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Charles R. Hoppin, Board Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

References: Workshop on Frost Protection held 19 January 2010
Proposed Regulations, Section 740 Russian River, Special

Dear Chairman Hoppin and Members of the Board:

Prior to the January 19 workshop on frost protection, I sent an email with comments. I had intended during the public comment time at the workshop to elaborate on what I had written, and make a stronger case for my points. I turned my blue card in before the meeting began.

In his opening remarks at the workshop, Mr. Hoppin said he would cover five discrete points, in response to citizens' emails of the prior week or so. By the time he finished his fourth one, I had already decided against speaking that morning and I had already decided to write to the Board, restricting my comments to only one issue. During the formal public comment period on this proposal, I will address other aspects in another letter.

As it came my turn to speak, I said I was declining that opportunity. Mr. Hoppin addressed the audience and me to make sure I didn't want to speak at that moment. He then said that he liked reading what I had written and was interested in my comments, which truly gratified me. I answered to say I wouldn't speak then, but that the Board might get a letter in a few weeks. Here it is.

To all of you who sit on what is arguably the most important regulatory board in the State of California, I mean it when I say that I recognize you have one of the toughest jobs in all California government. It's also clear that your decisions affect nearly every person in the state although the consequences of your decisions are not uniformly distributed. You all deserve high praise for your work in the public sector.

If you have read my various communications to the Board on the North Coast Instream Flow Policy, you know that I do not lob bombs from the sidelines. In fact, I try to reason objectively, conduct careful research and provide you with as much supporting evidence as possible for my statements and conclusions. It's a lot of work for an individual but I feel compelled to act in these matters. In this instance of the January 19 workshop, I feel I must speak out now because what I heard absolutely shocked me. Let me address here only one topic: the concept that frost protection is an unreasonable use of water, and the consequences if that declaration is adopted.

Chairman Hoppin prefaced the workshop, and said he wanted to clarify five points. Regarding the concept of "unreasonable use", he said, "The idea that water for frost protection is an unreasonable use I find offensive, but [Division of Water Rights] staff explained this is the route we needed to go to regulate. If you're in a group, it won't be considered wasteful and unreasonable." He went on to say this proposal would be limited to the Russian River Basin.

At the end of the workshop, Board Member Spivy-Weber said, "I sympathize with those who are offended by the terms waste and unreasonable use, but we need them to regulate. To the ordinary person, they seem offensive, but the law says we need to use these [words] in order to make the regulations."

I am sure that all affected landowners were gratified to hear these disclaimers, but one fact remains clear: the use of water for frost protection in the Russian River Basin will be declared by law an unreasonable use between March 15 and June 1. The declaration is slightly modified by saying water may be diverted pursuant to a board approved water demand management plan, but that is a minor point. I understand that the idea is to say that water for frost protection is unreasonable only outside of a board approved water demand management program, but any program developed will still be a modification of a declaration which is a monumental change in meaning and long-standing practice.

The reality regarding water used for frost protection is that it is an essential use regardless of any board approved program. At the November 19, 2009 workshop, several of you listened to Glenn McGourty, University of California Cooperative Extension viticultural expert who addressed this issue.

He said, "My predecessor, Bruce Bearden, worked for more than 30 years in Mendocino County. He said to me, 'The best thing I ever did was to introduce sprinklers for frost protection.' He'd roll over in his grave if he knew that the best environmental practice he made is threatened or questioned. We'd like alternatives, but this is the best. There are no alternatives. There are benefits to California. You get a great deal back: growers pay parcel taxes, excise taxes, improvement taxes, etc. If this industry goes away, so do taxes. This is our economic engine." Mr. McGourty also discussed the fact that compared to pears, prunes, hops, or other irrigated crops, grapes use the least amount of water by a significant margin. Mr. McGourty made it clear that because of Mr. Bearden's efforts, farmers had eliminated environmentally damaging procedures such as smudge pots for frost protection.

So much for the concept that frost protection is an unreasonable use of water. It is an economic necessity in this and other areas. The major point of the proposed rule is to declare water for frost protection an unreasonable use, and the words and meaning of that declaration do not correspond with observed reality.

