4/27/10 Board Hearing
AB 2121
Deadline: 3/26/10 by 12 noon

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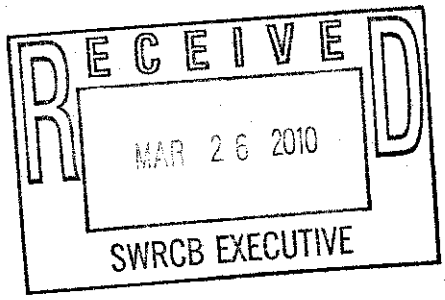

Via Electronic Mail And Facsimile (916) 341-5620

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

Re: Comment Letter -- AB 2121 Policy

Dear Ms. Townsend:

I submit these written comments on behalf of Golden Real Estate, LLC ("Golden Vineyards") to the State Water Resources Control Board ("State Board") regarding the latest version of the proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams issued on February 18, 2010 ("Proposed Policy") and the accompanying Substitute Environmental Document dated December 2007 and March 14, 2008, with responsive comments issued on February 18, 2010 (collectively "SED").

INTRODUCTION

Golden Vineyards requests that the State Board decline to adopt the Proposed Policy and refuse to certify the accompanying SED. Among other things, the Proposed Policy fails to meet the legal requirements of AB 2121, fails to balance protection of all beneficial uses (including agricultural supply), will have a drastic and unfairly disproportionate adverse impact on vineyard diverters, is based on flawed and uncertain science and is accompanied by a legally deficient Substitute Environmental Document. Unfortunately, the February 2010 revisions to the earlier versions of the Proposed Policy do not correct the legal, scientific and policy deficiencies in it. Accordingly, the Proposed Policy should be rejected by the State Board in its entirety.

Golden Vineyards submitted a comment letter dated May 1, 2008 regarding the prior version of this policy and the SED. A true and correct copy of this letter is enclosed herewith as Exhibit "A" and is incorporated in its entirety herein. To expedite its comments on the current Proposed Policy, Golden Vineyards will specifically refer to this letter into these comments as particularly described herein.

COMMENTS ON PROPOSED POLICY

Golden Vineyards has both general comments and specific comments relating to the Proposed Policy. These comments are set forth in the following sections:

General Comments:

1. **The Proposed Policy Is Still Legally Inconsistent With the Nature And Scope Of The State Board Mandate Under AB2121.**

For all of the reasons set forth on pages 3-4 of Exhibit "A," which are specifically incorporated herein, the Proposed Policy has at least two major deficiencies: (1) it fails the legal requirement that it constitute a balanced instream flow policy which evaluates and addresses protection of all beneficial uses, including agricultural supply; and (2) it completely ignores the Legislature's stated concern for expediting approval of appropriative water rights applications. The latest version of the Proposed Policy fails to address these deficiencies and they remain outstanding.

2. **The Tiny Modifications In Minimum Bypass Flow Guidelines In The Latest Draft Do Not Seriously Address The Dramatic And Unreasonable Restrictions On The Amount, Timing and Location Of Water Available For Agricultural Diverters.**

Golden Vineyards explained, in pages 4-5 of Appendix "A" (which text is specifically incorporated herein), that the combined effect of the minimum bypass flow and maximum cumulative diversion limitations in the Draft Policy would have a drastic adverse impact on water diversions by small farmers and the wine grape industry in general. Unfortunately, Golden Vineyards' comments still have not been addressed in the Proposed Policy. A very minor tweak was made to the minimum bypass flow guidelines in the Proposed Policy and the maximum cumulative diversion limitations have remained unchanged from the prior draft. Accordingly, small agricultural diverters will unfairly and illegally be bearing the brunt of this new policy.

3. **The Retroaction Application Of The Proposed Policy Is Inappropriate, Legally Improper and Unfair.**

The Proposed Policy, as currently drafted, will be applied retroactively to water rights applications that have been on file for years (some for over a decade) and the July 19, 2006 cutoff date for acceptance of onstream dams has no rational basis. For all of the reasons set forth on page 5 of Exhibit "A," which are specifically incorporated herein, these provisions are illegal and unfair. The Proposed Policy should be applied to applications filed after the date of its adoption unless the applicant affirmatively chooses to have its application considered under the new Proposed Policy.

4. The Proposed Policy Does Not Evaluate The Major And Unwarranted Water Availability And Financial Impacts It Will Cause To The Wine Grape Industry.

The Proposed Policy, like its predecessor drafts, avoids any analysis of its huge, disproportionate and unfair water availability and financial impacts on small agricultural diverters, including most of the vineyard diverters in the covered area. The vibrant and growing wine grape industry in Mendocino, Sonoma and Napa Counties, comprised of many small and medium sized vineyard owners and wineries, is particularly and unfairly targeted. These legal deficiencies are explained in pages 6-7 of Exhibit "A," which text is specifically incorporated herein.

Specific Comments:

1. Flawed And Incomplete Scientific Analysis

The scientific bases for the Proposed Policy are fundamentally flawed and incomplete for the reasons set forth on page 7 of Exhibit "A," which are specifically incorporated herein. Although the policy drafters apparently considered new scientific and technical comments that were submitted to them, they have not made meaningful changes to the flawed scientific bases of the policy, particularly those underpinning the minimum bypass flow, maximum cumulative diversion limitation and onstream dam provisions. Accordingly, the legal and scientific deficiencies identified in Exhibit "A" on this subject still remain.

