



napa valley vintners



WINEGROWERS
of napa county

February 1, 2013

Ms. Sandi Potter, Water Resources Control Engineer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, California 94612
VIA EMAIL: SPOTTER@WATERBOARDS.CA.GOV

Dear Ms. Potter:

The Napa County Farm Bureau, the Napa Valley Grapegrowers, the Napa Valley Vintners, and the Winegrowers of Napa County appreciate the opportunity to provide comments on the San Francisco Bay Regional Water Quality Control Board's ("Regional Board") proposed Conditional Waiver of Waste Discharge Requirements for Eligible Vineyard Properties in the Napa River and Sonoma Creek Watersheds ("Conditional Waiver") and proposed Initial Study/Mitigated Negative Declaration ("IS/MND") prepared pursuant to the California Environmental Quality Act ("CEQA"). We support the goal of improving the health of the Napa River watershed and actively promote Best Management Practices and innovative resource stewardship projects to achieve substantial habitat improvements in our region. Maintaining a healthy functioning watershed is essential to protecting agriculture, our livelihood, and a healthy ecosystem. Napa County's commitment to resource stewardship was recognized by the United States Environmental Protection Agency (in their Learning Module on Watershed Management) as an example of a successful watershed leader.

We assembled a review team consisting of landowners/operators of varying technical experience, and have provided comments on the Conditional Waiver throughout the process, including actively participating in the Stakeholder Advisory Group. We appreciate the opportunity to work with you and Jim Ponton and your willingness to understand the context of sustainable farming in Napa and Sonoma Counties and our current regulatory framework. Our primary objective has been to provide input on the proposed Conditional Waiver that recognizes the success of Napa County's Conservation Regulations, Erosion Control Plans, Sonoma County's Grading, Drainage, & Vineyard & Orchard Site Development Ordinance (VESCO) and other local programs, such as Napa Green/Fish Friendly Farming or Code of Sustainable Wine-Growing, and to help structure a waiver that can be easily implemented, and is manageable and cost-effective. More importantly, we feel that the Regional Board has an obligation to the public to exercise its authority in a manner that acknowledges existing policies and practices that have been proven to effectively reduce sediment without creating unnecessary and redundant regulation.

Basin Plan, TMDL, and Limiting Factor Analysis – The Conditional Waiver, as currently proposed, is overly duplicative with the Napa County Conservation Regulations and imposes economic impacts that have not been adequately determined and disclosed to the public. The following recommendations and comments are intended to address these concerns:

Option A - Limit the proposed Conditional Waiver to Vineyards (Vineyard Facilities)

This approach would be consistent with the Basin Plan and be in the public interest by building on existing programs in place, limiting new and unnecessary costs incurred by vineyard

landowner/operators to achieve sediment allocations for surface erosion, and encouraging broader participation and compliance.

- **Existing Napa County Conservation Regulations are Working** – Basin Plan Amendment, Napa River Sediment Reduction and Habitat Enhancement Plan, Table 4.1 Required and Trackable TMDL Implementation Measures for Sediment Discharges Associated with Vineyards, at footnote 5 states that “Napa County Conservation Regulations (County Code, Chapter 18.108) are effective in the control of excessive sediment delivery resulting from vineyard surface erosion.” These Napa County regulations address the Performance Standards listed for Vineyards in Table 4.1 for Surface Erosion. Yet the proposed Conditional Waiver also requires Vineyards to address Rural Lands (Table 4.3 in the Basin Plan). The cost difference between preparing and implementing a Farm Plan for the Vineyard (Vineyard Facility) versus the entire property (Vineyard Property) is substantial and has not been adequately analyzed or disclosed to the public.
- **95% of Hillside Vineyards will be covered under Existing Regulations** – The Napa River Sediment TMDL predicted (*without intervention from the Regional Board*) that, assuming a 20-25 year period for sediment TMDL implementation, 95% or more of the total projected hillside vineyard acreage would be permitted under the Napa County Conservation Regulations, up from the present 55%. (Napa River Sediment TMDL at page 80, n. 29.) The Basin Plan Amendment also formally recognized the Fish Friendly Farming Certification Program as an effective means of controlling pollutant discharges associated with vineyards and that approximately 7,000 acres had been certified as of 2009. (Napa River Sediment TMDL at pages 81 and 86, and at Appendix D at page 36, Comment 8.1.) In just three years since the adoption of the TMDL, the number of certified acres has more than tripled to 25,660 certified acres. Yet, the proposed Conditional Waiver ignores this substantial and measurable progress and overlays a new and duplicative regulatory program without adequate justification or a demonstration of necessity. [See Gov’t Code §§11353(b)(2)(C) and (b)(4) (incorporating, *inter alia*, the standards of necessity and non-duplication from section 11349.1(a).]
- **Exclude Rural Lands from Proposed Conditional Waiver** – Table 4.3 (Discharges related to Rural Lands) of the Basin Plan Amendment, footnote 3 states that Rural Lands, per Napa County’s definition include: non-farmed and non-grazing portions of parcels. The Regional Board must consider the alternative of limiting the proposed Vineyard Conditional Waiver to Vineyards only (excluding the Rural Lands on the property as referenced in the Rural Lands Table 4.3). The full environmental and economic impacts of a Rural Lands Waiver have not been assessed nor have they been vetted with a Rural Lands Stakeholder group. In addition, an entire property may include Vineyard operations (possibly leased or professionally managed) and Non-Vineyard operations (non-farmed) and it is not practical to have two different parties trying to prepare, implement, and divide the financial impact of one Farm Plan.
- **The Proposed Conditional Waiver is Duplicative and Costly** – The Napa River Sediment TMDL and Habitat Enhancement Plan (Sept. 2009), amended into the Basin Plan as R2-2009-0064, expressly stated in relation to vineyard surface erosion that “**No new costs are associated with the proposed Basin Plan amendment as we rely on landowner compliance with Napa County’s Conservation Regulations to achieve sediment allocations for vineyard**

