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Via Electronic Mail (commentletters@waterboards.ca.gov) and Facsimile (916-341-5620)

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

Re: Comment Letter – Proposed Russian River Frost Protection Regulation

Dear Ms. Townsend:

I submit these written comments on behalf of our client Golden Real Estate, LLC, which operates two vineyards in Mendocino County, California ("Golden Vineyards") and which has authorized us to submit this letter. These written comments are addressed to the State Water Resources Control Board ("State Board") regarding the proposed Russian River Frost Protection Regulation ("Draft Regulation") and the accompanying Draft Environmental Impact Report ("Draft EIR") dated May 2011.

Golden Vineyards requests that the State Board decline to adopt the Draft Regulation and refuse to certify the Final EIR that results from this greatly flawed Draft EIR. Indeed, the Draft EIR is so woefully inadequate that this draft document needs to be recirculated once the deficiencies in it have been addressed. In brief, the Draft Regulation fails to balance protection of all beneficial uses, will have a drastic and unfairly disproportionate impact on vineyard diverters like Golden Vineyards, is based on a seriously inadequate environmental analysis and is accompanied by a legally deficient Draft EIR.

The Draft Regulation essentially ignores the huge economic and water availability impacts that it will inevitably cause to vineyard owners in Mendocino and Sonoma Counties and fails to take into account the associated environmental impacts. Implementation of the Draft EIR also relies on a series of unwarranted legal presumptions against vineyard owners regarding diversion of water for frost protection. Most importantly, the Draft EIR that supposedly justifies adoption of the Draft Regulation is fundamentally flawed and completely fails to inform the public of anticipated environmental impacts and fails to provide an appropriate environmental decision basis for State Board consideration of the Draft Regulation.



BACKGROUND ON GOLDEN VINEYARDS

Golden Vineyards owns two large vineyard ranch properties within the area covered by the Draft Regulation. Golden Vineyards was established in 1997 with the goal of growing high-quality wine grapes while promoting sustainable farming techniques. The vineyards at both Ranches have received both an organic certification and a biodynamic certification. The biodynamic agricultural technique arises from a non-chemical agricultural movement which predates the organic agricultural movement. In conformance with these certifications, Golden Vineyards does not use any chemicals or pesticides. Weed control is entirely mechanical or manual, and insects are controlled by use of cover-cropping and chickens. Fertilizing is accomplished using biodynamic preparations applied using a drip irrigation and spray system and through use of compost. Frost protection and heat control will be achieved, when necessary, using misters rather than sprinklers, and irrigation is accomplished using drip technology. These practices significantly reduce water use and also result in excellent erosion and run-off controls.

Golden Vineyards has also constructed special bypass diversion structures and strengthened, repaired and updated all of its storage ponds. Because of the drainage system features and the beneficial management practices of Golden Vineyards' farming operation, the National Marine Fisheries Service, the California Department of Fish and Game, the Regional Water Quality Control Board and the Sotoyome Resource Conservation District have officially certified the Ranches as Fish Friendly Farms. They specifically determined that the Ranches serve as excellent examples of fish friendly farming techniques.

In short, Golden Vineyards has chosen to farm in an organic and sustainable manner that reflects enlightened stewardship of water and other environmental resources. Nonetheless, many of the unreasonable, costly and experimental limitations contained in the Draft Regulation will likely make it extremely difficult for Golden Vineyards to continue receiving adequate frost protection water supplies and the Draft Regulation's unreasonable anticipated costs of compliance may threaten Golden Vineyards' ability to continue farming in this manner or in any productive manner over the long term.

COMMENTS ON DRAFT REGULATION

Golden Vineyards has three major objections to the Initial Statement of Reasons for, and the text of, the Draft Regulation. First, the Draft Regulation is expected to require vineyard owners to spend huge sums of money to employ consultants, conduct monitoring, participate in a plan and then implement interim and permanent corrective measures, and this expenditure is not economically achievable for many vineyard owners. Second, the Draft Regulation is not properly based on a solid scientific footing and this flawed science is insufficient to justify the regulation's adoption. Third, the Draft Regulation improperly attempts to shift the State Board's legal responsibilities by adopting certain legal presumptions (for example, that diversion of water for frost protection is supposedly a *per se* unreasonable use of water) that are not legally appropriate or supportable. Each objection will be discussed below.