2. Stream Classification System

The policy drafters have made no changes whatsoever from the prior draft regarding the stream classification system requirements in the Proposed Policy. Thus, all of the deficiencies we identified on pages 7-8 of Exhibit "A," which text is specifically incorporated herein, still remain.

3. Minimum Bypass Flow Limitation

The policy drafters have made some minor adjustments in the minimum bypass flow limitation guidelines that make the conditions slightly less onerous in a few situations. However, these adjustments have not addressed the key legal deficiencies on this subject identified on page 8 of Exhibit A," which text is specifically incorporated herein. For this reason, all of these legal, policy and scientific deficiencies remain.

4. Maximum Cumulative Diversion Limitation

The policy drafters have made no real changes in the maximum cumulative diversion limitation guidelines. Accordingly, Golden Vineyards reasserts all of its comments on this subject set forth on pages 8-9 of Exhibit "A," which are specifically incorporated herein.

5. Season Of Diversion Limitation

The Proposed Policy shrinks the season of diversion from a start date of October 1 to December 15 each year. Golden Vineyards believes that the earlier diversion date set forth in the prior draft should be retained and that the new "start date" is scientifically unjustified and legally invalid.

6. Onstream Dam Limitations

The litany of legal, scientific, policy and financial deficiencies in the onstream dam provisions identified in pages 9-10 of Exhibit "A" have not be corrected in the Proposed Policy. Accordingly, Golden Vineyards specifically reasserts these comments herein. The Proposed Policy's attempt to apply these expensive provisions retroactively to water rights permit applications filed prior to adoption of the policy is illegal and unfair to applicants like Golden Vineyards who have diligently pursued their applications for many years and have been thwarted by constant State Board delays in processing the permit applications.

COMMENTS ON SUBSTITUTE ENVIRONMENTAL DOCUMENT

State Board staff prepared a Substitute Environmental Document in connection with the Draft Policy issued to the public for comment in 2008. The State Board received an avalanche of comments from Golden Vineyards and many other stakeholders identifying the legal deficiencies in this document. The comments of Golden Vineyards on the SED are set forth on pages 11-15 of Exhibit "A," and these comments are specifically incorporated herein. Although State Board staff has issued responses to some of the comments of Golden Vineyards, it has made no meaningful changes in the SED to address these comments. Thus, our original comments retain their full vitality and the SED remains deficient in many key respects. Accordingly, the State Board should not adopt or certify this SED.

Thank you for the opportunity to comment on the Proposed Policy and SED. Please feel free to contact me if you have any questions or would like further information.

Very truly yours,

Paul P. "Skip" Spaulding, III

cc: Ms. Julie Golden
Mr. Joseph Golden
Mr. Drew Aspegren

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May 1, 2008

VIA ELECTRONIC TRANSMISSION, FACSIMILE (916-341-5400) and U.S. MAIL

Karen Niiya
Senior Engineer
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, California 95814

Re: Comment Letter -- AB 2121 Policy

Dear Ms. Niiya:

I submit these written comments on behalf of Golden Real Estate, LLC ("Golden Vineyards") to the State Water Resources Control Board ("State Board") regarding the proposed Policy for Maintaining Instream Flows in Northern California Coastal Streams ("Draft Policy") and the accompanying Substitute Environmental Document ("SED") dated December 2007.

Golden Vineyards requests that the State Board decline to adopt the Draft Policy and refuse to certify the accompanying SED. Among other things, the Draft Policy fails to meet the legal requirements of AB 2121, fails to balance protection of all beneficial uses (including agricultural supply), will have a drastic and unfairly disproportionate adverse impact on vineyard diverters, is based on flawed and uncertain science and is accompanied by a legally deficient Substitute Environmental Document. For these and the other reasons set forth herein, the State Board should refuse to adopt the Draft Policy and should instead embark on an open, balanced and scientifically sound process for developing a future instream flow policy. In the meantime, the State Board should expeditiously process existing water rights applications using current standards.

INTRODUCTION

Golden Vineyards owns two vineyard properties within the Draft Policy area: (1) Fairbairn Ranch, located on Eastside Road in Hopland, California; and (2) Heart Arrow Ranch, located north of Ukiah. Applications for appropriative rights to divert and store water were submitted 16 years ago for Fairbairn Ranch (by a prior owner) and seven years ago for Heart Arrow Ranch. The applications have undergone the public notice and comment process. After

EXHIBIT "A"

long delays, the State Board finally agreed to enter into Memoranda of Understanding with Golden Vineyards for California Environmental Quality Act ("CEQA") review for the applications, but the CEQA review has not yet begun for either Ranch since the State Board staff has failed to provide appropriate points of diversion and other information necessary for a water availability analysis.

Golden Vineyards was established in 1997 with the goal of growing high-quality wine grapes while promoting sustainable farming techniques. The vineyards at both Ranches have received both an organic certification and a biodynamic certification. The biodynamic agricultural technique arises from a non-chemical agricultural movement which predates the organic agricultural movement. In conformance with these certifications, Golden Vineyards does not use any chemicals or pesticides. Weed control is entirely mechanical or manual, and insects are controlled by use of cover-cropping and chickens. Fertilizing is accomplished using biodynamic preparations applied using a drip irrigation and spray system and through use of compost. Frost protection and heat control will be achieved, when necessary, using misters rather than sprinklers, and irrigation is accomplished using drip technology. These practices significantly reduce water use and also result in excellent erosion and run-off controls.