surface erosion.” (Napa River Sediment TMDL at pages 144 and 147 (Table 17).) Instead of relying upon the cited Napa County Conservation Regulations, the proposed Conditional Waiver goes beyond those regulations to create a **duplicative and more costly program** for landowners/operators of vineyards. Since the Regional Board proposes to go beyond what was expressly stated in the Basin Plan amendment, the proposed Conditional Waiver would violate Water Code section 13269(a)(1) as *inconsistent* with the Basin Plan and would not be in the public interest.

- **Statutorily Mandated Factors have Not been Considered** – Before a Regional Board can implement any agricultural water quality control program for discharges from irrigated lands, the Porter-Cologne Water Quality Control Act requires that “an estimate of the total cost of the program, together with an identification of potential sources of financing, shall be indicated.” (Wat. Code §13141.) In addition, for any water quality objectives being implemented in the Sediment TMDL and through this agricultural waiver, the Regional Board must demonstrate that the factors set forth in Water Code section 13241 were considered, including “economic considerations” and “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” (Wat. Code, §13241.) It is not clear that the water quality objectives underlying the TMDL and driving adoption of this Conditional Waiver contemplated the costs and attainability of such a regulatory program on vineyards or specifically considered each of the factors set forth in Water Code section 13241.
- **Costs have Not been Adequately Considered** – The significant management and regulatory compliance costs of implementing this Conditional Waiver have not been adequately considered. As noted above, the Basin Plan Amendment was initially characterized as imposing “no new costs” on vineyard owners. In 2009, the Regional Board estimated the total costs for implementation of the Conditional Waiver for “agricultural sources” to be between \$1.9 and \$3.4 million per year for the 20-year implementation period (Napa River Sediment Reduction and Habitat Enhancement Plan, Basin Plan Amendment, page 18.). Not only were these costs compiled prior to the development of the actual provisions and scope of the Conditional Waiver, they appear to be woefully inadequate. Dividing these costs by 45,274 (total acres of planted vineyards in Napa County) results in costs of approximately \$42 to \$75 per acre. Implementation costs of an Erosion Control Plan alone range can from \$5,000 up to \$20,000. Even if the costs were accurate, the costs to landowners over the 20-year period would be between **\$38 and \$68 million**. Anticipated program implementation costs to the agricultural community include increases in potential fees, management practice implementation, monitoring costs, report preparation, cost for education, legal fees, permitting, design, contractors, and biologists, etc. In addition, there appears to have been no consideration to the costs associated with loss in plantable acreage. Land purchased as plantable acreage currently estimated at \$200,000/acre, could drop to \$2,000/acre in value, a \$198,000/acre loss. Given that the impacts of water quality regulations frequently take years to materialize, the Regional Board should analyze the economic costs and impacts within a dynamic framework taking into account the projected changes in the economic situation *over time*.
- **Potential Funding Sources have Not been Identified** – As pointed out above, Water Code section 13141 provides that, “...prior to implementation of any agricultural water quality control program, an estimate of the total cost of such a program, together with an

identification of potential sources of financing shall be indicated in any regional water quality control plan.” The Regional Board “anticipated” that 75 percent of the implementation costs will be paid for with public funds, yet no specifics are provided regarding grant requirements, funding availability, or what costs would be covered by such grants, if in fact the funds are actually available as anticipated over the 20-year implementation period. The economic impact of the Conditional Waiver must be accurately evaluated in order to determine whether it is in the public interest for the Regional Board to adopt such costly and duplicative regulations. The current information provided by the Regional Board does not provide any defensible analysis of economic impacts on the vineyard industry.

- **Economic Disadvantage and Disclosure of Trade Secrets** – The Regional Board has failed to justify application of the new requirements to just the Napa and Sonoma areas since sedimentation is an issue seen in other Bay Area watersheds. In addition, the requirement to comply with the Conditional Waiver and produce Farm Plans may subject the Napa and Sonoma area vineyard to an economic disadvantage over other vineyards in areas not required to implement such practices. The requirements may also result in inadvertent disclosure of trade secrets even though, under state law, the release of public records that might reveal trade or business secrets is prohibited.¹

Option B – Adopt a Categorical Waiver of Waste Discharge Requirements for Vineyard Facilities as a Basin Plan Amendment

This alternative approach is suggested in the State Water Board’s *Policy for the Implementation and Enforcement of the Non-Point Source Pollution Control Program* (May 20, 2004)(“NPS Policy,” NPS Policy at page 4) and would be in lieu of the standard conditional waiver under Water Code 13269. This alternative would also implement the NPS Policy’s goal of being “as creative and efficient as possible in devising approaches to prevent or control NPS pollution.” (NPS Policy at page 9.)

- **Utilize Local Agencies and Programs** – The NPS Policy specifically recognizes third party programs administered by agencies *other than the Regional Board*, such as a county or Resource Conservation District (“RCD”). These agencies or entities can be linked to the RWQCB through a Memoranda of Understanding (“MOUs”) or Management Agency Agreements (“MAAs”) that delineate the roles and responsibilities of the individual entities in controlling NPS pollution. (NPS Policy at page 9-10.) The NPS Policy also recognizes that “another agency’s actions can serve, for example, as the basis, in whole or in part, for a RWQCB waiver of the WDRs for the activities covered in these agreements.” (*Id.* at page 10.) This process can achieve NPS control more efficiently by leveraging RWQCB limited staffing and financial resources. (*Ibid.*)
- **Conserve Regional Board Resources** – By adopting a categorical waiver through a Basin Plan Amendment, the Napa County Conservation Regulations/Erosion Control Plans could be deemed *functionally equivalent* to a waiver/permit, and this waiver would save Regional Board resources since the amendment would not need to be readopted every 5 years like the Waiver, but merely “reviewed” triennially. This proposal is also consistent with the Basin Plan’s Watershed Management Approach, could be the required implementation plan for

¹ See Wat. Code §13267(b)(2); Gov. Code §6254(k); Evid. Code §1060. Information may be a trade secret if disclosure of the information would cause a competitive disadvantage. [*Uribe v. Howie* (1971) 19 Cal.App.3d 194.]

water quality objectives and, under Water Code section 13225(d), the Regional Board could maintain enforcement in addition to or instead of third parties, RCD, or the County.

- See also the discussion in the Option A comments above regarding effectiveness of Napa County Conservation Regulations in addressing Vineyard Facility surface erosion.

General Comments

- **Confidentiality Concerns** – We concur with the Conditional Waiver’s requirement that all Farm Water Quality Plans are to be kept at the Vineyard Facility or nearby location. Information within Farm Plans contains intellectual property, trade secrets, and proprietary information, much of which has no correlation or nexus to the Regional Board’s authority to regulate water quality. The Tentative Order should be clear that, while representatives of the Regional Board may examine and review a Farm Plan in connection with a field inspection of the subject property, the Regional Board does not exercise dominion, control, or ownership of the Farm Plan. The Porter-Cologne Act explicitly provides protection to growers for intellectual property, trade secrets, and proprietary information that may be within a Farm Plan, monitoring report, or technical submittal. (*See* footnote 1.) Unless this is made clear, the Farm Plan could inadvertently be subject to the Public Records Act. Specific recommendations have been made below addressing this issue.
- **Need for Qualifying Conditions Regarding Inspections** – Water Code section 13267(c) clearly states that any inspection “shall be made with the consent of the owner or possessor of the facilities or, if the consent is withheld, with a warrant duly issued pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure.” As currently drafted, the Conditional Waiver does not contain the statutory provisions outlining proper inspections of private property. The following condition should be added to the waiver:

“The Member understands that pursuant to Water Code section 13267(c), the Regional Board or its authorized representatives, upon presentations of credentials at reasonable hours, may inspect the facilities of persons subject to this Order to ascertain whether the purposes of the Porter-Cologne Act are being met and whether the Member is complying with the conditions of this Order. The inspection shall be made with the consent of the Member or owner of the facilities, or if consent is withheld, with a duly issued warrant pursuant to the procedure set forth in Title 13 Code of Civil Procedure Part 3 (commencing with section 1822.50). However, in the event of an emergency affecting the public health and safety, an inspection may be performed without the consent or the issuance of a warrant.”

- **Third Party Review Options** – The proposed Conditional Waiver references Third Party Groups assisting landowners in preparing, among other things, farm water quality plans. It is essential that farmers have a variety of options, not only to accommodate differing farming methodologies and preferences, but more importantly to ensure that the large number of vineyard owners effected by the Waiver will have sufficient resources to assist in the development of Farm Plans. The Regional Board must clarify that landowners will be able to utilize consultants other than approved Third Party groups for the purpose of preparing Farm Plans, recognizing that these consultants will

not be authorized to submit annual compliance forms on behalf of the Vineyard Owner. Further, the current timeframe does not allow interested organizations to obtain the required Regional Board authorization to be recognized as a Third Party Group. It is essential that farmers have a variety of options and the time and ability to research these options. An applicant will also not know which fee structure is appropriate when completing their NOI, since fees vary depending upon participation in a Third Party Group. We recommend that the NOI submittal date be extended to allow for establishment of viable Third Party Groups. Additionally, Third Party Groups must not be burdened with enforcement responsibilities and must not be required to report compliance and non-compliance to the Regional Board.

