

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

Petition to Reconsider Denial of a Petition to Set Minimum Flows on the Shasta River  
Pursuant to the California Constitution, Article 1, Section 3, and Government Code Section 11340.6

*Petitioners*

California Coastkeeper Alliance, Friends of the Shasta River, Mount Shasta Bioregional Ecology Center,  
Water Climate Trust, Shasta Waterkeeper, Save California Salmon, and Environmental Protection  
Information Center

**I. Introduction.**

On January 17<sup>th</sup>, 2024, Petitioners submitted a Petition<sup>1</sup> to urge the State Water Board (State Board or Board) to establish a regulation setting a permanent instream flow requirement for the Shasta River which states that the goal of the regulation is recovery of endangered salmonid communities. That Petition contained the best available scientific information needed to identify and enforce instream flow regulations in the Shasta Watershed. We respectfully ask that you reconsider your decision to deny our petition.

Petitioners took this action because, without State intervention, flows and temperatures in the Shasta watershed are insufficient to protect, let alone recover, economically, culturally, and ecologically vital salmon. The historic lack of state intervention has had a dire effect on the Shasta River salmonids and the people and cultures that rely upon them.

As this Board is aware, the Shasta River Watershed is home to the threatened Southern Oregon/Northern California (SONCC) ESU of coho salmon, listed both federally and statewide. Moreover, according to the Department of Fish and Wildlife (DFW), some of the “most adversely affected populations in the State are in the Shasta River.”<sup>2</sup> These salmon, alongside steelhead trout and fall-run Chinook, are imperative to the ecological health of California’s waterways. It is undoubted that these fish need protection, and the State Water Board is the only regulatory agency authorized to implement a legal framework capable of balancing the state’s water rights system and groundwater withdrawals against the need to protect public trust resources and prevent waste and unreasonable use. Yet, a history of inaction by the State Water Board continues to let these fish dwindle and die and today, circumstances have become dire and urgent.

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<sup>1</sup> See Attachment 1.

<sup>2</sup> California Fish and Game Commission, RECOVERY STRATEGY FOR CALIFORNIA COHO SALMON PROGRESS REPORT 2004 – 2012, (2015), available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=165447>.

The impacts from the death of these fish are tremendous. Culturally, tribal communities in the region rely on salmon as a necessary part of their culture, religion, and heritage. As noted by Russell “Buster” Attebery, “Salmon are a cornerstone of my Karuk culture and the loss of salmon for my people cannot be overstated.”<sup>3</sup> Losing these fish means losing culture, which has had extreme consequences. There is a high suicide rate among tribes that call the Klamath River home, which has been attributed to the slow extirpation of salmon.<sup>4</sup>

In addition, this year the Pacific Fishery Management Council unanimously voted to close the California salmon fishing season following DFW’s recommendation based, in large part, on the vulnerability of the Klamath River stocks.<sup>5</sup> Notably, this \$460 million industry, unlike growers in the Shasta Valley, must stop their harvest and place their livelihoods on pause because of the vulnerability of salmon. By comparison, once the emergency regulations expire State Water Board intervention, growers in the Shasta Valley will be allowed to continue the diversions that lead to these devastatingly low salmon numbers.

Ecologically, salmon are incredibly important keystone species, necessary to transfer nutrients from the ocean inland and vice-versa. These fish are a central part of the food web, and studies have even shown that salmon migrations benefit forest health. Streamside riparian plants uptake significant amount of their nutrients from salmon and scientists can even estimate the strength of historical salmon runs based on tree rings.<sup>6</sup>

Recently, the Governor’s drought emergency proclamations have authorized the Board to take short-term emergency actions in the Shasta River Watershed and the Board has stated that it is preparing to potentially set long-term flow requirements in the Shasta Watershed. Despite these actions, Petitioners felt it necessary to submit their Petition because short-term actions expire by definition, and priorities, on their own, are insufficient to protect salmon. The Shasta River has been an instream flow priority watershed for a decade, and simply labeling a waterway as a priority does not and has not led to robust, long-term enforceable protections.

