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North Coast Water Quality Control Board

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Subject: Total Maximum Daily Load for Elk River and associated actions and projects

The Elk River TMDL will continue to render the waters of the state unfit because it is not designed to attain the objectives of the Basin Plan, the fishable swimmable and existing use requirements of the Clean Water Act, State and Federal Anti-Degradation policies, Section 7 and Section 10 of the Endangered Species Act, the Public Trust Doctrine, public trustee duties, CEQA, or Section 13242 of the Water Code. RB1 needs to consider the alternative TMDL that can achieve the sediment related water quality standards. This is the people and fish alternative.

In 1997, the State Agencies placed a moratorium on harvest plan approval in Elk River that lasted until summer 2002, and as Table 1 attests, anthropogenic loading rapidly dropped by 51%--- from 966 cubic yards per square mile per year to 476; while road surface erosion loading dropped by 59%. Similarly, Salmon Forever's suspended sediment concentration (SSC) monitoring of samples collected during 106 storm events between 2002 and 2013 detected a 59% reduction in South Fork SSC by 2008. As high rates of logging resumed after 2008, SSC adjusted for antecedent rainfall index and flow increased 89% by 2013. This demonstrates that RB1's plan to log its way to attainment of water quality standards is a non-starter.

The TMDL relies on insufficient monitoring and inadequate methods. Thus, if or when the data is analyzed it will be insufficient to detect trends. Furthermore, even if RB1 implements a robust monitoring program, designed to, and capable of, detecting trends in the shortest period of time, the TMDL still does not define an enforceable trajectory toward attainment of water quality standards. Like the trajectory for control of cumulative aggradable sediment chosen by the RB1 in 2002, here RB1's TMDL does not require that harvest be halted when the trajectory towards attainment of water quality standards is not met.

I find it improper and a failure to proceed in the manner required by law, for the North Coast Regional Water Quality Control Board (RB1) regulatory agency to permit activity that results in wrongful trespass occupation of residents' property. RB1 has not demonstrated that RB1 has flood servitude¹ over residents' property nor that it is proper for RB1 to permit polluters to fill the public trust river channels with sediment debris---so that ordinary rains create flooding that severely damages residents. Instead of terminating permits for wrongful trespass, RB1's TMDL substitutes a "conceptual" zero load allocation that is wing-nutted to a concept---

¹ California Civil Code 804. A servitude can be created only by one who has a vested estate in the servient tenement.

no amount of land use restriction can physically result in zero loadingi.e. the control of all natural sediment delivery from the tributary system. This non sequitur arbitrarily avoids the primary purpose of a proper TMDL---to control all anthropogenic discharge of sediment and peak flow.

The TMDL also wing-nuts the 40 CFR 130.7©(1) margin of safety –“The TMDL is equivalent to the loading capacity of the waterbody for the pollutant in question” then identifies that the TMDL’s goal is an “expansion sediment loading capacity” and concludes that once the program of implementation increases transport of sediment and water---RB1 can “recalculate” the sediment TMDL. By failing to consider existing uses of water and a thriving commercial and recreational fishery within the Clean Water Act’s margin of safety, the TMDL fails to attain legal muster. Congress intends that TMDL be more than a vehicle to get logging trucks in and out of the forest while the community floods--

Twenty one years have passed and the dischargers have not been ordered to remove a single shovel full of their wastes from the affected river bed or banks. The cross-sections along the channel tell us that the channel is rapidly infilling. Table 1 tells us what is required for a margin of safety---1985 conditions. Table 1 and 2, also tell us that the TMDL is completely unenforceable as written: because there is no moratorium coupled with the requirement that forest stands recover equivalent to 1985 levels, there can be no measure of safety for residents, their health, their homes, or their farms. A 10% increase in peak flow over 15 year old background is a death sentence---“decreasing road surface erosion” is laughable, not enforceable--- there is no sufficient monitoring and many WDR roads are egregious sediment sources---deepseated landslide rates are highly elevated—so how is zero increase, with no monitoring, a measure of safety? Zero increase in drainage network—while truth is every rolling dip is a derangement contributing to new gully formation and slumpage or openslope landslides. “Decreasing length of channel with actively eroding banks”—get real, come on—the forest stand has been reduced from 60 to 80 year old unre-entered to 15 year selection re-entries where basal area is reduced to de minimus. Ok, Class III retentions will help, but the target is not near what the 70 year old stand provided in 1985 when the anthropogenic loading was 268 tons per sq.mi.per year.