- **Annual Monitoring should not be overly burdensome** – The Grazing Waiver annual monitoring report supplies the Regional Board with required information, while being clear and concise for the landowner/operator. We request modifying the Grazing Waiver annual monitoring report for utilization with the Vineyard Conditional Waiver by replacing “Ranch Water Quality Plan” with “Vineyard Farm Plan” and by deleting the request for RDM results.
- **Vineyard Projects with approved Erosion Control Plans and CEQA documentation should qualify for coverage under the Conditional Waiver** – Section 6 of the proposed Conditional Waiver excludes from coverage new vineyard construction or facilities on undisturbed land that contains “candidate, sensitive species, or special status species, habitats and sensitive natural communities . . .” This would exclude vineyard projects with approved Erosion Control Plans and CEQA documents from qualifying for coverage under the Conditional Waiver. Since these projects would be consistent with Napa County’s Conservation Regulations and be in compliance with CEQA and any required mitigation measures, such projects should qualify for coverage under the Conditional Waiver. Accordingly, this language should be revised to provide an exception for vineyard projects with approved Erosion Control Plans and CEQA documentation.
- **Waiver Eligibility** - The proposed Conditional Waiver currently excludes from coverage replants on slopes 30 percent or greater. We request that eligibility be extended to Vineyard Facilities that contain slopes 30 percent or greater that are eligible for replanting under Napa County Conservation Regulations (County Code, Chapter 18.108). Requiring these facilities to apply for a ROWD is duplicative and overly burdensome, as Napa County Conservation Regulations require the submittal of a comprehensive Erosion Control Plan, including evidence of intelligent site design, prior to any replanting. Further, many of these sites have approved Farm Plans through Fish Friendly Farming and show no evidence of increased erosion through poor design.
- **Definition Clarification**
 - Hydrologically Connected Road – We request that the Conditional Waiver remove the term “Hydrologically Connected” since that term is a legal term of art used to define tributaries under the Clean Water Act, and might be construed to consider roads to be tributaries. Instead, we request the Conditional Waiver use the term “Flow Contributing Road” and use the USDA Forest Service definition “Any road segment that, during a ‘design’ runoff event, has a continuous surface flow path between any part of the road prism and a natural stream channel.”

- Sensitive Species – The term “sensitive species” is not defined in the Tentative Order and can be construed to regulate species not otherwise protected by federal and state agencies with jurisdiction over rare, endangered, listed or threatened species. Additionally, if “sensitive species” are present on a large parcel, but are not going to be disturbed as a result of construction activity or the property or relevant portions thereof have been evaluated pursuant to an approved CEQA document, no reason exists to exclude the entire property from coverage under the proposed Conditional Waiver.
- Roads – We request that the waiver adjust the Roads definition to delete Item (3) and read as follows:

Roads. Roads include (1) access routes through vineyards that are graded to accommodate vehicular traffic (farmed areas between vine rows are excluded from this definition); and (2) roads that provide access to **Vineyard Facilities** from other parts of the **Vineyard Property**; ~~and (3) roads that serve, or once served, other uses on the Vineyard Property.~~ For the purposes of this Conditional Waiver, only roads that are under ownership and control of the Landowner/Operator are included (do not include roads that are maintained by other entities under property easement(s) or other legally binding agreements).

Initial Study/Mitigation Negative Declaration (IS/MND) CEQA Concerns

- **Need to Properly Review Impacts to Agriculture** – The IS/MND concludes that the impacts to agricultural resources are “less-than-significant” because land is not converted from agricultural uses to non-agricultural uses. Specifically, the IS/MND concludes that the Conditional Waiver will not convert any prime, unique, or statewide important farmland because any removal of vines would be to activities that are “ancillary to, existing vineyard agricultural uses.” (IS/MND, p. 35.) This conclusion is erroneous, not supported by any evidence, and ignores the actual analysis to be conducted under CEQA. Appendix G specifically states, “would the project (a) Convert prime farmland, unique farmland, or farmland of state-wide importance . . . to *non-agricultural use*?” (CEQA Guidelines Appendix G, section II, Agricultural Resources, emphasis added.) Taking lands that are currently in agricultural production and turning them into riparian lands, vegetative setbacks, or buffers amounts to the conversion of farmland to non-agricultural use that should be analyzed under CEQA.
- **The Less-Than-Significant Designation is Improper** – The loss of productive farmland could occur either directly or indirectly due to the compliance activities and practices growers must conduct in response to the conditions of the Order. Given that this agricultural regulatory program impacts agriculture and agricultural lands, the WDR should acknowledge that “the loss of productive farmland may occur due to increased regulatory costs and management practices growers must implement to comply with the Conditional Waiver” and that such impacts do not qualify as “less-than-significant.”
- **Unintended Consequence of Farmland Conversion** – The IS/MND concludes “setbacks will not result in conversion of farmland to agricultural use.” (MND, p. 29.) However, this

conclusory statement is not supported by any substantial evidence, or any evidence at all, and is in direct contrast to CEQA requirements. [*Mountain Lion Coal. v. Fish & Game Comm'n* (1989) 214 Cal.App.3d 1043, 1047; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 404, (Conclusory comments in support of environmental conclusions are generally inappropriate); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721.] A review of the MND provides no evidence to support the Regional Board's conclusion that the Conditional Waiver will not result in reasonably foreseeable physical changes to the environment through the conversion of agricultural lands. Such lack of information and resulting analysis does not comply with an agency's required good-faith effort to disclose the environmental impacts of a project to decision makers and the public. (CEQA Guidelines, Section 15151.)

- **Potentially Significant Air Quality Impacts are Not Adequately Analyzed** – The IS/MND identifies Road Modifications and Repairs to Gullies and Landslides as likely physical changes to the environment associated with the implementation of the proposed Conditional Waiver (IS/MND, p. 28.). Despite the fact that the proposed Conditional Waiver covers the entire Vineyard Property, the IS/MND, without any evidentiary basis concludes that “most of these repairs will occur on land that has already been disturbed by vineyard agricultural land uses.” (*Ibid.*) It also states that these activities may include importing of fill, rock material, and pipe to resurface and re-contour roads, as well as mobilization and use of trucks and heavy equipment for extensive grading or deep ripping. (IS/MND, Table 7, pp.30-31.) These types of activities generate dust, increased traffic and vehicle emissions associated not only with equipment operation and transport but also associated with the employees or contractors that will be traveling to the work site on a daily basis. While the IS/MND does reference Air Quality regulatory requirements it does not adequately discuss or analyze the reasonably foreseeable Air Quality impacts associated with the level of work necessary to meet the proposed Conditional Waiver's stated purpose. In fact, no attempt has been made to estimate the aggregate number of projects that would be undertaken as a result of the proposed Conditional Waiver. [See CEQA Guidelines, Section 15151 requiring good-faith effort to disclose environmental impacts, CEQA Guidelines, Section 15063 and *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal. App. 3d 151 holding that an initial study must disclose the data or evidence relied upon]. (See also discussion below.)
- **Project Description and Analysis Fail to Identify and Address Impacts** – The IS/MND's Project Description and analysis are inadequate in that they make no attempt to quantify or discuss the reasonably foreseeable extent of the road improvements, landslide repairs, culvert replacements, detention basins, etc. that will be undertaken as a result of the proposed Conditional Waiver (IS/MND, p.p.27-29). In order to adequately evaluate the impacts of the proposed Conditional Waiver the analysis must disclose and evaluate the scale and extent of the stated physical changes likely to result from the proposed Conditional Waiver. (See CEQA Guidelines Sections 15378(a), 15064(b), and 15063). This inadequacy is amplified due to the fact that the Conditional Waiver not only proposes to address Vineyard Facilities, but extends to the entire Vineyard Property, which in many instances can include a significant portion of acreage and roads not associated with the Vineyard Facility. The IS/MND estimates that there are 96,300 acres of vineyard parcels within the Napa River Watershed alone that would be required to implement the types of construction projects, but there is no discussion or estimate of the number of road miles, culvert repairs/replacement, detention

basins that have the potential to cause environmental impacts on an individual or cumulative scale (IS/MND, Table 6, p. 17). Further, the proposed Conditional Waiver in Table 2. Conditional Waiver Water Quality Requirements, states that “Landowners/Operators shall come up with a schedule to implement . . . management practices so that not more than 25 percent of Roads on the Vineyard Property are Hydrologically Connected . . .” (Conditional Waiver, p. 21), yet nowhere in the IS/MND is the scale of the proposed actions as a whole discussed or taken into consideration in the evaluation of environmental impacts. Accordingly, the IS/MND fails to disclose the data or evidence upon which the conclusions of the IS/MND rely. (*Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal. App. 3d 151, holding that an initial study must disclose the data or evidence relied upon.).

- **Cumulative Analysis Does Not Adequately Discuss Past, Current, or Probable Future Projects** – “Cumulatively considerable” means that the incremental effects of an individual project are significant when viewed in connection with the effects of past, current, and probable future projects. (CEQA Guidelines Section 15064(h)(1)). An agency must conclude that a project may have a significant effect on the environment if effects are individually limited but cumulatively considerable.” (CEQA Guidelines Section 15065(a)(3) and *San Joaquin Raptor/Wildlife Center v. County of Stanislaus* (5th Dist. 1996) 42 Cal. App. 4th 608.) The IS/MND fails to identify any past, current or future projects that would contribute to the cumulative impacts of the activities required by the proposed Conditional Waiver. The analysis states that the impacts would be limited in extent, consisting of repair of existing facilities, replacement and reconstruction of existing facilities, construction of small structures, and minor alteration of land; however, there is no meaningful consideration of other project in the County, not even those that would be undertaken pursuant to the Regional Boards recently adopted Grazing Waiver or anticipated Rural Land Waiver. (IS/MND, p. 89.) The only discussion states “. . . other future related projects, road improvements, and vineyard management projects in the Napa and Sonoma Valleys would include measures to reduce and avoid similar construction related dust, noise, biological and cultural resource impacts as required by existing regulations. . .” (IS/MND, p. 90.) However, it is important to note that these “existing regulations” have not been analyzed as they relate to these resources. For example, no mitigation measures are proposed to address air quality and noise in the IS/MND, nor is there any analysis of the cumulative impacts of past, present, and future projects as they relate to any project impacts. The only discussion appears to focus on each individual project, such as one road repair project, as opposed to dust generation associated with all current and foreseeable projected road repairs and other construction activities. The discussion is limited to “impacts are temporary, localized, and ephemeral and therefore would not be cumulatively significant.” (IS/MND, p. 89.) The Regional Board must examine the impacts of the project under review against the backdrop of cumulative conditions, and may not rely on the fact that a particular project’s impacts are small in comparison to a large environmental problem, such as traffic, water quality, or air quality. (*Communities for a Better Environment v. California Resources Agency* (3rd Dist. 2002) 103 Cal. App. 4th 98, holding that an agency may not employ a *de minimis* rationale when evaluating cumulative impacts.)

Specific Comments to the Proposed Waiver, Initial Study and Mitigated Negative Declaration, See Attachment A – The comments above relate to the larger policy issues, while Attachment A addresses specific items and language in the proposed Waiver and IS/MND.

Conclusion

We seek a manageable and cost-effective regulatory program that encourages participation, compliance, protects the public interest, and achieves TMDL objectives. We advocate for a program that moves the ball forward in terms of water quality protection, but does not create duplicative bureaucracy and unnecessary activities and costs that detract from or usurp resources that would otherwise go towards completing projects and implementing programs that address areas of concern where real tangible benefits can be achieved, such as, the Napa River Rutherford Reach Restoration Project. We hope that the Regional Board will not adopt the Conditional Waiver in its current form, but continue to work towards final action reasonably addressing water quality concerns while simultaneously promoting a program acceptable to all interested parties.

Finally, we reserve the right to offer additional comments at the hearing and request that due to the numerous landowners/operators that we represent, we be granted additional time to address the Regional Board at the hearing on March 13.

Respectfully submitted,



Jim Lincoln
Director
Napa County
Farm Bureau

Jon Ruel
President
Napa Valley
Grapegrowers

Bruce Cakebread
President
Napa Valley
Vintners

Bob Torres
President
Winegrowers
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Attachments: Attachment A – Specific Comments to the Proposed Waiver, Initial Study and Mitigated Negative Declaration

Cc: Lois Wolk, California State Senator, District 3
Noreen Evans, California State Senator, District 2
Mariko Yamada, California State Assemblywoman, District 4
Napa County Board of Supervisors
Richard Mendelson/Thomas Adams, Dickenson, Peatman & Fogarty
Christian Scheuring, California Farm Bureau Federation, Managing Counsel

Attachment A

Specific Comments to the Proposed Waiver, Initial Study and Mitigated Negative Declaration

Conditional Waiver Specific Comments:

1. In the Title on page 1 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
2. In paragraph 1 on page 1 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
3. In paragraph 13 on page 2 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
4. In paragraph 14 on page 3 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
5. In paragraph 20 on page 4 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**” in two locations.
6. Paragraph 20 on page 4 of the Tentative Order contains a discussion regarding the reduction of the length of roads that drain directly to receiving waters. Similar, but not identical, language is used in the conditional water quality requirements on page 21 of the Order and on page 4 (Section 4(e)) of Exhibit D to the Tentative Order. The variations of language used in each instance are somewhat confusing and we request that a uniform standard be consistently articulated throughout the Tentative Order. (Gov’t Code §11353(b)(4)(must comply with standards of clarity and consistency).)
7. In paragraph 26 and in two places of paragraph 27 on page 6 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
8. In paragraph 29 on page 7 of the Tentative Order, remove “and Vineyard Replants” from the first sentence.
9. In paragraph 29 on page 7 of the Tentative Order, the last sentence indicates that the waiver excludes from coverage construction activities on undisturbed land that contains “sensitive species.” As indicated in discussion above, the term “sensitive species” is not defined. Additionally, if “sensitive species” are present on a large parcel, but are not going to be disturbed as a result of construction activity, there appears to be no reason to exclude the entirety of the property from coverage under the proposed waiver. We respectfully request that the last sentence in paragraph 29 be deleted.
10. In paragraph 35 on page 8 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
11. In paragraph 44 or 45 on page 10 of the Tentative Order, we ask that a reference be included recognizing that farming in compliance with the Code of Sustainable Wine-Growing may be

characterized as and equivalent to maintaining a Farm Plan, since that Code has a water quality focus similar to the plans required by the Tentative Order.