In 2014, Governor Brown released his California Water Action Plan in response to severe drought, prioritizing the creation of instream flows in five priority watersheds, including the Shasta River.<sup>7</sup> The State Water Board released its strategic workplan, similarly prioritizing the creation of flows in priority watersheds.<sup>8</sup> In 2013 and 2014, two Ocean Protection Council funded studies were finalized for the

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<sup>3</sup> Russel “Buster” Attebery, New Legislation Would Prevent Old Policies From Undermining Newsom’s “Salmon Strategy” – Opinion, Sacramento Bee, (Apr. 7, 2024), <https://www.sacbee.com/opinion/op-ed/article287331650.html>

<sup>4</sup> Susan Sawyer, People of the Salmon, U.S. Fish and Wildlife Service, (May 24, 2023), <https://www.fws.gov/story/2023-05/people-salmon>; Joe Mozingo, How a Remote California Tribe Set out to Save its River and Stop a Suicide Epidemic, LA Times, (May 19, 2017), <https://www.latimes.com/local/california/la-me-salmon-demise-yurok-suicides-20170519-htlstory.html>

<sup>5</sup> WON Staff, California Department of Fish and Wildlife Recommends 2024 Ocean Salmon Closure, Western Outdoor News, (Apr. 9, 2024), <https://wonews.com/california-department-of-fish-and-wildlife-recommends-2024-ocean-salmon-closure/>; Rachel Becker, California Salmon Fishing Banned for Second Year in a Row, CalMatters, (Apr. 10, 2024), <https://mavensnotebook.com/2024/04/10/cal-matters-california-salmon-fishing-banned-for-second-year-in-row/>

<sup>6</sup> Anne Post, Why Fish Need Trees and Trees Need Fish, Alaska Fish and Wildlife News, (Nov. 2008), [https://www.adfg.alaska.gov/index.cfm?adfg=wildlifeneews.view\\_article&articles\\_id=407](https://www.adfg.alaska.gov/index.cfm?adfg=wildlifeneews.view_article&articles_id=407)

<sup>7</sup> Office of Governor Jerry Brown, California Water Action Plan, 2014, at 12, [https://resources.ca.gov/CNRALegacyFiles/docs/california\\_water\\_action\\_plan/2014\\_California\\_Water\\_Action\\_Plan.pdf](https://resources.ca.gov/CNRALegacyFiles/docs/california_water_action_plan/2014_California_Water_Action_Plan.pdf).

<sup>8</sup> State Water Resources Control Board, Strategic Plan Update 2008-2012, at 24 [https://www.waterboards.ca.gov/water\\_issues/hot\\_topics/strategic\\_plan/docs/final\\_draft\\_strategic\\_plan\\_update\\_090208.pdf](https://www.waterboards.ca.gov/water_issues/hot_topics/strategic_plan/docs/final_draft_strategic_plan_update_090208.pdf).

Shasta River for the explicit purpose of establishing long-term flow protections in the Shasta Watershed.<sup>9</sup> And the Governor’s proposed budget for 2015-2016 anticipated providing \$4.0 million to the State Board and the Department of Fish and Wildlife to create and implement flows in those priority watersheds.<sup>10</sup> Despite this “prioritization,” as of 2024, neither the Shasta nor the other four priority watersheds have instream flow regulations.

This year, Governor Newsom released his Salmon Strategy in response to severe drought, prioritizing the creation of instream flows in many of the same priority watersheds.<sup>11</sup> The State Board released its strategic workplan and updated its Racial Equity Action Plan where it also prioritized the creation of instream flows in priority watersheds, including the Shasta.<sup>12</sup> And the State Water Board submitted a budget request to the Legislature to fund these actions.<sup>13</sup>

Despite all this, the State Water Board has not committed to a process or timeline that will make those necessary long-term protections a reality. In fact, it has done the opposite by denying our previously submitted Petition without offering any other relief warranted by the Petition, including formally committing itself to alternative actions.<sup>14</sup>

The Board has made clear from the Dais, its strategic workplan, and its Racial Equity Action Plan that setting long-term flow protections in the Shasta is a priority. Yet Petitioners fear that the Board will continue the state’s history of prioritization without action. This Petition for reconsideration is to give the Board an opportunity to reconsider its Denial of the Petition, identify other relief warranted by the Petition, and turn its statements on the importance of flows in the Shasta into formal action consistent with the goal of long-term salmonid recovery.

## **II. Petition for Reconsideration.**

Pursuant to Government Code 11340.7 (c): “Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved.” The denial was issued on February 17<sup>th</sup>, 2024, and 60 days after the date of the decision is April 16<sup>th</sup>, 2024.

Government Code 11340.6 states that a Petitioner must state the following clearly and concisely:

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<sup>9</sup> Ocean Protection Council, In-Stream Flow Assessments, (Nov. 2008), at 4,

[https://opc.ca.gov/webmaster/ftp/project\\_pages/salmon\\_and\\_steelhead/0811COPC\\_Instreamflow.pdf](https://opc.ca.gov/webmaster/ftp/project_pages/salmon_and_steelhead/0811COPC_Instreamflow.pdf).

<sup>10</sup> Department of Finance, 2015-16 Governor’s Budget Summary, at 103, <https://dof.ca.gov/wp-content/uploads/sites/352/budget/publications/2015-16/FullBudgetSummary.pdf>.

<sup>11</sup> Office of Governor Gavin Newsom, California Salmon Strategy, at 22, <https://www.gov.ca.gov/wp-content/uploads/2024/01/Salmon-Strategy-for-a-Hotter-Drier-Future.pdf>.

<sup>12</sup> State Water Resources Control Board, Draft 2024 Strategic Work Plan, at 7 [https://www.waterboards.ca.gov/board\\_info/agendas/2024/feb/020624\\_6\\_drft2024strategicworkplan.pdf](https://www.waterboards.ca.gov/board_info/agendas/2024/feb/020624_6_drft2024strategicworkplan.pdf); State Water Resources Control Board, Racial Equity Action Plan, (2023) at 13, [https://www.waterboards.ca.gov/racial\\_equity/docs/racial-equity-action-plan-final-en.pdf](https://www.waterboards.ca.gov/racial_equity/docs/racial-equity-action-plan-final-en.pdf)

<sup>13</sup> State Water Resources Control Board, Budget Change Proposal – Instream Flow Objectives in the Scott River and Shasta River Watersheds, [https://esd.dof.ca.gov/Documents/bcp/2425/FY2425\\_ORG3940\\_BCP7230.pdf](https://esd.dof.ca.gov/Documents/bcp/2425/FY2425_ORG3940_BCP7230.pdf).

<sup>14</sup> State Water Resources Control Board, Decision on Petition for Rulemaking to set Permanent Minimum Flows on the Shasta River, (Feb. 16, 2024), [https://www.waterboards.ca.gov/drought/scott\\_shasta\\_rivers/docs/2024/Decision\\_ShastaPetitionwCoverLetter.pdf](https://www.waterboards.ca.gov/drought/scott_shasta_rivers/docs/2024/Decision_ShastaPetitionwCoverLetter.pdf).

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reason for the request.
- (c) Reference to the authority of the state agency to take the action requested.

Accordingly, the nature of the regulation requested is long-term flow protections in the Shasta River with the goal of endangered species recovery. The reason for the request for reconsideration is provided below. And, the State Water Board may act pursuant to a variety of authorities, including:

- (1) The Reasonable Use Doctrine: Article X Section 2 of the California Constitution, Water Code 100, 275, 1050;
- (2) The Public Trust Doctrine: *See, e.g. National Audubon Society v. Superior Court*, 33 Cal.3d 419, 420 (Cal. 1983));
- (3) Water Quality Planning Authority: Water Code sections 13140 et seq.;
- (4) Authority to hold hearings: Water Code section 183;
- (5) Authority over water appropriations: Water Code sections 1200 et seq.;
- (6) Authority to exercise the adjudicatory and regulatory functions of the state: Water Code section 174;
- (7) Authority to control interconnected groundwater to surface water: *See, e.g. Hudson v. Dailey*, 156 Cal. 617, 627-28 (Cal. 1909)).

### **III. Reason for the Request for Reconsideration.**

In denying the Shasta Petition, the State Board provided three key justifications: (1) it is conducting ongoing work in the watershed, (2) it is uncertain as to the appropriate means to address flows and has a need to retain flexibility, and (3) there is insufficient timing to issue a notice of proposed rulemaking thirty days after receiving a Petition.

Petitioners believe that the Board failed to consider government code 11340.7 (b), which states that “A state agency may grant or deny the petition in part, *and may grant any other relief or take any other action as it may determine to be warranted by the petition* and shall notify the petitioner in writing of this action.” (emphasis added). This allows the Board to be far more flexible in its response to the Petition. In light of this section of the government code, we believe the Board’s stated explanations for denying the Petition lack compelling reasoning.

First, Petitioners acknowledge the important ongoing work in the Shasta Watershed, including the administration of the emergency regulations. Moreover, Petitioners recognize that there is a substantial amount of background work that must be done prior to issuing a notice of proposed rulemaking. Not only must the Board issue the full text of the proposed regulation, financial analysis, and its initial statement of reasons, there are several other required actions that must take place prior to that notice. For example, government code 11346.45 requires agencies to “involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations.” Preparatory work is necessary to ensure that whatever final management tool the Board chooses has a sound basis with scientific support.

However, preparatory work must be for a purpose and with a goal. Yet, the Board has given no indication of its ultimate management goal in this watershed, let alone that it has plans to act to achieve that goal in a

timely manner. The Board has instead only reiterated that it is preparing to potentially act. Further, the Board has expressly stated that it has yet to decide the best course of action. Because this statement comes after more than ten years of prioritization, without publicly identifying the management tool the Board plans to use and releasing expected timelines, Petitioners are left with nothing more than the same promises made over a decade ago which resulted in no action.

Second, the Board's denial was based, in part, on its need to "retain flexibility" in how it will address flows because it has yet to decide whether "a long-term rulemaking establishing and implementing flows is the appropriate means to address fishery flow constraints in the Shasta River watershed."<sup>15</sup> However, the Board's authority is not so limited. Simply because the Board has chosen to use one of its many management tools, does not foreclose the option of using other, additional authority to supplement its actions. In other words, taking action to regulate flows in the Shasta in no way limits the Board's flexibility.

While the Petition was a request to begin formal rulemaking, as is a required factor to Petition the State Water Board under government code 11340.6, there are several other actions the Board can take to provide relief warranted by the Petition. Government code 11340.7 gives the Board flexibility in how it chooses to respond, and the Board need not limit itself to formal rulemaking.

Finally, while the State Board determined that the timelines articulated by the OAL interpretation of government code 11340.7<sup>16</sup> would, in effect, make it impossible for any agency to accept a petition for formal rulemaking, OAL has made clear that its memo should in no way "be interpreted as preventing an agency from adopting regulations requested pursuant to a Government Code section 11340.6 petition."<sup>17</sup> Further, should the Board choose to provide other relief warranted by the Petition beyond just formal rulemaking, OAL has not provide any similarly strict time-frame requirements.

#### **IV. Other Relief Warranted by the Petition.**

The goal of the Shasta Petition was to urge the State Water Board to commit to action and use its authority to set long-term recovery flow protections for the Shasta River Watershed. The Petition simply requested that the Board: (1) adopt a resolution to formally declare that it is the Board's goal to take action that will recover salmonids in the Shasta River, (2) commit itself to taking action that achieves that goal, and hold itself accountable to timelines and milestones that recognize the urgency of the issue, and (3) use its legal authority to implement actions that will result in its goal.

While formal rulemaking would accomplish these requests, the Board has a variety of other tools it may use to achieve this purpose. Below is a non-exhaustive list of other relief warranted by the Shasta Petition.

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<sup>15</sup> *Id.*

<sup>16</sup> Office of Administrative Law, Notice of Decision Pursuant to Government Code section 11340.7, (2022), <https://oal.ca.gov/wp-content/uploads/sites/166/2022/12/Petition-Decision-for-Gambling-Control-Commission-Petition-12-22-2022.pdf>

<sup>17</sup> Email Communications with OAL available upon request.