First, if the Draft Regulation is implemented in its current form, it will have a huge, disproportionate and unfair water availability and financial impact on small vineyard owners in the covered geographic area. The vibrant and growing wine grape industry in Mendocino and Sonoma Counties is composed in large part of small vineyard owners and wineries, many of whom entered the business in the last 25 years. It is absolutely critical for these businesses that their wine grapes be protected during the early part of the growing season when freezing temperatures threaten the viability of the grapes. If proper frost protection is not implemented, the crops could be completely lost.

As the Draft EIR concedes (page 41), wine grapes are far and away the top agricultural crop in Mendocino and Sonoma Counties, with an annual value in 2009 of \$78.5 million in Mendocino County and \$465 million in Sonoma County, totaling over half a billion dollars annually. These crops dwarf in value all of the other agricultural crops in the counties put together. Without question, wine grapes are a key driver and economic mainstay of the economies in both counties. It is undisputed that frost protection to protect these crops is a recognized "beneficial use" which the State Board is required to enhance and protect. However, the Draft Regulation makes no attempt to protect and enhance this beneficial use. To the contrary, it elevates protection of one beneficial use above all other beneficial uses.

The Board's own economic analysis demonstrates that adoption of the Draft Regulation will have huge economic consequences for wine grape growers. A typical 160-acre wine grape vineyard is expected to spend from \$9,600 to \$352,000 initially (including capital costs for corrective actions) to comply with the Regulation's mandates and an additional \$3,000 to \$36,200 every year to remain in compliance. For small farmers like Golden Vineyards, these expected costs are not affordable and could well cause a wholesale shift in land use away from wine grapes.

Second, we understand, from discussions with water availability and threatened/endangered species experts, that the scientific bases for the Draft Regulation are flawed and incomplete. There are key scientific uncertainties regarding the magnitude, extent and causes of the stranding problem, as well as regarding the assumptions and analyses underlying the Draft Regulation. Moreover, as explained in more detail below, the basis for describing environmental impacts and rejecting other alternatives for addressing this problem is notably unscientific, relying more on the personal views of the drafters rather than on a thorough and unbiased scientific analysis of the issues.

Moreover, in conducting these scientific analyses, it is important to recognize that diversion for frost protection has different impacts than diversion for irrigation. Water diverted for frost protection does not normally evaporate – rather, most of the water melts and is returned to the water table. As a result, the scientific analyses of this issue overstate the impacts of water diversion for frost protection.

Accordingly, before the State Board adopts the Draft Regulation, there should be appropriate studies, the addition of a wider range of alternatives and solicitation of further peer



review comments to examine the key elements of the Draft Regulation. It is imperative that any new restrictions on agricultural supply diversions have solid, accepted and completely defensible scientific bases.

Third, the legal presumptions against water diverters that are built into the Draft Regulation are not legally appropriate or adequate. For example, the Draft Regulation purports to make a legal finding that any diversion of water from the Russian River stream system for frost protection from March 15 to May 15 is *per se* unreasonable and a violation of law, unless a certain procedure is followed. Moreover, this regulation illegally attempts to shift the legal burden from the State Board to the diverter to demonstrate that pumped groundwater is not hydraulically connected to the Russian River. Instead of basing such a hydraulic connection determination on scientific evidence and having the State Board shoulder this burden, any pumping of groundwater is presumed to be from the Russian River unless the diverter “can demonstrate to the satisfaction of the board” (a legally imprecise and subjective standard) that the groundwater is not hydraulically connected. None of these presumptions and standards is legally appropriate and they should be excised from the Draft Regulation.

COMMENTS ON DRAFT ENVIRONMENTAL IMPACT REPORT

The State Board Staff prepared a Draft EIR in connection with the Board’s consideration of the Draft Regulation. Unfortunately, the Draft EIR is deficient in many key respects and should not be adopted or certified by the State Board. These deficiencies include, but are not limited to, the following matters:

1. Failure To Identify And Describe Significant Environmental Impacts

The CEQA environmental document should provide information regarding the Draft Regulation’s significant environmental impacts that is sufficient to allow the State Board and the public to understand its environmental consequences. *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal. 3d 376, 404 (1988). In this case, the Draft EIR does not provide an adequate description of the full range of environmental impacts of adopting and implementing the Draft Regulation. This deficiency is particularly important because the State Board will not be able to properly evaluate or compare the Proposed Action with other alternatives because it is not properly informed of the nature and extent of each alternative’s environmental impacts.