How much of the volumetric loading reduction 2004-2011 is due to the '97 to 2002 moratorium and the low harvest as PL slumped into bankruptcy? By 2013, residual SSC had spiked 89% in the South Fork! By 2016 storms’ turbidity was reaching 1,500 and 2,200 and slow coming down on the falling limb. We’ve got 1.5” to 4” deposits on the overbank this year.

The TMDL action on the load allocation must be stringent, and to the extent that the TMDL adoption fails to require the dischargers to pay the value of the use of the residents’ property and that the amount paid shall be the greater of the reasonable rental value of that property **or** the benefits obtained by the discharger[s] (via Regional Board permits to) wrongfully occupy[ing] the property by reasons of that

wrongful occupation ², the TMDL action violates civil code that requires economic disincentives for would-be polluters. This TMDL, by stretching out the agreed time schedule for beginning implementation from 2002 to 2016 and then making the deadline an open ended date somewhere after 2031 knowingly increases the benefits obtained by the dischargers. So, here we have appointed Board Members acting to incentivize benefits for would-be polluters. All done while residents' water supplies are polluted and homes and farms are purposefully flooded.

Does RB1 have servitude over residents' property to permit wrongful occupation by the wastes of a discharger pursuant to the TMDL? Is RB1 by adoption of the TMDL in effect "ordering residents" to provide a servitude impacting residents' rights to beneficial uses of water, permitting exceedances of Water Quality Objectives, reducing the quality of high quality water and/or permitting nuisance conditions for an open ended period of time? Is this forced occupation pursuant to proper/ legitimate police power? Were alternatives such as a cessation of harvest on the dischargers' lands that could reduce the duration of the occupation of residents' properties? Has RB1 considered an alternative that would place a civil liability lien on the dischargers to pay the residents to remove tree branches acting as resistance to flow and/or dig sediment deposits off of the stream banks? Is RB1 forcing residents' properties to serve as flood way easement by exercise of its inverse condemnation eminent domain authority? Does the TMDL violate or run counter to the Legislative intent identified during the enactment of Civil Code 3334(b)(1)?³

Clayton Creiger announced at the workshop that "a moratorium on timber harvest until the sediment flushes through is off the table" because "RB1 wants to keep HRC involved in non-regulatory efforts to increase the waste load allocation" over residents' properties by altering the river's assimilative capacity. Is the TMDL failure

² California Civil Code 3334(b)(1): 3334. (a) The detriment caused by the wrongful occupation of real property, in cases not embraced in Section 3335 of this code, the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure), or Section 1174 of the Code of Civil Procedure, is deemed to include the value of the use of the property for the time of that wrongful occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession.

(b) (1) Except as provided in paragraph (2), for purposes of subdivision (a), the value of the use of the property shall be the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation.

³ Civil Code 3334, subdivision (b)(1) was amended in 1992 to address a specific problem addressing how damages were awarded for the wrongful occupation of land. Before the amendment, damages were limited in wrongful occupation cases to the value of the property—usually the fair rental value. If the owner of the property sought redress, the polluter faced relatively low potential damage awards because the land was essentially worthless. (Sen. Com. On Judiciary, com. on Assem. Bill 2663). The Legislature's goal was to create an economic **disincentive** to would-be polluters. [63 Cal.Rptr.3d 181}

to fully analyze the no harvest or greatly reduced harvest rate alternative improper? If not, why not? Does this precedent setting TMDL create an economic incentive to would-be polluters?

Economic statistics released by **NOAA** show that commercial and recreational fisheries in the U.S. contributed \$72 billion to the Gross National Product and supported 1.4 million jobs in 2010. How much of it could have supported Humboldt County jobs?

Instead of avoiding or fully mitigating ongoing cumulative impacts, the TMDL proposes to permit the types of activities that have increased coho competition for space and food to continue. The unmitigated cumulative effects harm coho by maintaining the river as a shallow beyond-fully-allocated waste ditch. The TMDL in reliance on the proposed WDR, creates a high likelihood that the historically deeply incised, gravel bedded, Elk River channel will permanently remain degraded---a silt/sand bedded, wider channel with shallow pools and where much of the flow is subsurface.