12. In the middle of page 12 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
13. In paragraph A.1 on page 12 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
14. In paragraph A.1(c) on page 12 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
15. In Paragraph 2(b) on page 13 of the Tentative Order, we request language be added to allow replants on slopes 30 percent or greater if the facility is eligible for replanting under Napa County Conservation Regulations (County Code, Chapter 18.108) and has an approved Erosion Control Plan.
16. In Paragraph 2(c) on page 13 of the Tentative Order, strike “**Vineyard Property**” from the sentence.
17. In section B on page 14 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
18. In section 3(a) on page 14 of the Tentative Order, the opportunity is provided to file a Notice of Non-Applicability for certain vineyards on slopes less than five percent (5%) and which contain established stream setbacks. We would ask that the District staff consider expanding the ability to file a Notice of Non-Applicability for vineyard properties that are located at a safe distance from any watercourse and that do not have the potential to discharge either sediment or pesticides and related materials into the waters of the State.
19. In paragraph C on page 14 of the Tentative Order, a landowner or operator must submit a Notice of Intent (“NOI”) to the Regional Board no later than April 13, 2013, or within sixty (60) days of “acquiring ownership/control” of a covered vineyard. We request that the language be clarified to avoid a construction of the language that would trigger the requirement for an NOI upon such occurrences as changing vineyard managers or putting the property into a limited liability company or corporation owned by the same individual originally submitting the NOI.
20. In section D.1(a), on page 14 of the Tentative Order, a reference is made to the Farm Water Quality Plan that states that the plan “be available for review by or submitted to Water Board staff upon request.” We request that the words “or submitted to” be deleted. Otherwise, a contention could be made that the Regional Board has dominion, custody, or control of the Farm Plan and, by virtue of this, the Farm Plan is transmuted into a public record. (See footnote 1 above.) Deleting this language would also make the language conform to the second paragraph on the first page of Attachment D, setting forth the Farm Water Quality Plan requirements.

21. In paragraph 6(a) on page 17 of the Tentative Order, an absolute prohibition on the construction of structures or facilities on undisturbed land is proposed where the land contains “candidate, sensitive, or special status species, habits and sensitive natural communities identified in local or regional plans, policies, and regulations or by the California Department of Fish and Game or the U.S. Fish and Wildlife Species [Service].” We believe that this language is overbroad and ignores required federal and state mitigation policies. We request that the language be adjusted to preclude construction unaccompanied by mitigation in accordance with requirements of the federal or state agency with regulatory jurisdiction over the affected species. We do not believe that the Regional Board intended to extend protection to species that are not protected in some fashion by state or federal agencies with regulatory jurisdiction over those species.
22. Paragraph 6(b) on page 17 of the Tentative Order requires a landowner to “survey” areas to “ensure that they do not contain special status species, habitats and sensitive natural communities as specified above.” A “survey” requirement is extremely onerous, both in terms of time and money. Protocol level surveys can last several years and cost tens of thousands of dollars. We believe that requiring landowners to do a biological assessment in every instance goes beyond those steps necessary to meet the Regional Board’s obligations under the California Environmental Quality Act (“CEQA”). We would request that paragraph 6(b) be re-written as follows:
 - i. “To ensure compliance with (a) above, identify implementation actions that involve the construction of new structures or facilities (such as storm water detention basins) on undisturbed land and consult with, obtain a permit from, and/or mitigate for any impacts to any such species present in accordance with requirements of the state or federal agency having regulatory jurisdiction over the affected species.”

We will provide additional comment on this issue in connection with our comments on the Initial Study and proposed Mitigated Negative Declaration, as set forth below.

23. In paragraph 6(d) on page 17 of the Tentative Order replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
24. At the beginning of Paragraph 7 (b) on page 18 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**” and near the end of the paragraph replace “**Vineyard Property**” with “**Vineyard Facility**”.
25. In Table 2, Section **Roads** on page 21 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**” and replace “Hydrologically Connected” with “Flow Contributing Roads”.
26. In Table 2, Gullies and shallow landslides section and Storm Runoff section on page 21 of the Tentative Order replace “**Vineyard Property**” with “**Vineyard Facility**”.
27. In footnote 3 on page 21 of the Tentative Order replace “Hydrologically Connected Roads” with “Flow Contributing Roads”.

28. Paragraph 9(b) on page 22 of the Tentative Order again speaks to changes in control or ownership of the property subject to the Farm Plan. We request clarification that changing vineyard managers or transferring the property to a wholly owned company or corporation would not trigger the necessity to submit an additional NOI.
29. On page 23 of the Tentative Order, amend the Stream Setback definition and delete section (b).
30. In the title of Attachment A replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
31. In section III, on page 2 of Attachment A and in section III, on page 2 of Attachment C replace “**Total Vineyard Property**” with “**Total Vineyard Facility**”.
32. In the first paragraph of Attachment B replace “**Vineyard Properties**” with “**Vineyard Facilities**”.
33. In the first paragraph on page 1 and in section 1 on page 2 of Attachment D replace “**Vineyard Property**” with “**Vineyard Facility**”.
34. In section 1, on page 2 and in section 7 of Page 6 of Attachment D, delete references to Class III streams.
35. In section 1(e) on page 2 of Attachment D delete the first sentence that refers to general description of the **Vineyard Property**.
36. Delete section 1(l) on page 2 of Attachment D that refers to other land uses on the property.
37. In section 4(a) and 4(e) on page 4 of Attachment D replace “Hydrologically Connected” with “a Flow Contributing Road”.
38. In section 4(e) on page 4 of Attachment D, add “for roads on slopes of 5% or greater”.
39. In section 5(b) and in section 6(a) on page 5 of Attachment D replace “**Vineyard Property**” with “**Vineyard Facility**”.
40. Section 6, on page 5 of Attachment D, includes a requirement to stabilize unstable areas such as gullies, rills, landslides, mudflows, rock falls and channel erosion. The prefatory language in paragraph 6 should be revised to read: “where they exist as a result of roads or vineyard facilities, the Farm Water Quality Plan shall;” Absent this, a property owner would have an obligation to do significant work unrelated to either vineyards or roads serving vineyards on the property. The expense and time associated with doing this could be inordinate. Moreover, these erosion events happen in nature, without human intervention or cause, and cannot be prevented in all instances.
41. In section 7, at the top of page 6 of Attachment D replace “**Vineyard Properties**” with “**Vineyard Facilities**”.