Words do matter. The meaning of words matters. There is no doubt that the Division of Water Rights staff proposal considers use of water for frost protection from March 15 through June

1 an unreasonable use despite Mr. Hoppin's statement. Section (b) says, "For purposes of this section, any diversion from the Russian River stream system, including the pumping of closely connected groundwater, shall be considered significant, unless the diverter can establish to the satisfaction of the board that the diversion will have a negligible effect on flows in any portion of the Russian River stream system that provides habitat for anadromous fish." That is clear enough. Any diversion (presumably to include frost protection, diversion to storage, or even municipal water) is covered, and any diversion is significant unless a diverter can prove it is not.

But Section (a) had narrowed the scope to water for frost protection, and to the date March 15 through June 1. It says specifically, "After [date], any diversion of water from the Russian River stream system, including the pumping of closely connected groundwater, for purposes of frost protection between March 15 and June 1 that the board has determined to be significant shall be considered unreasonable and a violation of Water Code section 100, unless the water is diverted pursuant to a board approved water demand management program."

What could be clearer than this? Section (b) says all diversions are significant unless the diverter can prove otherwise, and Section (a) says that all diversions for frost protection between March 15 and June 1 that the Board determines are significant shall be an unreasonable use of water and a violation of Section 100. It doesn't take a logician to figure out this peculiar syllogism: 1) All diversions are significant. 2) Water used for frost protection during March 15 - June 1 is an unreasonable use if its use is determined to be significant. 3) But since all water diversions at that time of year are significant, therefore water for frost protection is declared an unreasonable use. The whole concept that frost protection is an unreasonable use is false, and Chairman Hoppin said so in his opening remarks and so did the University of California viticultural expert, Glenn McGourty. Farmers have been using water for frost protection for 30 years or more and they know it is not unreasonable but is in fact essential to their operations. But so far in the proposed regulations, the words stand, completely contrary to the truth. Even with the added provision of a board approved program, the words "unreasonable use" clearly take precedence over any program that might be developed, and it is all but certain that in many areas of the Russian River watershed, the Water Board or the Division of Water Rights staff will not even allow a program to be developed and implemented.

Chairman Hoppin and others were surprised that the growers thought that the words used in the proposed rules meant what they said. At best, landowners have a hope that the outcome will be different from what the words say or at least can be modified with some vague operational plan approved by the Board. But there is no guarantee whatever that such plans will be created in all the areas they are needed, and that is a chief reason why I said this is a minor point. The main idea is to curtail or eliminate water for frost protection, not to develop board approved water demand management plans.

Now, let's look ahead a few years at the consequences. Board membership will change, and your replacements will not read my letter nor the emails and concerns of other affected landowners. Your successors will come onto the Water Board and they will begin learning about all the difficult

decisions requiring studious thought. But the only documents the new board members will read and believe is what the then adopted regulations say: that frost protection between March 15 and June 1 is an unreasonable use of water. And the new members will not question that. Staff will tell them it's an unreasonable use and show them the regulations that were adopted during your tenure. The new members won't question this. The new members won't find Chairman Hoppin's comments where he said, "The idea that water for frost protection is an unreasonable use I find offensive, but staff explained this is the route we needed to go to regulate." Likewise, your successors won't read Chairman Hoppin's comment about these proposed regulations being limited to the Russian River stream system. Nor will they read Board Member Spivy-Weber's remarks.

Words and their meanings do matter, and one of your collective and perhaps unintentional legacies will be to declare for all time that water for frost protection is an unreasonable use during the time its use is most critical. I mean no personal offense to any of you, for I recognize you have a balancing act of extraordinary difficulty. But this seems to me a disingenuous way of making laws, when staff and Board resort to declaring a use unreasonable when all of you know in fact it is not only reasonable but necessary and a best management practice compared to other alternatives, e.g., wind machines and smudge pots. This is true with or without any board approved water demand management plan. You know the proposition is false and advance it anyway. The reality is frost protection is critical to farmers growing many kinds of crops, and you are treating it as the opposite. Moreover, I can with some confidence predict that in the future these regulations for frost protection will be expanded to include other areas of California, despite Chairman Hoppin's assertion to the contrary.

The Board and staff are telling us that the words do not mean what the sentences say they mean. Both Chairman Hoppin and Board member Spivy-Weber said to the workshop attendees that staff said the Board needs to use this language in order to make these regulations. During the meeting, I was hoping staff would provide a rationale and discuss the legal basis for that assertion. No one on staff offered any reason for the need to declare water for frost protection an unreasonable use in order to regulate that use, nor did they verbally cite any statutes.

After I returned home, I looked up the five references cited at the end of the proposed regulations.

Article X, Section 2 of the California Constitution declares that water resources "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented. . . ." The right of use is to be limited to amounts as "shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." Riparian rights may be constrained by limiting water use to no more than is needed for beneficial use. But the section goes on to say, ". . . ; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled." The

section concludes by saying, "This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

Water Code Section 100 confirms Article X Section 2, saying that "... the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that waste or unreasonable use or unreasonable method of use of water be prevented. ..." It says a few sentences later that the right to use water is limited to the amount that is reasonably required for beneficial use, and that the right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion.

Water Code Section 275 simply states in full, "The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

Water Code Section 1051.5 says that the Water Board has the power and duty so it may "supervise trial distribution of water in accordance with agreements and court orders" referring to Part 2 starting at Section 1200, and Part 3 starting at Section 2000 of the Water Code.

Water Code Sections 1200 and following discuss conditions under which water is or is not available for appropriation and other subjects not relevant to this discussion. Water Code Section 1240 and the next several sections generally discuss what the law is in the situation when an appropriative water right is not exercised.

Water Code Section 2000 and following are generally procedural and deal with enforcement once a provision takes effect.

Water Code Section 1058 gives the Water Board the rule-making authority saying in full, "The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code."

It is very clear that the Constitution and Section 100 intend that water be used in a beneficial manner and not be wasted, nor used in an unreasonable way. Water use is to be limited to the amount that is beneficial. At the same time, however, those holding riparian rights cannot be deprived of the reasonable use of that water. Moreover, no appropriator of water can be deprived the use of the water if the appropriator is legally entitled to its use.

It's also clear from Section 1058 that the Water Board has the authority to "make reasonable rules and regulations." Also, under Section 275 the Water Board has a duty to act in order to prevent waste and unreasonable use of water.

The Water Board has had authority to regulate diversions for many decades. Every water permit and license contains terms and conditions such as amount to be diverted or appropriated, the

rate of diversion, season of diversion, and more recently, required bypass flows. In all this time, the Water Board has never had to convert the words, "beneficial" or "reasonable" to "unreasonable" or "waste" in order to carry out its duties in accordance with Section 1058 which directs the Board to "make such reasonable rules and regulations. . . ." It seems to me that the Board already has the authority it needs to develop "reasonable rules and regulations" to set up a program just as growers did for the 2009 growing season. But, no, the Board is saying it must now take an approach to completely redefine one use and label it "unreasonable" except under very limited and vaguely defined circumstances.

So here is the crux of the matter. Farmers throughout California, including the Sacramento Valley, the San Joaquin Valley, the Salinas Valley, the Russian River Basin, the Napa Valley and other places, all use water for frost protection and have done so for decades. It's an obvious beneficial use of water, and without that use, both low growing crops such as strawberries, and taller perennial crops such as grape vines or orange trees will in some years lose a significant portion of the crop or the plant itself may die. This latter outcome is extremely rare for grape vines but crop failure in most of the Russian River Basin due to cold weather is common unless preventive measures are taken in each and every year. Water for frost protection is the best management practice.

The laws say that neither riparian users nor appropriators can be deprived of reasonable use when they are lawfully entitled to the use of the water. Water has been lawfully used in this manner, i.e., for frost protection, for many years, with full knowledge of the Water Board.

Now, the Division of Water Rights staff is declaring in the proposed regulation that such use for frost protection is an unreasonable use and a violation of Section 100 in the entire Russian River Basin and from March 15 to June 1, unless the water is diverted in accordance with an approved water demand management program.

I am not an attorney, but it seems to me that as good an argument may be made that the proposed Section 740 is in direct contradiction to the Constitution and to Section 100 as to accepting the idea that water for frost protection can so easily be declared an unreasonable use. The only way this proposal can be forced into law is to say that frost protection is an unreasonable use (even though the Board and others know it is not), then apply Section 275 to permit the Water Board to take the position it must prevent waste or unreasonable use. However, this is depriving a lawfully entitled riparian user or appropriator of that user's water, whether or not there is a board approved water demand management plan.