Golden Vineyards has also constructed special bypass diversion structures and strengthened, repaired and updated all of its storage ponds. Because of the drainage system features and the beneficial management practices of Golden Vineyards' farming operation, the National Marine Fisheries Service, the California Department of Fish and Game, the Regional Water Quality Control Board and the Sotoyome Resource Conservation District have officially certified the Ranches as Fish Friendly Farms. They specifically determined that the Ranches serve as excellent examples of fish friendly farming techniques.

In short, Golden Vineyards has chosen to farm in an organic and sustainable manner that reflects enlightened stewardship of water and other environmental resources. Nonetheless, many of the unreasonable, costly and experimental limitations contained in the Draft Policy will likely make it extremely difficult for Golden Vineyards to continue receiving adequate water supplies and the Draft Policy's unreasonable, anticipated costs of compliance may threaten Golden Vineyards' ability to continue farming in this manner or in any productive manner over the long term.

COMMENTS ON DRAFT POLICY

Golden Vineyards has both general comments and specific comments relating to the Draft Policy. These comments are set forth in the following sections:

General Comments:

1. **The Draft Policy Is Legally Inconsistent With The Nature And Scope Of The State Board's Mandate Under AB 2121.**

In August 2004, the California Legislature passed Assembly Bill 2121 ("AB 2121") and it was signed into law by the Governor on September 29, 2004. A major impetus for the bill was the State Board's failure to process water rights applications in a timely manner. As the legislature stated: "Many of these applications [to appropriate water] have been pending for a decade. Most of these applications have been pending for at least five years. These delays are inappropriate, and they produce regulatory uncertainty for the water user community and the conservation and fishing communities." AB 2121, section I(g).

AB 2121 also explicitly incorporates the existing legal framework governing the State Board's administration of appropriative water rights. Thus, AB 2121 states that the State Board shall adopt principles and guidelines for maintaining instream flows "in accordance with state policy for water quality control adopted pursuant to Article 3 (commencing with Section 13140) ...." Water Code § 1259.4(a)(1) and (2). These incorporated policies require that this new instream flow policy be in accordance with adopted basin plans and that "[t]he principles, guidelines, and objectives shall be consistent with the state goal of providing a decent home and suitable living environment for every Californian." Water Code §§ 13141, 13142. It is significant that the applicable Basin Plans require the State Board to protect and enhance Agricultural Supply (which includes farming and irrigation uses) as a "beneficial use" for the streams covered by the Draft Policy. *See, e.g., Water Control Plan for the North Coast Region*, Chapter 2 and Table 2-1 (January 2007).

In short, AB 2121 and the existing law which it incorporates require the State Board to adopt an instream flow plan that includes the protection of all beneficial uses in these areas, including vineyard use of the covered streams for agricultural supply. The State Board is also well aware, as reflected in Table 4-2 of the draft SED, that wine grapes are by far the leading agricultural crop by value in Mendocino, Sonoma and Napa Counties, with a total value of almost $1 billion. Thus, in adopting an instream flow policy, the law requires that the State Board not only protect and enhance agricultural supply beneficial uses, but that it recognize the prominence of wine grape production as part of the suitable living environment in these North Coast areas.

In light of this legal framework embedded in AB 2121, the State Board has misinterpreted and misapplied this legislative mandate in three fundamental respects. First, the State Board has failed to propose a balanced instream flow policy that evaluates and addresses protection of all beneficial uses, including agricultural supply. Rather, as the Draft Policy candidly admits, the policy adopts maximum protectiveness criteria for salmon and steelhead, with no serious attempt within the policy to balance its adverse impacts on other beneficial uses

such as agricultural supply. Rather than heeding the Legislature's mandate that the new policy itself incorporate these balanced principles, the Draft Policy appears to be based on the concept that the only purpose to be served by the Draft Policy is protection of salmon and steelhead. However, AB 2121 does not authorize the State Board to issue a policy that protects these species without incorporating an appropriate balancing of all applicable water quality principles, guidelines and objectives.

The second legal misinterpretation evident in the Draft Policy is its failure to appreciate and apply the Legislature's stated concern for expediting approval of appropriative water right applications. Many parts of the policy do not articulate in a clear, reasonable and predictable manner the policy requirements for the regulated community, and many provisions inevitably will cause further unacceptable permitting delays. For example, the policy essentially presumes that all streams in the policy area are Class I (even if intermittent or ephemeral) and requires an applicant to commission an expensive stream classification study (estimated at $15,400) to demonstrate that a particular stream should be classified differently. This presumption is unnecessary and only adds unnecessary financial expense and administrative delay in the process. Similarly, since no factual criteria and legal standards are articulated for variances and other site-specific exceptions, any applicant trying to utilize these provisions will inevitably suffer lengthy permitting delays. These types of provisions directly contravene AB 2121's intent to expedite water right processing.

Third, the State Board appears to have ignored the Legislature's suggestion that the 2002 DFG/NMFS Guidelines be adopted as instream flow guidelines, even if they later need to be amended. Although AB 2121 does not explicitly require the adoption of these standards, it states that the State Board's "adoption of these guidelines is necessary for the protection of fishery resources even if these guidelines are required to be amended from time to time." Instead, rather than deferring to the federal and state agencies with the expertise to make these types of decisions (the California Department of Fish and Game and the National Marine Fisheries Service), the State Board attempts to formulate a new approach without having the necessary scientific expertise and without receiving sufficient technical support.

2. The Draft Policy Is Expected By Experts To Dramatically And Unreasonably Restrict The Amount, Timing And Location Of Water Available For Small Agricultural Diverters.

We understand, from discussions with water availability experts, such as Drew Aspegren of Napa Valley Vineyard Engineering, that the Draft Policy will dramatically reduce the amount of water available for small farmers such as Golden Vineyards. According to Drew, and as confirmed by State Board staff at the February 6, 2008 technical staff workshop, the Draft Policy's minimum bypass flows generally are expected to be two to ten times higher under the Draft Policy than they are under current Board practice based on the DFG/NMFS Guidelines. Moreover, the new maximum cumulative diversion limitation is expected to significantly restrict

the ability to divert water during high flow events. The combined effect of these two measures will be to reduce the available diversion times to as few as only a few days a year, and the total volume of water collected will be greatly reduced from current practice.

This result could well have a drastic adverse impact on the wine grape industry in Mendocino and other counties, as many vineyards will not obtain the water that they need for their crops. Many vineyards do not have other cost-effective options for obtaining a water supply and, if they are even able to obtain a supply, it will likely be significantly more expensive. This result, in turn, may force some grape growers out of business, thereby changing fundamental land use patterns, and it will undoubtedly exert upward price pressure on wine grapes and products. None of these anticipated impacts have been analyzed in the Draft Policy, the SED or the other accompanying documents.

3. The Proposed Retroactive Application Of This Draft Policy Is Inappropriate, Legally Improper And Unfair.

The State Board has created a massive backlog of applications to appropriate water in the North Coast areas by not diligently processing the applications. For example, despite its best efforts to expeditiously complete the processing of its applications, Golden Vineyards waited several years before the State Board even gave public notice of its applications and then had to wait between two and four years more for the State Board to enter into two MOUs for CEQA review. Since entering into the requisite MOU for Fairbairn Ranch, Golden Vineyards has been waiting over two more years to receive information from State Board staff necessary to prepare a water availability analysis. If the State Board had been doing its job properly, Golden Vineyards almost certainly would have received water right permits, if not licenses, by now.

Given the State Board's creation of this huge backlog, it is inappropriate, illegal and unfair to apply the Draft Policy retroactively to applications that were filed prior to the time that the new policy is adopted. Moreover, as explained in greater detail below, the July 19, 2006 retroactive cut-off date for acceptance of onstream dams has no rational basis and unfairly penalizes applicants who followed the law by waiting for a permit before constructing their reservoirs.

4. The State Board Did Not Utilize An Appropriate Process For Considering And Adopting The Draft Policy.

The State Board's process for developing, considering and adopting the Draft Policy is notable for its lack of openness or meaningful early stakeholder input. Rather than being an inclusive process based on a series of local workshops, with extensive input from knowledgeable local consultants, the process was relatively closed. Although there was one opportunity for providing "scoping" comments in 2006, the State Board staff engaged thereafter in what appeared to be a very secretive process. For example, the State Board chose not to circulate

advance drafts and not to seek public input on what is a completely new and scientifically complex policy before publishing it in draft form in December 2007.

Given the major environmental, social and financial considerations at stake, the State Board should have adopted a more inclusive, open and scientifically rigorous process with all of the relevant stakeholders at a meaningful early time. Accordingly, Golden Vineyards requests that the State Board adopt such a process at the present time and that, in the interim, it expeditiously process its backlog of water rights applications using current practices. Any new instream flow policy adopted can then be applied to applications filed after that date. Indeed, in AB 2121, the Legislature specifically authorized the State Board to use the DFG/NMFS Guidelines prior to adoption of a new policy. Water Code § 1259.4(b).

5. The Draft Policy Does Not Evaluate and Address The Major And Unwarranted Water Availability And Financial Impacts It Will Cause To The Wine Grape Industry.

It is undisputed that the Draft Policy, if implemented in its current form, will have a huge, disproportionate and unfair water availability and financial impact on small agricultural diverters, including most of the vineyard owners and vintners in the covered area. Most large water suppliers, municipalities and larger institutional diverters have had their water rights applications resolved years ago and they are less likely to have onstream dams and other facilities that are affected by the Draft Policy.

In contrast, the vibrant and growing wine grape industry in Mendocino, Sonoma and Napa Counties is largely composed of small vineyard owners and wineries, many of whom entered the business in the last 20 years. Many, like Golden Vineyards, applied for water rights years ago, but have been prevented from completing the process by the delays of the State Board. It is patently unfair that these small business owners, who form the backbone of the wine industry in these locations, will bear the adverse brunt of the Draft Policy.