42. In section III on page 2 of Attachment F replace “**Vineyard Property**” with “**Vineyard Facility**”.

Initial Study and Proposed Mitigated Negative Declaration (IS/MND)

1. On the title sheet of the IS/MND, replace “Vineyard Properties” with “Vineyard Facilities”.
2. Amend the IS/MND to account for “vineyard facilities” instead of “vineyard properties”.
3. In Table 1 on page 3 of the IS/MND, add the end the definition for Steep Slopes “and are not eligible for replanting under Napa County Conservation Regulations”.
4. In the second line of the second paragraph of the Summary on page 4 of the IS/MND, delete “or replanted”.
5. In the third line of the second paragraph of the Project Description on page 8 of the IS/MND, delete “or replanted”.
6. We have the following comments on the draft Initial Study and Proposed Mitigated Negative Declaration (“Negative Declaration”):
 - a. The biological resources impact discussion primarily concerns work done either in-channel or in wetland or riparian areas, not impacts related to upland areas where the majority of Vineyard properties reside. For instance, the impact referenced on page 6 of the Initial Study would lead to this conclusion. Again, page 29 states that “in a few, low probability cases, deep excavation and construction in stream channels could result in potentially significant impacts that would be mitigated to a less than significant levels by measures required in the IS/MND and incorporated into the conditional waiver.” Again, on page 31 of the Negative Declaration, the use of heavy equipment in stream channels appears to be the driving force behind biological mitigations. The second and third paragraphs on page 42 lead to a similar conclusion. Mitigation Measures IV-1 through IV-3 on pages 43 through 48 also focus primarily on potential impacts associated with construction in stream channels or riparian areas.

While passing reference is made to potential construction in upland areas (such as the beginning of the second paragraph on page 44), the Negative Declaration indicates that such construction would be an anomaly and not the norm. On page 44, the Negative Declaration states, “Occasionally, construction of a new structure may be contemplated in an upland area not already disturbed by farming, which may contain sensitive species.”

While we completely understand the Regional Board’s legitimate concern with respect to potential impacts to Chinook Salmon and Central California Coast Steelhead, upland impacts would be far less likely and no nexus has been demonstrated. In addition, Section 6(b) on page 17 of the Tentative Order goes far beyond the requirements of CEQA in connection with the mitigation of potential impacts to upland special status species, habitats and natural communities. In a recently decided case, *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, the

court discussed appropriate CEQA mitigation in connection with potential impacts to endangered species. That court held as follows on pages 236 and 237:

“The Foundation’s attack on the mitigation measures requiring compliance with regulatory permitting requirements if an endangered species, such as the Black Rail, is discovered, is a red herring.” ‘A condition requiring compliance with environmental regulations is a common and reasonable mitigating measure [citation omitted].’ The condition is particularly reasonable here because the City required Real Parties in Interest to obtain all necessary federal and state permits from the Army Corps of Engineers and the State Department of Fish and Game regulating the project’s impacts on wetlands, which happened also to be the very procedures in which the project’s potential impacts on endangered species would be addressed, arising as they would in this project by means of impacts to wetlands. . .

At issue is whether requiring Real Parties in Interest to obtain the permits that must be obtained and to comply with the mitigation measures imposed on those permits, as well as those imposed by the City, as a way to prevent the project from taking Black Rails, is an enforceable mitigation measure. We conclude it is. [our emphasis]”

In light of this, we again request that Sections 6(a) and (b) be re-written to confine the scope of the mitigation necessary for species actually protected by a state or federal regulatory agency. Actually, Sections 5(a) and (b) of the Tentative Order contain exactly the mitigation anticipated by the *Clover Valley* case. Additionally, we believe that it would be more appropriate, and sufficient, to recast Section 6(b) to impose a duty on the landowner to obtain any required federal or state permit and to comply with the mitigation measures as set forth in any such permit. This issue was recently addressed by the Sonoma County Agricultural Commissioner who, in lieu of requiring consultation with the Department of Fish and Game as a predicate to issuing a VESCO permit, developed a notification letter and a list of Regulatory Requirements to be given to the landowner and to agencies with potential jurisdiction over regulated species to clearly advise the landowner that they had a duty to consult with the affected agencies, obtain such permits as those agencies might require, and to comply with the mitigation measures attendant to any such permit. This has proved to be an effective program and places the compliance responsibility where it should be, on the landowner. We request that the Regional Board utilize similar mitigations for the “occasional” upland improvements that might necessitate species mitigation.

7. We request that the Negative Declaration consider other alternatives to the Conditional Waiver as presented herein, including our Option B, or relying upon current regulatory programs, such as the Napa County Conservation Regulations, and tracking the water quality improvements achieved without the need for adoption of a duplicative regulatory program at this time. These types of alternatives have not been adequately explored.