In all honesty, I can't see how this proposal would survive a challenge. Section 1058 requires that "reasonable rules and regulations" be made by the Water Board. Given the lengthy history of water for frost protection and the success of the current voluntary program, a judge may well say that the proposal is "unreasonable", especially in light of the Constitution's stricture that riparian owners and appropriators cannot be deprived of the water to which they are lawfully entitled. I hate the thought that the development of good regulations based on the current effective program that benefits salmonid migration might be waylaid by a lawsuit by water rights holders against the indefensible

language of this proposal. Moreover, the issue would probably be stuck for decades in the courts.

To my simple common sense mind, it looks like the overall language is being used in order to thwart the idea and historical practice that water used for frost protection really is a beneficial use, as Chairman Hoppin assured us it indeed is beneficial. It's like saying people know that water for frost protection is a beneficial use but in order to regulate that use, the Board intends to prohibit its use for frost protection during the only season of the year when frost protection is actually practiced. Yossarian faced a similar self-contradictory paradox in "Catch 22". The justification of a board approved water demand management program may well not hold up to scrutiny.

If the proposed regulation is adopted, I have no doubt that it will be expanded in the future to other regions of the state and with different dates, to the serious detriment of agriculture. This regulation will also become another weapon in the arsenal of environmental groups whenever they want to shut down agriculture, because they will cite the words as written. And the environmental groups will omit all references to any sort of water demand management plan, board approved or otherwise. At the moment, the Board is telling us that in order to regulate the process for frost protection, that activity must be declared illegal. But in declaring it illegal, it is almost certain that many farms will be jeopardized to the point of ceasing to operate. I know that destruction of agriculture is not at all the Board's intent. Chairman Hoppin and Ms. Spivy-Weber made that clear. The Board is trying to regulate a necessary activity so as to promote both agriculture and downstream salmonid passage. But in that attempt you all may inadvertently be harming legitimate agriculture, and not just in the Russian River area, but eventually in the entire state.

I'm reminded of the words of an army major at a news conference during the Vietnam War after the Tet offensive of 1968. The army had leveled a village with heavy artillery, killing hundreds of people, and the major explained it to the press, "We had to destroy the village in order to save it." I'm sure it is not the intention of the Board to destroy agriculture in order to save it, but that is a real and frightening possibility.

The issue here is far more significant than the regulation of water for frost protection. The issue is honesty of language in government, so that what is meant follows as a direct consequence of what is written. Without that, agencies fail the regulated community and the society which they serve. These provisions become laws with very significant economic and social consequences. We farmers and diverters are at the moment left in the position of the Board wanting us to trust what they say verbally, and therefore accept what is about to be written into law. The concept of a board approved water demand management plan does not qualify. The actual language of the proposal does not reflect what the Board members say verbally. We must know that the words mean what they say, because words do matter. Without honesty in language, there is no way to tell if words really mean what they say.

In closing, I have a concrete alternative suggestion to this proposal. You already have a workable water demand management program in place. In view of the obvious success in 2009 of the frost protection water management program created by the farmers, Mendocino and Sonoma

County Farm Bureaus, Russian River Flood Control District, Sonoma County Water Agency, NOAA Fisheries and others, I think it would be a good idea to promote what they did, and continue this program. It worked, and worked well. Grapes were protected from frost damage and there was abundant water for fish to travel downstream to the ocean even in a lower than average rainfall year. You can rely on citizens to do what is right, and if you will give this program a chance for three or four years, I'm certain all of you will be pleased by the results, and will not feel the Board has to regulate in this draconian manner. The goal is to have enough water for fish passage in spring, and farmers will be happy to work to ensure that goal. So it is not only reasonable and sensible, but also morally right to proceed with a plan that has been shown to work.

If there are any problems with individual water right holders, the Water Board and other state and federal agencies already have plenty of hammers in the toolbox: federal and state Endangered Species Acts, Fish and Game Department regulations, and I suspect other provisions of the Water Code itself. Frost protection does not have to be declared an unreasonable use to allow for the prosecution of illegal diverters.

Thank you for taking time to read this letter and I hope you will accept these comments in the constructive spirit in which they are intended. Remember — we're all in this together.

Very truly yours,



Rudolph H. Light

A final request: When Members of the Board share this letter with staff, I respectfully request that the letter be posted on the Water Board website along with other comments on the proposed regulations for frost protection. Thank you.