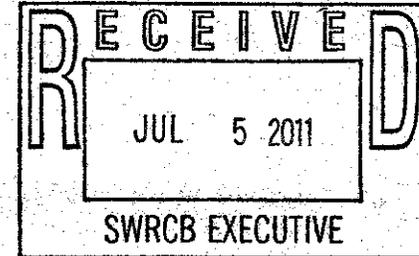




Submitted via email: commentletters@waterboards.ca.gov
Hard copy to follow VIA US Mail

June 28, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000



Re: Comments on the Proposed Russian River Frost Regulation

Dear Sir or Madam:

This letter is in response to the State Water Resources Control Board (SWRCB) proposed regulation relating to the use of water for frost protection of crops in the Russian River watershed in Mendocino and Sonoma Counties, and provides the comments of Jackson Family Wines (JFW) regarding the proposed regulation.

Jackson Family Wines, as one of the largest growers in Sonoma County and a dedicated steward of the land that provides us the grapes to produce our world-class wines, recognizes the importance of water, not only for agriculture and domestic use but also for the aquatic resources that make up the ecosystem of the Russian River. To that end, we have been, on our own initiative, diligently implementing water conservation initiatives throughout our operations. In our vineyards, we have been actively exploring and investing in alternative methods of frost protection. Effective solutions require careful analysis, implementation and, unfortunately more often than not, substantial capital investment and time. While we and some of the larger organizations are more likely to have the resources to implement these initiatives on a meaningful scale and time frame, many of the growers in the Russian River watershed will need time and financial support to do the same. Given the importance of agriculture to the identity and economic vitality of Sonoma and Mendocino Counties, we believe you should take that fact into account as you consider any changes to the regulations that would have serious, long-lasting impacts on the agricultural community.

JFW's concerns center around the fact that (1) the proposed regulation is incomplete in every meaningful way, (2) the proposed regulation does not recognize or provide for enhanced storage in times of high-flow for use during frost season, despite significant commentary about its importance in both the Draft EIR and Statement of Reasons, (3) the proposed regulations will create a substantial and poorly understood financial burden on the agricultural community, and (4) the regulation seeks to improperly and massively expand the Board's regulatory authority over groundwater resources that are unrelated to the legitimate purposes of this regulation. JFW believes

that the SWRCB will receive comments from other individuals detailing similar concerns; and JFW endorses those comments and incorporates them by reference.

The proposed regulation is incomplete to the point of failing to provide affected parties with sufficient notice of the true impact and significance of the regulation and fails to provide due process.

The regulation is largely incomplete in many respects. The most meaningful part of the regulations, the Water Demand Management Plan (WDMP) has not yet been created. Because of this, any assessment of how this regulation – prohibiting activity that is not in compliance with a non-existent plan – is speculative. Other similar issues are in every section of the regulation:

Section 862(a). In addition to the failure to define the WDMP, there is no guidance on how to comply with the regulation prior to the implementation of the WDMP. In all likelihood the WDMP will take a long time to define and implement, and is likely to be challenged in legal proceedings and enjoined for that time. During that time, the regulation creates the unanswered question of how does one divert in accordance with a plan that does not exist?

Section 862 (b). The most critical aspects of this paragraph, the stream stage and the composition and operation of the “governing body,” are completely undefined.

Section 862 (c). As mentioned above, the WDMP is undefined in almost every meaningful way. The recitation of minimum standards for the WDMP is insufficient to provide notice to affected parties of the actual impact and burden this regulation imposes.

Section 862 (d). The groundwater provision, which is discussed in more detail below, simply asserts that all groundwater is subject to the regulation. This is blatantly a decision to avoid trying to craft a meaningful definition of what is hydraulically connected groundwater (and make it the landholder’s problem) and is an improper exercise in kicking the problem down the road.

Section 862 (e). Asserting that compliance is a condition of permitting and licensure magnifies the problem of not having a WDMP in that there is no way to comply with a plan that does not exist. Further, as discussed below, due to the overreaching and erroneous assumption that all groundwater in the watershed is hydraulically connected to the stream system, this provision is of confusing relevance to properly unpermitted and properly unlicensed wells in the watershed.

It is simply not possible to determine what the real-world impact of this regulation will be, what the costs of compliance will be or whether this regulation will actually further the stated goals of the regulation and the Board. This results in a near complete lack of guidance for compliance and a lack of guidance and clarity on nearly every issue attendant to the regulation, such as the placement, implementation and operation of the stream gauge network. In addition, the methodology for determining target stream stages,

a methodology which would be the basis of any punitive or corrective action directives to land owners, is only vaguely described in the Draft Initial Statement of Reasons and is full of qualifying terms and comments that completely undermine the ability to read and meaningfully understand what is actually being presented in the regulation. This leads to the possible conclusion that the regulation is being kept purposefully vague to at this stage to limit criticism and scrutiny from those that it seeks to regulate.

Accordingly, the consequences of this regulation are almost entirely unknown and unknowable. JFW asserts that, in addition to being improper rule-making and bad regulatory practice, implementing this regulation without further development of the WDMP and other details is a denial of due process. JFW reserves all of its rights to object to and comment on developing consequences of this regulation.

The proposed regulation does not recognize or provide for enhanced storage in times of high-flow for use during frost season.

Despite being broadly recognized as an important part of the solution to unnecessary mortality of salmonids due to stranding, the regulation is silent on provision for enhanced storage to alleviate the demand for in-stream water during frost protection season. The Draft Environmental Impact Report for this regulation states as follows:

In this case, application of the reasonable use doctrine described in section 2.0, above, requires consideration of the benefits of diverting water for purposes of frost protection, the potential harm to salmonids, and the diverters' ability to frost protect without adversely affecting salmonids by coordinating or otherwise managing their diversions to reduce instantaneous demand. Deitch et al. suggest that, if properly managed, the abundance of flow that occurs during wet winters may provide enough water to meet human needs and protect instream uses. This may be accomplished by changing when the diversions occur. For example, water can be diverted to storage prior to a frost event, thereby reducing instantaneous demand during the event. *Draft EIR, Sec. 3.1, p 11.*

There is little controversy about the need and effectiveness of enhanced offstream storage to mitigate demand on stream flows during frost season. The concept of storing water in times of high flow for use in times of low flow is not only self-evident but endorsed by the materials attendant to the draft regulation. The Draft EIR even identifies it as a significant "Potential Action by Affected Party" and devotes substantial pages to the concept. Programs for enhanced storage are proven and feasible. The Draft EIR cites the Napa regulatory system's focus on offstream storage as a practical and effective solution, saying "[t]he Napa regulation has been successful and is an example where diverters have used offstream storage and coordinated their diversions in order to reduce instantaneous demand on the stream system."

Despite the recognition of the need for enhanced offstream storage and the utility of pre-frost season diversions for the purpose of storing water for frost protection, the regulations are completely silent on the issue of storage. This needs to be corrected, and a

reasonable plan for implementing a program for storing frost protection water needs to be incorporated into the regulation itself.

The proposed regulations will create a substantial and poorly understood burden on the agricultural community.

Another effect of the lack of definition or specificity in the regulation is that the burden on the agricultural community in terms of time and money is impossible to reliably calculate, but promises to be substantial. The Notice of Proposed Rulemaking estimates the cost impacts to regulated persons and business to be as follows:

The State Water Board estimates that the initial capital costs for a 160-acre vineyard to comply with the proposed regulation would range from \$9,600 to \$17,000 and the annual costs would range from \$3,000 to \$4,700. Capital costs for implementing any needed corrective actions for a 160-acre vineyard would range from \$236,000 to \$352,000, with annual costs ranging from \$26,000 to \$36,200. *Notice of Proposed Rulemaking, p. 6.*

These initial estimates, which are likely skewed towards the low end of the range of possible costs, are in themselves extremely broad ranges, offering a plus-or-minus \$116,000.00 estimate in one case. In addition, there is stated basis for calculating these estimates and no indication of what kinds of expenditures make up the total costs. Again, the failure to propose a substantially developed regulation, rather than a regulation that simply states that all the important parts will be developed later, prevents those with the most to bear from the regulation from being able to understand the true burden of the regulation. Beyond this, the costs estimated in the Notice of Proposed Rulemaking improperly and disproportionately burden the agricultural community with unreasonably large compliance costs. More information needs to be shared about the basis for the cost estimates and more time spent examining the extent of the burden of this regulation and the allocation of that burden before the regulation can be implemented. Not to do so risks crippling this areas signature agricultural industry – threatening other sources of income to the region, including everything from regional revenue from tourism to government revenue from payroll and sales taxes.

The regulation seeks to improperly and massively expand the Board's regulatory authority over groundwater resources that are unrelated to the legitimate purposes of this regulation.

The provisions of the regulation relating to groundwater are clearly, and improperly, overreaching. Section 862 (d) of the proposed regulation reads as follows:

(d) For purposes of this section, groundwater pumped within the Russian River watershed is considered hydraulically connected to the Russian River stream system unless the diverter can demonstrate to the satisfaction of the board that the groundwater being diverted is not hydraulically connected to any surface stream within the Russian River watershed.

This is a completely improper burden shift to the land holder to prove a negative proposition. Further, because wells are typically beyond the appropriate jurisdictional reach of the SWRCB this paragraph amounts to a massive territorial grab over water rights and resources that are beyond the role of the SWRCB to reach. Moreover, the science exists, and has been memorialized in maps cited in the Draft EIR itself, which identify suspected hydraulically connected groundwater. *Draft EIR, p. 16*. This provision effects a legal taking – imposing regulatory and oversight authority and costs upon landholders using groundwater that is unrelated to anything the SWRCB does.

Further, the provision creates regulatory problems. The enforcement mechanism in the regulation is contained in Paragraph (e), asserting that compliance is a condition of licensure and permitting. Many of the groundwater wells the regulation is attempting to assert dominion over are not within the SWRCB's regulatory scope and are therefore not permitted. As a result, this regulation creates a legal quagmire over what this means for properly unpermitted and unlicensed wells within the watershed.

This aspect of the regulation must be changed to remove the presumption of "connection" (analogous to presuming "guilt"). A more reasonable regulation would create a presumption of connection only if the site of the well falls within the areas delineated in the maps prepared by Stetson Engineers, as referenced in the Draft EIR.

Thank you for the opportunity to comment on these critical issues. If you have any questions regarding JFW's comments, please feel free to contact me.

Sincerely,



E.B. "Pete" Downs

Senior Vice President, External Affairs