For example, one of the reasonably expected environmental impacts of the Draft Regulation is the removal/modification of surface water diversion structures. These activities, which will often occur in or near riparian areas, can reasonably be expected to adversely affect, and may cause prohibited “take” within the meaning of the federal Endangered Species Act (“ESA”) and/or the California Endangered Species Act (“CESA”), of a range of listed species including the California tiger salamander and California red-legged frog. However, instead of analyzing these biological impacts in any true depth, the Draft EIR provides a few sentences in scattered locations (see, for example, pages 66 and 71) noting that these impacts potentially may occur. The Draft EIR makes no real effort to identify the species at risk and quantify the



expected adverse biological impacts. This omission is especially problematic because, in the name of preventing stranding of three aquatic species, the Draft Regulation may be directly causing a “taking” of a full range of other such threatened and endangered species. The DEIR’s brief references to these impacts, even in a programmatic document, are demonstrably inadequate.

As another example, there is no serious effort in the Draft EIR to analyze the serious and reasonably foreseeable land conversion impacts of the regulation. These physical environmental impacts will occur because the dramatic reduction in frost protection water and the huge increases in financial costs caused by the Draft Regulation could make it impossible for many small vineyards to continue wine grape production, thereby causing a large-scale shift in land use from vineyards to other uses. The Draft EIR attempts to avoid this required CEQA analysis by making the unsupported claim (page 87) that: “The proposed regulation does not restrict operations or financially impact the vineyard or orchard owner at a significant enough level to assume that an owner would forfeit the agriculture business and explore other land use alternatives.” However, this assertion is incorrect and amounts to improper speculation by the document’s drafters.

This failure to analyze the environmental impacts of the Draft Regulation runs throughout all of the identified resource areas. Rather than making any real attempt to analyze these issues, the Draft EIR attempts to hide behind its status as a “program” EIR and to defer all real analysis to unspecified future CEQA reviews for individual projects. However, this approach is inadequate under CEQA. Because the Draft EIR fails to analyze, minimizes without support and otherwise limits its analysis of the true environmental effects of the Draft Regulation, the State Board is unable to conduct an accurate comparison of the Draft Regulation with other alternatives, thereby making the document insufficient for CEQA purposes.

2. Failure to Identify And Properly Analyze All Reasonable Alternatives

One key to an adequate EIR is its identification and detailed discussion of alternatives to the Proposed Action (the Draft Regulation). In this case, the Draft EIR neither identifies a full range of alternatives nor does it analyze and compare the alternatives in a legally proper manner.

First, the Draft EIR improperly rejects the no-project alternative because it supposedly does not meet the project objective of preventing stranding mortality. At the same time, the Draft EIR admits that this alternative is the “environmentally superior” alternative. In fact, the analysis of this alternative (pages 88-89) makes it evident that the Draft EIR has no good basis for discounting this alternative. Rather than failing to meet the project objective, it appears instead that the alternative could meet the objective, but that the drafters of the document thought the range of available regulatory tools “would not be the most effective regulatory mechanism” for addressing the problem. In fact, as this analysis implicitly concedes, there are currently many regulatory tools available to the State Board to effectively address the problem. However, the Draft EIR purports to reject them as infeasible because they might take longer or cost the State a



little more money. This analysis is patently insufficient and the no-project alternative is legally feasible under CEQA.

Second, the Draft EIR purports to reject, with only superficial analysis, the many innovative alternatives that are being pursued both by private individuals and governmental agencies. Thus, it improperly rejects the local stakeholder voluntary programs (Alternative 2) because they are only “voluntary” and supposedly do not cover monitoring over the entire area. The document asserts, without support, that “[r]eliance on voluntary participation is not enough to ensure all frost irrigators will work to reduce their cumulative instantaneous demand.” However, given the large and growing participation in these programs, this statement has no basis in fact. Similarly, the Draft Regulation rejects the Sonoma County regulatory approach (Alternative 3) because it too is voluntary and supposedly will not have as comprehensive an impact. Once again, the basis for these conclusions is not provided. Contrary to the Draft EIR’s assertions, both alternatives appear to be legally feasible.