It is precisely because of these types of concerns that the Legislature requires the State Board, prior to implementing any agricultural water quality control program, to prepare "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." Water Code § 13141. One document accompanying the Draft Policy attempts to ballpark the costs of compliance under the new policy. *Direct Cost Analysis For The Proposed Policy For Maintaining Instream Flow In Northern California Streams* (December 2007). Among other things, it estimates that application costs will exceed $73,000 if various studies are needed, that mitigation plans will cost almost $10,000 to prepare, $99,000 to implement and $6000 per year to maintain. However, the expected "big ticket" items relate to the onstream dam provisions, which are estimated to cost between $100,000 and $3 million per reservoir to implement. These astronomical costs are

beyond the ability of most farmers to afford and could likely force many wine grape growers out of business.

When considering the Draft Policy, the State Board must take the magnitude of these financial costs, and the extreme adverse impacts on the agricultural supply beneficial use, into account. Because the current financial costs and beneficial use impacts of the Draft policy are unacceptable, the State Board should reject the Draft Policy.

Specific Comments:

1. Flawed And Incomplete Scientific Analysis

We understand, from discussions with water availability and threatened/endangered species experts, as well as from some of the State Board's peer review comments, that the scientific bases for the Draft Policy are flawed and incomplete. Many of the peer review commenters solicited by the State Board identified major (and often completely unquantified) scientific uncertainties in the assumptions, analyses and applications of the Draft Policy.

Accordingly, before the State Board adopts any new instream flow policy, there should be appropriate studies and solicitation of further peer review comments to examine the key elements of the policy, including but not limited to the minimum bypass flow assumptions and calculations, maximum cumulative diversion assumptions and calculations, and the need for the proposed onstream dam provisions. It is imperative that any new restrictions on agricultural supply diversions have solid, accepted and completely defensible scientific bases.

2. Stream Classification System

The policy proposes to adopt an overly aggressive and unacceptable stream classification system that appears designed to classify almost any reservoir as being located on a Class I stream and to require incredibly expensive bypass and/or removal measures. According to the proposed classification system, any stream or drainage (whether perennial, intermittent or ephemeral) that now has or ever contained a fish of any kind, or which even has habitat for fish present (with no fish), will be designated a Class I stream. Indeed, the policy effectively establishes a presumption that all drainages or streams are Class I streams, and it purports to put the factual burden on the applicant to commission an expensive stream classification study to prove that its watercourses do not so qualify. The definition of a Class II watercourse is similarly unreasonable, requiring only the presence of habitat for macroinvertebrates or benthic organisms, even if none are present.

These proposed stream classifications, with their significant and expensive consequences for onstream dams, are unreasonable and bear no rational relationship to the achievement of the goal of the Draft Policy, which is to protect listed salmon and steelhead species. Even a Class I

stream, under the Draft Policy, does not need to show the historic or current presence of salmon or steelhead – rather, the presence of habitat for any non-listed fish in a small ephemeral drainage is deemed to be enough to qualify it as Class I. Moreover, these definitions are inconsistent with the definitions used by other state and federal agencies for classifying various types of watercourses, which will thereby inevitably lead to regulatory inconsistencies and other adverse consequences.

These stream classifications, when combined with the accompanying Draft Policy restrictions, also are not designed to rationally achieve their stated purpose because they apply to locations above the limit of anadromy (where salmon and steelhead indisputably cannot access). For example, Heart Arrow Ranch is located on a ridgetop, 1,000 feet in altitude above the nearby creeks, and the estimated average slope from the diversion points on the upland Ranch areas to the creek is 30%-50%. Yet, the Draft Policy apparently applies all of its limitations (including the radical onstream dam provisions) to these diversion points despite the fact these locations are completely inaccessible to anadromous salmonids. The Draft Policy is legally deficient for applying these limitations above the limit of anadromy in watercourses.

3. Minimum Bypass Flow Limitation

The Draft Policy establishes minimum bypass flows (flows which must be present in a watercourse before any appropriative water right diversion can occur) that, as acknowledged by State Board staff, will in almost all cases be significantly higher than such flows under the 2002 DFG/NMFS Guidelines, which are currently used by the State Board. For example, in the four specific examples disclosed by the State Board at the February 2008 workshop (based on diversions from Forsythe Creek, Donnelly Creek, Star Creek and an unnamed tributary), the minimum bypass flows would be 290%, 812%, 650% and -27% **higher** than they would be under the DFG/NMFS Guidelines. If these new minimum bypass flow principles are adopted, the availability of water for diversions by wine grape growers, especially during normal and dry years, will plummet.

We understand, from both endangered species biologists and water availability consultants, that the scientific analysis in the Draft Policy supposedly supporting these greatly increased minimum bypass flows is scientifically suspect and unsupported. Since this new policy will greatly reduce the water available for diversion, it is essential that the State Board conduct appropriate studies and peer review to analyze appropriate minimum bypass flows. No policy should be adopted unless and until such studies and review are done.

4. Maximum Cumulative Diversion Limitation

The Draft Policy also includes what it calls a maximum cumulative diversion limitation that it asserts is necessary to protect stream habitat for listed salmon and steelhead species. The underlying theory is that high flood flows should be allowed to occur so that the stream geometry

and vegetative structure is preserved. As the Draft Policy concedes, this concept is the single most restrictive limitation on the diversion of water. As currently proposed, this limitation would greatly reduce a diverter's ability to fill reservoirs during high flow periods. It will also add significantly to the expected cost of bypass facilities because of the need to redivert these flows.

