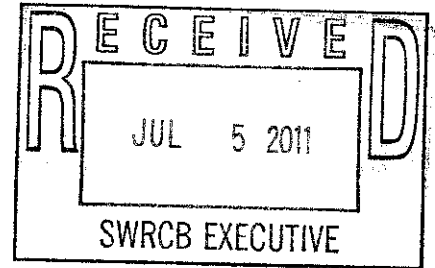


Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



RE: Comment Letter on the Proposed Russian River Frost Regulation

Dear Board Members,

The proposed Russian River Frost Regulation is concerning for a number of reasons. The proposed regulation would: regulate all water used for frost protection in the Russian River Watershed including pre-1914, riparian, licensed, permitted and groundwater; would declare all diversions for frost protection unreasonable unless and until the water is diverted pursuant to a Board approved water demand management program; is not based on sound science; includes water users that have no detrimental effect on salmonids; provides little consideration for the priority of individual water rights; ignores other water users in the watershed such as domestic or municipal; will require detailed data collection; and will result in significant costs on agricultural operations within the watershed. Even more concerning is the fact that the proposed regulation is based upon an unprecedented and justified assertion of the Board's authority under the reasonable use doctrine, ostensibly for purposes of regulatory convenience and in order to avoid the takings clause.


The need for this regulation is based on a letter to the Board dated February 19, 2009 from NOAA Fisheries which referenced two episodes of fish stranding that occurred in the April 2008 and requested the Board to implement emergency regulations related to the use of Russian River water for frost protection. However, after almost three years, there has been little evidence brought forward to support this need. The transparency amongst the agencies to develop collaborative solutions was disheartening and the only information that was able to be obtained to truly understand the overall scope of the issue was found through multiple FOIA requests. This regulation lacks both factual analysis and evidence to support the conclusion that every frost diversion in the Russian River watershed is harming salmonids.

As the related agencies focused on developing regulatory enforcement, the agricultural community voluntarily worked to implement on the ground projects that would actually benefit the fishery. Both stranding episodes referenced in the April 2008 NOAA letter have been fully addressed, millions of dollars of infrastructure have been constructed, numerous meetings have been held and a thorough contingency plan, the Russian River Frost Program, was presented to the Board in 2009. All of this was done in good faith to demonstrate that any problems that existed could be resolved without a regulation, yet the Board has insisted on pursuing a regulatory approach.

As detailed in the comment letters submitted by the Frost Program, the California Farm Bureau Federation and the Mendocino County Farm Bureau, the proposed regulation and supporting documents fail to meet the required legal standards.

As a member of the agricultural community that will be impacted by the proposed regulation, I encourage the Board to reject the proposed regulation and instead support the collaborative, cost effective and productive solution to allow for Russian River water to be used both for farming and the fishery without additional layers of needless regulation.

Sincerely,


Wendel Nicolaus
Middlegate Vineyard
M/R Vineyard

6/28/11

**Affidavit on
Frost Protection Use**

1. My full name is Wendel Nikolaus ^{Middlegate Vineyard} ^{N/R Vineyard}
(Print name)
2. The information contained in this affidavit is based upon my personal knowledge.
3. In the last five years I have used water diverted from the Russian River, or a tributary of the Russian River, for frost protection purposes.
4. I plan on using water for from protection purposes in the future.
5. A significant portion of my income is derived from income I receive from selling crops that depend upon using water for frost protection.
6. I am aware that the SWRCB estimates this regulation is expected to cost a typical 160-acre vineyard from \$9,600 to \$352,000 in order to initially comply with its mandates. It will cost an estimated additional \$3,000 to \$36,200 per year to keep that 160-acre vineyard in compliance. It is estimated to cost a typical 40-acre vineyard from \$2,400 to \$87,880 in order to initially comply with its mandates. It will cost an additional \$750 to \$9,000 per year to keep that 40-acre vineyard in compliance.
7. If I were forced to incur these costs in order to continue to use water for frost control, I would likely have to cease using water for frost control purposes.
8. As a result of not having water available for frost control, I would either: (a) likely cease farming altogether because my crop losses would be so high that it would be difficult to cover my costs in bringing what little fruit I could harvest to market; or (b) reduce the amount of acreage I do farm and either leave the remainder fallow or sell it.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 6/28 ["] _____, 2011
(Month and day)

Signature: _____