September 11, 2011

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RE: COMMENT LETTER – PROPOSED RUSSIAN RIVER FROST REGULATION

I would like to take the opportunity to respond to the second Draft EIR and proposed resolution no. 2011 to be adopted on September 20, 2011. As the Board failed to make any substantive changes from the original Draft EIR, I again would like to request the Board address the issues below before finalizing the EIR and make appropriate changes to the implementation of any imposed regulation.

I would also like to note the extraordinarily short period of time given to commentators to adequately review and respond to the Draft EIR and proposed regulation. The second draft EIR was made publicly available September 1, 2011 with comments due no later than September 16, 2011. Fifteen days is hardly enough time to let the public know a new document is available or to review a lengthy, complicated document and subsequently provide a comprehensive response.

I. Scientific Bases

SWRCB has yet to identify the scientific methods to the events that precipitated the promulgation of this regulation. It appears from the draft EIR that two episodes of strandings occurred. However, lacking from any and all documentation is the *data which extrapolated the two incidents into what now appears to be a series of incidents throughout Sonoma and Mendocino counties in 2008 and thereafter.*

In its response to comment 2.0.31, the Board again admits that according to the *single* study on which it relies to implement the regulation ("Hydrologic Impacts of SmallScale Instream Diversions for Frost and Heat Protection in the California Wine Country" by Deitch et al.) that "continuous data collection and monitoring are necessary to establish whether changes in streamflow occur because of frost protection use." The Board then claims this statement is consistent with the proposed regulation.

The Board admits the proposed regulation is based on a lack of data. I encourage further appropriate studies, a wider range of alternatives and at the very minimum a solicitation of peer review comments prior to the adoption of the Draft EIR and Draft Regulation. Relying on one

study for this massive regulation is simply unconscionable and more notably is not legally sufficient.

II. Reasonable Alternatives

The Draft EIR fails to adequately consider adequate reasonable alternatives. As stated above the proposed regulation is based on insufficient scientific data. The Board relies on such data to justify its reasonable alternatives as noted in its response to Comment 2.0.14. While the Board suggests it relied on over 28 alternatives, such alternatives are missing from the EIR. Therefore, there is no evidence that such consideration actually took place.

Furthermore, as a recent Eastern District of California case notes, government officials have a responsibility to consider reasonable alternatives which not only protect the species, but also minimize the adverse impact on humans and the human environment. Case 1:09-cv-00407-oww-DLB. The Board has simply failed to properly address such alternatives based on the lack of range of alternatives or the substance of such alternatives in properly addressing the adverse impacts to the human environment.

Lastly, and as already addressed in previous comments, the alternatives provided by the Board are simply what it and other agencies consider insensitive environmental alternatives. Increasing groundwater production is frowned upon by the Board yet it endorses the measure in its own EIR. Water pumps are a highly contested issue in the Air Resources Control Board, recently requiring growers to replace old with the new, increasing costs exponentially. The Board fails to adequately address the financial and practical feasibility of wind machines and orchard heaters. Finally, the Board explicitly rejects a no-project alternative, even though it admits it is the "environmentally superior alternative."

III. Economic Impact

In its response to comments, the Board states, "Landowners who choose to discontinue frost protection altogether would likely explore other profitable crop options before selling and converting farm land to other uses". Response to Comment 8.0.4. The Response goes further to comment the "2010 Sonoma County Crop Report reports the following total values per acre of agricultural crops: Grapes = $6,550; Vegetables = $11,500; and Apples $2,250". Response to Comment 8.0.4. It is unclear where these figures were derived from as they are not stated in the 2010 Sonoma County Crop Report.

The Board fails to cite any evidence of the likelihood growers could switch to other profitable crops before selling, other than apparently vegetables gross a higher dollar of value per acre than do winegrapes and apples gross a lower value per acre—an unverified and contestable statistic.

What is clear from the 2010 Sonoma County Crop report is winegrapes are the number one commodity in the County with a gross production value of $390,448,300. Vegetables were the number 7 crop with gross production at $8,212,200, two percent of the total value of winegrapes. Apples were the number 10 at $4,169,300. *See*, http://www.sonoma-

county.org/agcomm/pdf/2010_crop_report.pdf. The report also indicates there are 710 acres of vegetables and 56,522 acres of winegrapes.

The likelihood growers would switch from winegrapes to vegetables cannot be supported by the mere gross production value per acre, even if the number provided is accurate. First and foremost this number fails to consider costs involved with vineyard removal, increased water usage from implementation of row/vegetable crops, and the frost vulnerabilities of such crops. Secondly, as indicated above, vegetables only account for 710 acres compared to over 56,000 acres of winegrapes. Should vegetable crop acreage grow, the price received will decrease as supply increases.

Furthermore, the Draft EIR fails to consider the economic value of what happens past the original grape sale. For example, missing from the economic studies are the economic impact to wineries, hospitality, restaurants, and other tourism that has a direct correlation to winegrape acreage. Without winegrapes, there is no wine, and if there is no wine there is no "Wine Country". It is highly unlikely Sonoma County tourism will be able to maintain its status if its new name is resorted to "Vegetable Country." For example, see the City of Healdsburg's Chamber of Commerce website noting Healdsburg as a "town renowned for its eclectic offering of all the finest things in life… food, wine, friends and fun." http://www.healdsburg.com. Noticeably missing from such description is an abundance of vegetables and apples, even though they are grown in the county. Vegetables simply do not attract visitors like the wine industry can and does.

The Board also fails to acknowledge the amount of money that has been spent in marketing Sonoma County winegrapes as worldly renowned and the intrinsic value of such commodity beyond that stated in crop reports. Sonoma County is the only climate in the entire world which has the topography to grow the specialty grapes and produce the type and quality of wine as we do here. California wine is at the forefront of the wine industry because of its unique climate that can change from mile to mile and no County has the temperature, soil, climate as Sonoma as indicated through various studies required to make such land an American Viticulture Area (AVA). Sonoma County alone has 13 different AVA's. *See* http://www.sonomawinegrape.org/winemap.

The Board also fails to acknowledge the history of Sonoma County agriculture specifically when casually stating growers could switch to different crops prior to selling their land. Growers *have* switched to winegrapes over the years from pears, plums/prunes, apples, vegetables, dairies, etc. because profitability was not feasible for those crops. Growers made the commitment to winegrapes because it was the only commodity that could be grown efficiently in the economic and regulatory conditions of Sonoma County—meaning winegrapes are the only commodity that can produce the amount of yield necessary to make a profit off extraordinarily high valued and highly regulated land.

IV. Legal Authority

The Board responded to questions of its legal authority to pursue this regulation with a

mere conclusory statement that it does have legal authority. Response to Comment 3.0.15 and Response to Comment 10.1.3. The Board fails to cite what findings, documentation and legal authority gives it the power to implement the proposed regulation.

The second Draft EIR again states (although slightly rephrased from the original Draft EIR) that water diverted not in accordance with Board's WDMP will be unreasonable. Draft EIR, 9. This wording is no different than the original EIR stating all water diverted for frost protection from the period of March 15 to May 15 is per se unreasonable. The Board has no authority to make a broad sweeping determination one activity declared by the legislature as beneficial, is unreasonable per se without a sufficient case by case analysis.

The Board states it "has based its determination of unreasonableness on the facts and circumstances of this case." Response to Comment 1.1.46. The Board notes "What constitutes reasonable use of water depends on current circumstances and varies as the current situation changes." Response to Comment 1.1.46. This commentator wholeheartedly agrees this is the appropriate standard by which to judge reasonable use, however, the Board has *not* based its determination on the facts and circumstances of this case.

As stated above, the legal studies are highly inadequate. Furthermore, a case by case analysis requires looking at each diverter and determining how and if his use is unreasonable. Instead, the Board has made broad sweeping presumptions about growers and frost water use in the Russian River Watershed and that based on one study (which concludes further scientific analysis is needed) all diversions in the Russian River Watershed between the dates of March 15 to May 15 are per se unreasonable. This is simply not a case by case analysis and is precisely the over sweeping regulatory authority to which the courts have limited the Board's power.

Based on these issues, this commentator requests the final EIR, the proposed resolution and regulation not be adopted.

Sincerely,

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