This maximum cumulative diversion concept may be innovative, well-intentioned and academically interesting, but it is an unproven, uncertain and unfair limitation that will radically diminish water supplies to the most robust sector of the Mendocino, Sonoma and Napa County economies. There has not been any scientific demonstration that agricultural diversions during high flow events have had adverse impacts on stream geometry or habitat. This limitation also fundamentally undercuts a very important opportunity for small agricultural diverters to replenish their reservoirs during high winter flow events. Accordingly, this flow limitation should not be utilized in any policy until it is studied more carefully and it has established a successful track record.

5. Season of Diversion Limitation

The Draft Policy proposes a season of diversion of October 1 to March 31. This is an expansion of the current recommended DFG/NMFS Guideline season of December 15 to March 31. Golden Vineyards supports this expansion of the season of diversion, so long as water right applicants are given the opportunity to modify their pending applications to take advantage of this expansion of the diversion season without having to start the water rights process all over again. Water rights applicants should not be penalized for such after-the-fact policy changes.

6. Onstream Dam Limitations

The new onstream dam provisions proposed in the Draft Policy, especially given their retroactive application, do not appear to be rationally designed to achieve their desired objectives. These provisions go significantly beyond the measures deemed necessary by DFG and NMFS in the 2002 Guidelines, and they represent the single most costly financial element of the Draft Policy.

Golden Vineyards has several major objections to these provisions. First, the Draft Policy does not define exactly what qualifies as an "onstream dam" and we have found in the past that the State Board is not clear and consistent in what it means by this term. Moreover, during the application process, State Board staff often encourage applicants to characterize their dams as "onstream," even if probably located off-stream, because it will otherwise require the applicant to start back at the beginning of the process if an onstream determination is made many years later under current or new standards. Given the draconian provisions relating to onstream dams in the policy and these State Board application practices, there needs to be a clear and scientifically defensible set of provisions in any policy regarding this definition.

Second, the interaction of the stream classification system and the onstream dam provisions needs to be revisited, balanced and perhaps deleted entirely. For example, there is no rational reason for the onstream dam limitations in the Draft Policy to be applied to any class of stream if it is above a point reasonably accessible to anadromous salmonids. In addition, the onstream dam limitations should not apply to the mainstem of the Russian River below Lake Mendocino because the minimum bypass flow and maximum cumulative diversion limitations explicitly do not apply to this area, and there is no rational basis for maintaining onstream dam limitations.

Third, the onstream dam limitations in the new policy should only be applied to water rights applicants who apply on or after the date of the new policy adoption. Particularly given the range of expense estimated by the State Board for retrofitting existing storage reservoirs with passive or automated bypass systems or removing existing dams (ranging from $100,000 to $3 million per reservoir), these provisions should apply only to persons who had clear and unequivocal notice of these new limitations prior to the time that they applied for their water rights. Moreover, the July 19, 2006 cut-off date for construction of reservoirs that will be allowed on certain types of streams is completely arbitrary and counterproductive, particularly since it penalizes applicants who were following the law by waiting to be granted a water right before constructing the reservoir facilities. This date should be changed to be the date on which a new policy is adopted by the State Board.

Fourth, given the major uncertainties and huge financial costs associated with these new proposed onstream reservoir provisions, the State Board needs to keep in mind its duty, under both existing law and AB 2121, to preserve and enhance all beneficial uses of these waters, including agricultural supply. If it were to adopt this set of onerous provisions relating to onstream dams, it could well, for many agricultural diverters, be removing this potential beneficial use entirely. This is one key area where greater balance among all beneficial uses is essential.

7. Variances and Site-Specific Exceptions

The Draft Policy refers to the possibility of a water right applicant to conduct a site-specific study to obtain a variance from one or more elements of the Draft Policy (section 4.1.8) and also to the possibility of receiving a case-by-case exception (section 13.0). In the public workshop held in February 2008, Board staff stated that these provisions would supposedly be a reasonable avenue for an applicant to modify the policy in appropriate situations.

Golden Vineyards certainly supports the concept of incorporating variances and exceptions into any adopted instream flow policy. However, as currently formulated, these variances/exceptions are completely illusory and unavailable as a practical matter to applicants under the Draft Policy. The primary reason is that no factual criteria or legal standards whatsoever are articulated for the granting of either a variance or an exception request. Rather,

the granting of a variance/exception appears to be at the complete and unconstrained discretion of the State Board on a case-by-case basis. This lack of articulated criteria and legal standards means that neither State Board staff nor an applicant will have guideposts by which to determine whether and to what extent it might qualify for a variance/exception and this situation will likely result in significant processing delays. It also means that the State Board itself will not have definitive guidance on when a variance or exception is appropriate, leaving it open to charges of acting in an arbitrary or capricious manner.

COMMENTS ON SUBSTITUTE ENVIRONMENTAL DOCUMENT

The State Board Staff has prepared a Substitute Environmental Document in connection with its consideration of the Draft Policy. According to the State Board, it is entitled to prepare this document, in lieu of an Environmental Impact Report under CEQA, because this policy comes within the certified regulatory program for State Board establishment of instream beneficial use protection programs. CEQA Guidelines, § 15251(k). However, if this SED is allowed by CEQA in lieu of an EIR (and it appears that the Draft Policy may not qualify for this alternative), it must still comply with a full range of CEQA goals and policies. *See, e.g.,* CEQA Guidelines, § 15250.