The failure of the WDR and TMDL to implement an enforceable trajectory of attainment of water quality standards assures a continuing reduction in the likelihood of restoration of properly function condition to the affected stream habitat. Remember, **Water Board members are voting FOR or against fishery JOBS, not just a proper TMDL.**

The WDR proposes to continue to permit discharges in amounts known to impair reproductive activities of coho, increase mortality, interfere with feeding and breeding success, add to already severe channel and pool infilling, loss of riparian shade and tree canopy, causing potentially lethal reductions in dissolved oxygen levels as miles of aquatic habitat grows duckweed and reeds causing biological oxygen demand to skyrocket during the night.⁴ **Recovery of the commercial salmon fishery begins with Elk River's core salmon habitat!**

Mitigations in both the present WDR and the HCP have proven to be woefully inadequate: impacts to coho and human beings have worsened over time; the enforcement provisions fail to prevent degradation, require clean up, abate impacts or provide financial resources for remedy; the WDR and HCP monitoring fails to detect, analyze, and locate sources of the impacts that elevate suspended sediment concentrations downstream. Thus, avoided costs of compliance are externalized onto neighboring residents, tribes, commercial and recreational fishermen, and future generations.

The methods and analysis in the proposed WDR provide minimal and ineffective monitoring: specifically- 1) road surface runoff is not monitored during peak rainfall events; 2) water bars, rolling dips, soil piping, rills and gullies and channel extension

⁴ Salmon Forever monitored dissolved oxygen demand at station SFM and sent that data to the North Coast Regional Water Board in 2009 or 2010.

are not continuously monitored during peak flow runoff, 3) the effect of concentrated discharge is not monitored to determine the extent to which it overloads the deranged hydrology of the slopes below.

Does this concentrated discharge significantly accelerate erosion in soil piping networks? Would discharging a fire hose in a soil pipe increase downstream suspended sediment concentration?

Because the Regional Board has **purposefully taken** Cease and Desist, Administrative Civil Liabilities, and Clean up and Abatement **off the table for dischargers**, the **TMDL will be ineffective at restoring water quality, the fishery or abating downstream flooding in the necessary timeframe**. The only remaining plausible purpose of the regulatory inaction is to enable the discharger to pocket the avoided costs of compliance. Can you say **coddling the polluters that profit by destroying the fishery?**

Section 7(d) of the Endangered Species Act (Act) prohibits federal agencies and permit applicants from making any "irreversible or irretrievable commitment of resources"...which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate section 7(a)(2) of the Act, during consultation under section 7(a)(2). Section 7(a)(2) prohibits Federal actions that jeopardize the continued existence of listed species or which destroy or adversely modify their critical habitat.

Section 7 of the Endangered Species Act requires Federal agencies to initiate consultation with the Services when they determine that any action they authorize, fund, or carry out may affect a listed species or designated critical habitat. Although the ESA does not dictate a timeframe within which an action agency must make this determination, agencies should review their actions at the earliest possible time to determine whether consultation is required. The regulations for implementing section 7 of the ESA at 50 CFR part 402 describe procedures for conducting consultations, including distinguishing formal consultation from informal consultation.

A principal purpose of section 7(d) is "to prevent Federal agencies from 'steam rolling' activity in order to secure completion of projects regardless of their impact on endangered species." [*North Slope Borough v. Andrus*, 486 F.Supp. 332, 356 (D.D.C.), *aff'd in part and reversed in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980)]. The U.S. Court of Appeals for the Ninth Circuit wrote "Section 7(d) does not amend section 7(a) to read that a biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources...Rather, section 7(d) clarifies the requirements of Section 7 (a), ensuring that the status quo will be maintained during the consultation process" [*Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988)].

The Services' Interagency Consultation Handbook provides guidance regarding the application of section 7(d) during the consultation process and states that the section 7(d) restriction is triggered by the determination of "may affect". Destroying

potential alternative habitat within the project area, for example, could violate section 7(d).

Section 7(d) is increasingly becoming an issue for the Services, especially during internal Service consultations involving the issuance of section 10(a)(1)(B) permits and review of Habitat Conservation Plans (HCPs). Concerns over this issue have also been raised by HCP applicants following a district court decision [*Environmental Protection Information Center v. Pacific Lumber Company*, 67 F. Supp. 2nd 1113 (N.D. Cal 1999)] which asserts that section 7(d) applies to both formal and informal consultations as specified in 50 CFR part 402.

Sincerely,

Jesse Noell

Attachments to follow: