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September 15, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
1001 I Street, 24th Floor
Sacramento, CA 95812



By electronic and first class mail

RE: Comment Letter – Proposed Russian River Frost Protection Regulation

Dear Board Members:

On behalf of Williams Selyem, a vineyard owner on Westside Road in Healdsburg and Drake Road in Guerneville, we provide the following comments on the changes made to the May 20, 2011, draft Russian River Frost Protection Regulation and supporting documents. We are providing comments on the changes made to the regulation itself and the changes made to the Draft Environmental Impact Report (DEIR).

While the SWRCB has made changes to the regulation, the SWRCB has failed to recognize, and correct, one of the fundamental problems with it. The regulation has been drawn too narrowly because it fails to regulate other water users that also affect stream stage during the frost season. There are entities, both public and private, many known to and permitted by the SWRCB itself, that withdraw large amounts of water from the system during the frost season, but the SWRCB has exempted all of those water users based solely on the USE to which the water is put. There is no legal basis for drawing this arbitrary distinction.

Indeed, state law and well as settled court cases require that a scarce resource like water be used with the objective of the maximum beneficial uses, and puts the burden upon the SWRCB to ensure such an outcome.¹ In our view, it is impermissible under the law to confine a water management plan to one class of user and exclude all others who may have an equal or larger effect on the resource. To protect the fish for example, water users other than frost users must be embraced in the management plan to ensure the maximum beneficial use of the water and the maximum protection of the fishery as well.

The regulation as currently drawn also inappropriately turns the Water Demand Management Program (WDMP) into an enforcement and reporting agency. Sections (c.) 4 and (c.) 5 of the regulation require the WDMP to prohibit water users from using water, and if they don't, report

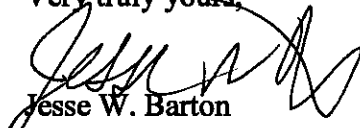
¹ *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 40 P.2d 486, 491. ("When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield.")

those users to the SWRCB. The regulation also requires the WDMP to essentially be an informant by requiring it to tell the SWRCB who is in the program, who is not, and who just joined or quit. Asking the WDMP to inform on the very people on whose cooperation its success depends is not an effective way to run a program, and it is an unlawful delegation of the SWRCB's authority to a private organization.

With respect to the DEIR, the SWRCB has effectively ignored all of our concerns about the environmental impacts, while at the same time making so many changes to it that we believe it must be recirculated. The changes excluding certain stream sections from the regulation and changes to the mitigation measures have created new environmental impacts that have not been examined or mitigated.

While these comments address a few specific items related to the regulation and its supporting documents, we also reassert and reaffirm all of our previous concerns with the regulation that were submitted on July 5, 2011. We appreciate your time and concern.

Very truly yours,



Jesse W. Barton

cc. Client