In this case, the SED is deficient in many key respects and should not be adopted or certified by the State Board. These deficiencies include, but are not limited to, the following matters:

1. General and Specific Comments Above

Golden Vineyards specifically incorporates herein by reference each and every general and specific comment on the Draft Policy set forth on pages 1 through 11 herein as a separate comment on, and deficiency in, this SED.

2. Failure to Identify And Analyze All Reasonable Alternatives

One key to a Substitute Environmental Document is its identification and detailed discussion of alternatives to the proposed activity (the Draft Policy). In this case, the SED identifies and discusses only three alternatives to the Draft Policy. These include: (1) the no-project alternative, which the State Board summarizes as not adopting any new instream flow policy and instead continuing to use current policies; (2) the DFG/NMFS Draft Guidelines alternative; and (3) a hypothecated "maximum protectiveness alternative" that "elevated the protection of fishery resources to the exclusion of all other uses."

The SED immediately discounts two of these alternatives. It states in conclusory fashion that the no-project alternative is "neither feasible nor reasonable" because the State Board is statutorily required to adopt an instream flow policy. As explained below, this rejection is

unjustified and is a serious deficiency. The SED also rejects (appropriately) the hypothecated maximum protectiveness policy on the basis that it violates a variety of legal and regulatory requirements. After these twin rejections, the SED identifies only the Draft Policy and the DFG/NMFS Guidelines alternative for further in-depth discussion.

There are several key deficiencies in this identification of alternatives. First, the SED has utilized a semantic sleight-of-hand to define the no-project alternative as unacceptable. Although it is true that the Legislature has directed the State Board to adopt an instream flow policy, it did not specifically dictate the contents of the policy. The true no-project alternative would be for the State Board to adopt a policy that incorporates all of its current practices, guidelines and standards (including its instream flow practices) for issuing appropriative water rights. By so defining the no-project alternative, the State Board would be able to discuss the no-project alternative in a meaningful way throughout the document and consider it as a realistic alternative to the Draft Policy. Its failure to do so is a fatal deficiency in the document.

Second, the State Board has failed to identify or discuss a reasonable and full range of alternatives to the Draft Policy. Most significantly, it has failed to propose and analyze a balanced instream flow policy that protects and enhances agricultural supply and other beneficial uses without applying the most conservative assumptions utilized in the Draft Policy. This policy would provide significant protections for salmonid species, while at the same time recognizing and protecting other uses. This alternative should promote greater balance of beneficial uses and incorporate mitigation measures to address the potentially significant impacts on agriculture, including the wine grape industry. Indeed, the State Board could certainly identify and analyze several types of more balanced alternatives.

Finally, there is a very troubling statement in the SED which reflects that the State Board did not fully understand, and was unable to implement, its legal duties with regard to alternatives. On page ii of the SED Summary, the State Board states: "Because the alternatives allow flexibility in compliance, and because the responses by the regulated community cannot be predicted with reasonable certainty, comparisons among the alternatives do not lead to clear differences in terms of the potential, indirect environmental effects of Policy implementation." By this statement, the State Board appears to be saying that it cannot distinguish among the alternatives in terms of their environmental effects, which is an astonishing and unacceptable admission. It is absolutely clear to Golden Vineyards that there are dramatically different environmental and other impacts caused by the different alternatives, and it is essential that these differences be addressed. The State Board's apparent concession that it cannot reasonably analyze such differences for alternatives cuts the heart out of the CEQA/SED process and renders the document insufficient under law.

3. Failure To Identify And Describe Significant Environmental Impacts

A CEQA environmental document should provide information regarding the Draft Policy's significant environmental impacts that is sufficient to allow the State Board and the public to understand its environmental consequences. *See, e.g., Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal. 3d 376, 404 (1988). In this case, the SED does not provide an adequate description of what the impacts of implementing the Draft Policy would be on the regulated community. For example, it does not identify how many diverters would be directly impacted by the Draft Policy and exactly how those impacts would occur by location, time of year, amount of diversion, location in a watershed, etc. Accordingly, given the SED's lack of necessary descriptive detail, it is not possible to understand and address the significant impacts on particular diverter categories such as vineyard diverters.

4. Failure to Analyze A Full Range of Direct, Indirect, Secondary And Social And Economic Impacts

In the SED, the State Board's analysis of direct, indirect and secondary impacts is woefully deficient. A CEQA environmental document must address all significant direct and indirect environmental effects, as well as all secondary or indirect impacts to the physical environment caused by a project's economic or social effects. CEQA Guidelines, § 15064(e). In this case, the SED is deficient in at least the following respects:

- The SED fails to identify, fully evaluate and address a full range of significant environmental impacts. For example, it does not address such reasonably foreseeable environmental impacts from implementation of the Draft Policy such as vineyards choosing not to plant and maintain cover crops due to water unavailability or extra expense, thereby resulting in significantly increased land erosion and sedimentation into nearby watercourses. Nor does it discuss the foreseeable adverse environmental impacts of dam removal activities on species, such as federally listed California tiger salamanders and California red-legged frogs, that may inhabit or utilize such reservoirs.