Moreover, the Draft EIR does not recognize the comprehensive voluntary efforts of many vineyards in Mendocino County with the organization formerly known as the Russian River Flood Control District, which is actively working in close cooperation with the U.S. Army Corps of Engineers to ensure that frost protection diversions do not have adverse impacts on aquatic species. The Draft EIR is deficient because, in its effort to discount such voluntary efforts, it is not appropriately recognizing the comprehensive nature and effectiveness of these ongoing efforts.

Third, the State Board has made no real attempt to analyze a reasonable and full range of alternatives to the Draft Regulation. For example, it has failed to propose and analyze a balanced frost protection policy that protects and enhances agricultural supply and other beneficial uses without applying the most conservative fish stranding assumptions utilized in the Draft Regulation. This type of alternative should promote greater balance of beneficial uses and incorporate mitigation measures to address the potentially significant impacts on the wine grape industry. Rather than undertake a creative and serious effort to develop such an alternative, the State Board urges commenters to come up with their own alternatives (after they have already made significant efforts to do so). This “pass the buck” approach to alternatives is not sufficient under CEQA.

3. Failure To Identify, Analyze And Adopt Mitigation Measures

An EIR must include “mitigation measures to avoid or reduce any significant or potentially significant effects that the project may have on the environment.” CEQA Guidelines, § 15252(a)(2)(A). This requirement applies to all types of discretionary agency actions, including this proposed action. In such case, “mitigation measures can be incorporated into the plan, policy, regulation, or project design.” CEQA Guidelines, § 15126.4(a)(2); *see also* Public Resources Code § 21081.6(b).

It is undisputed that, in the Draft EIR, the State Board has made no effort whatsoever to identify mitigation measures to lessen the potentially significant environmental impacts of the



Jeanine Townsend

July 5, 2011

Page 7

Draft Regulation. There is a section (beginning on page 98) in which the document supposedly identifies mitigation measures to reduce the proposed action's impacts. However, these measures almost uniformly constitute illegal "deferred mitigation" because they do not contain performance standards, specific criteria or other safeguards to ensure that they are well defined and will be implemented. Instead, almost every mitigation measure is a requirement that applicants comply with unspecified future mitigation measures imposed by other regulatory agencies for particular projects. This type of mitigation measure fails to ensure that the reasonably foreseeable environmental impacts of the Draft Regulation are effectively addressed or mitigated to less than significant levels.

4. Failure To Identify Or Analyze Cumulative Impacts

It is undisputed that an EIR is required to include a discussion of the Draft Regulation's cumulative impacts. *See* CEQA Guidelines, § 15130(a). In this case, the Draft EIR contains only a short section on cumulative impacts which does not contain any real analysis of such impacts. This failure to identify, discuss and analyze cumulative impacts is a fundamental legal deficiency in the document.

It is absolutely essential, when issuing a policy that will have the scope and magnitude of environmental effects that the Draft Regulation will, to include a thorough discussion of cumulative environmental impacts. For example, the Draft Regulation could well force large-scale physical changes in land use, environmental, social and economic patterns in the affected counties, particularly given its direct adverse impact on the wine grape industry. None of these changes are addressed in the cumulative impact discussion. Moreover, there is only an inadequate attempt to formulate mitigation measures to address such cumulative impacts.

CONCLUSION

The State Board should refuse to adopt this Draft Regulation because, in its current form, it will have a drastic adverse and unwarranted environmental, financial and business impact on vineyard owners in Mendocino and Sonoma Counties. Instead, the State Board should develop further alternatives and consider adopting a voluntary participation alternative. The underlying Draft EIR is patently deficient in many respects and must be redone and recirculated before it is even considered by the State Board.

Thank you for this opportunity to provide comments on behalf of Golden Vineyards, LLC. Please feel free to contact me if you have any questions.

Very truly yours,

Paul P. "Skip" Spaulding, III

cc: Julie and Joe Golden

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