near stream diverters taking from the underflow may affect low flow issues in low flow periods of the late summer and early fall. It is suggested that many of these near stream diverters are subject to State regulatory control and should fall under State Water Code and licensing requirements - and - may be subject to build storage for frost protection and low flow uses. Though this should be a lower priority than dealing with the direct diverters.

Again, the NMFS/DFG Joint Guidelines are sufficient, and the most efficient way at the time, to address many of these issues.

ADDITIONAL DISCUSSION AND RECOMMENDATIONS

Board Chair's Question to NMFS:

The Board Chair's question to NMFS, "Has it ever occurred to you (NMFS) that it would be of great help if NMFS would make suggestions for policy...?". This question has great import on the summation the whole problem of flow maintenance, in general, and the use of water for frost protection (which is a subset of the instream flow maintenance issue - and must be considered as such in the development of policy).

The first response to the Board Chair might be, Yes ! NMFS should and did make recommendations, and that recommendation had been proffered to the Board in the late 1990s, and revised in 2002 in the form of the NMFS/DFG Joint Guidelines. Implementation and adherence to these NMFS/DFG Joint Guidelines would solve, to the a great extent, most of the instream flow issues we are now dealing with. (See previous comments by CAG). In addition many of the outstanding applications for license and pond construction would already be approved if the NMFS/DFG Joint Guidelines were part of the permit conditions for these projects.

The second response would be, that the SWRCB is the responsible agency for managing Water Rights License and Diversion Policy. The SWRCB has been put on notice that it is managing a regulatory apparatus that is allowing for TAKE of listed species. It is the responsibility of the SWRCB to provide a regulatory framework that will assure that the TAKE of listed species will not occur.

In consideration of regulation to avoid TAKE of listed species State Board regulatory policy must (referring to CAG's November 6, 2009 comment letter and previous comments on flow maintenance policy) address issue raised in this paper and abide by the following:

Regulatory Action should start with the premise that all water diversion for the purpose of frost protection is not legal - unless the following occurs:

* The diverter must unequivocally demonstrate that diversion will cause no harm.

* No harm can be demonstrated by demonstration of item #1 and any (or all) of the following conditions:

1- The landowner possesses water rights license for such diversion
2- The landowner has offstream storage sufficient to carry out activity with sufficient …….backup (or guarantee) to eliminate the immediate need to refill storage.
3 -The landowner is participating in a planned program of diversion rotation or scheduling that ……is demonstrated to assure maintenance of stream flow.
4 - The landowner can demonstrate that well use is not diversion from surface flows or under flow in a defined channel

Burden of proof is to be on the landowner.

The SWRCB should consider the above noted regulatory constraints within the framework of short term emergency regulations until the Board has time to address and integrate a more comprehensible long term program considering diversion for frost protection and stream flow maintenance.

The current consideration of regulation of diversions for frost protection is needed. It must be recognized that the frost protection issue is a subset of the greater issue of maintaining instream flows. Long term policy can not deal with the frost protection issue without integrating it into the long awaited flow maintenance policy.

The final (long term policy) for flow maintenance and frost protection must consider:

* The relationship of frost protection diversion issues with flow maintenance policy
* Analysis of Cumulative Watershed Effects (cumulative diversion) related to planned diversion policy - with limitations of loopholes that would subvert regulation
* Impoundment facilities that block migration and access to habitat must be removed
* By-pass flow numbers must be sufficient to support salmonids in all life stages
* Monitoring and reporting programs must be sufficient to assure success of regulations

Imposition of the NMFS/DFG Joint Guidelines (are reasonable similar policy) is the most efficient and reasonable solution proposed to date for the solution (in part) of the current frost protection water use and flow maintenance issues facing the SWRCB.

Sincerely,

Alan Levine
for Coast Action Group

In SWRCB file and other documents supporting adverse effects of water use for frost protection:

Hydrologic Impacts of Small Scale Instream Diversion for Frost & Heat Protecion - Deitch et al

Surface Water Balance to Evaluate Hydrologic Impacts in Small Stream Diversion - Deitch et al
Comments on Draft Policy for Maintaining Instream Flows - Higgins