- Although the SED does contain a brief discussion of agricultural diverters switching to use of other water sources, it does not adequately analyze the close interactions between groundwater and surface water and the resulting impact on groundwater supply and use that could result from implementation of the Draft Policy.

- The Policy also fails to undertake any kind of analysis, much less a sufficient analysis, of the physical impacts caused by the social and economic consequences of the Policy. The most glaring deficiency relates to the environmental impacts arising from the dramatic reduction in water supply and huge increase in financial

costs caused by the Draft Policy. The SED appears to assume that it does not need to discuss any aspect of the financial or social impacts of the policy on the regulated community, except for possible environmental impacts resulting from potential increased use of alternative water supplies (which it also fails to discuss in a legally sufficient manner). The SED completely misses the fact that, because many vineyard and other agricultural diverters may not have other affordable sources of water and/or will not be able to afford to pursue water rights applications under the Draft Policy, they will leave the wine grape or agricultural business, thereby leading to a dramatic change in land use patterns and property uses. This could lead to a variety of potential environmental impacts that must be analyzed in the SED, including the potential of increased conversion of farm land to commercial and residential developments. There are undoubtedly a variety of other social and economic impacts that could further result from these physical impacts.

5. Failure To Identify, Analyze And Adopt Mitigation Measures

A substitute environmental document must include "mitigation measures to avoid or reduce any significant or potentially significant effects that the project may have on the environment." CEQA Guideline, § 15252(a)(2)(A). This requirement applies to all types of discretionary agency actions, including agency adoption of policies and plans. In such case, "mitigation measures can be incorporated into the plan, policy, regulation, or project design." CEQA Guidelines, § 15126.4(a)(2); *see also* Public Resources Code § 21081.6(b).

It is undisputed that, in the SED, the State Board has made no effort whatsoever to identify mitigation measures to lessen the potentially significant environmental impacts of the Draft Policy. Although it generates several charts identifying potentially significant impacts (see Table 7-1), it fails to identify, discuss or propose any mitigation measures to lessen these impacts. In addition, since the SED does not even identify or discuss many potentially significant impacts, such as those set forth in previous sections of this letter (including indirect, secondary, and physical impacts caused by economic and social changes), it certainly does not identify mitigation measures for these impacts either. The SED's failure to identify, discuss and incorporate all such mitigation measures is an important legal deficiency in the document.

The SED does not identify any reason for its failure to address mitigation measures. However, it is absolutely essential that such mitigation measures be addressed at this programmatic level as the necessary mitigation measures cannot be effectively adopted at the individual permit level. For example, if adoption of the Draft Policy is going to cause significant increases in groundwater withdrawals or is going to cause changes in fundamental land use patterns involving conversion of farmlands to other developments, these reasonably foreseeable changes must be anticipated, addressed and mitigated for at the policy level through policy modification. Later agency action on a particular permit cannot address these broad policy

impacts. It is also clear that existing portions of the Draft Policy – such as the supposed variances and exemptions – do not constitute mitigation measures because they are illusory and unavailable to applicants as described above.

In short, the SED's failure to identify, discuss and incorporate any mitigation measures to address the potentially significant environmental impacts of the Draft Policy is a serious legal deficiency. Among other things, it has prevented the State Board from directly considering and mitigating the full range of potentially significant adverse impacts, which would have allowed it to reach a more balanced policy that meets the requirements of AB 2121 and CEQA.

6. Failure To Identify Or Analyze Cumulative Impacts

It is undisputed that the SED is required to include a discussion of the Draft Policy's cumulative impacts. *See* CEQA Guidelines, § 15130(a). In this case, the SED contains only a two-page section 6.9 on cumulative impacts, most of which is merely a legal recitation of what the law requires. Unfortunately, however, neither this section nor any other part of the SED contains any real discussion of such cumulative impacts. This failure to identify, discuss and analyze cumulative impacts is a fundamental legal deficiency in the document.

It is absolutely essential, when issuing a policy that will have the scope and magnitude of environmental effects that the Draft Policy will, to include a thorough discussion of cumulative environmental impacts. This policy, by the State Board's own admission, will directly affect hundreds of water rights applications, petitions and registrations, many of which have been pending for over a decade. For example, the Draft Policy could well force large-scale changes in land use, environmental, social and economic patterns in the affected counties, particularly given its direct adverse impact on the wine grape industry, and none of these changes are addressed in a cumulative impact discussion.

7. Failure To Analyze Or Mitigate For Climate Change Impacts

Both the State Attorney General and the courts have emphasized, in the last few years, that CEQA environmental documents (and this would certainly include SEDs) should identify, discuss and analyze the potential individual and cumulative impacts associated with climate change. Although the SED includes (on page 84) a brief recognition that such an analysis is necessary, it then fails to provide any such serious discussion or to propose any mitigation measures to mitigate such expected impacts. In short, the SED is incomplete and legally deficient for its failure to analyze and mitigate for such anticipated impacts.

Thank you for this opportunity to comment on the Draft Policy and Substitute Environmental Document. Please feel free to contact me if you have any questions or would like further information.

Very truly yours,

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