1. The Board Identifies the Regulatory Tool(s) it will use to Implement Instream Flows in the Shasta Watershed.

Deciding which management option to use is the first step toward implementing any of the Board's management options. In its denial, the Board made clear that it has yet to decide which tool is most appropriate to establish and implement long-term flows in the Shasta River Watershed. Publicly making that decision is warranted by the Petition.

In addition to a formal rulemaking process, the Denial noted that a policy for water quality control under Division 7, Chapter 3, Article 3 (Water Code sections 13140 et seq.), a water rights proceeding, or some combination of these or other options could also be used as management mechanisms. As the decision-makers, ultimately the Board must make a choice on which tool is most appropriate, else no actions will be taken. Ideally, this decision would not be made behind closed doors, as consideration of the public trust should not be taken in some publicly invisible way<sup>18</sup> and there are several classes of stakeholders that have a strong interest in whichever management tool the Board determines is most appropriate.

Accordingly, the Board should commit to a hearing to have its Staff identify all the possible management tools available to the Board under its existing authority. Staff should explain both the pros and cons of each tool and supply estimated timelines and milestones.

At that hearing, the Board should consider all viable tools available to both establish and implement instream flow and temperature requirements, including but not limited to: (1) a formal rulemaking, (2) a policy or policies for water quality control including for flows and temperature, (3) a water rights proceeding, (4) utilizing its waste and unreasonable use authority to enforce existing policies for water quality control, or (5) some combination of the above tools.

Each of these tools, if implemented properly on their own or in coordination, has the ability to establish and enforce instream flows of sufficient quality to recover salmonids. However, due to the urgency of this issue, the Board must take into consideration whether management options result in instream flow requirements within the timeline necessary to prevent extinction of Shasta River coho salmon and to sustain the production of wild Fall Chinook.

Once these options are outlined for the Board, Board Members can then make an informed decision on how they will plan to manage flows in the Shasta Watershed. Importantly, while a hearing may help the Board weigh the facts, ultimately, it is the decision that will satisfy the Petition, not just a hearing. Each of these options are outlined below to assist the Board in making its determination.

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<sup>18</sup> "Any action which will adversely affect traditional public rights in trust lands is a matter of general public interest and should therefore be made only if there has been full consideration of the state's public interest in the matter; such actions should not be taken in some fragmentary and publicly invisible." *Zack's, Inc. v. City of Sausalito*, 165 Cal.App.4th 1163, 1188 (Cal. Ct. App. 2008)

**a. Formal Rulemaking.**

As noted by the Shasta Petition, Petitioner's preferred choice is for the Board to undertake a formal rulemaking both due to the procedure involved in the rulemaking process and the ability to deal with the multiple, complex factors contributing to the decline of salmonids in the Shasta.

For procedure, the formal rulemaking process allows the Board to engage in open decision-making with all stakeholders on the flows necessary to protect salmonids and how it will use its authority to implement those flows. The scientific data will be analyzed to ensure the Board is using best available science and the environmental impacts will be weighed to ensure that the Board's chosen action will not result in additional environmental harm. These procedural safeguards will help the Board make the best decisions on this important issue. Even more, a formal rulemaking gives the Board the opportunity to address due process concerns in a single proceeding whereas other management tools may require individualized evidentiary hearings. Once finalized, a formal rulemaking can be amended, allowing the Board to revisit its actions and adjust the regulations as necessary.

Moreover, formal rulemaking will allow the Board to consider a variety of controllable factors in reaching the ultimate goal – sustainable instream flows and temperatures for salmonids. Proper management of the Shasta Watershed requires balancing several factors, and tackling this issue piece-by-piece may lead to a piecemeal, improperly balanced approach. The issues facing salmonids in the Shasta Watershed are complex, involving interactions between the water rights system (including pre- and post-1914 and riparian rights), groundwater withdrawals, tribal uses, and the public trust doctrine. The benefit of formal rulemaking is that the Board can use the regulatory process to appropriately balance all of these factors at once.

**b. Policy for Water Quality Control.**

While utilizing a policy for water quality control can be an effective tool, the Board must carefully consider both flow and temperature and the timing required to both adopt and implement these objectives when weighing this choice.

Procedurally, adopting a water quality objective is a somewhat lesser requirement than a formal rulemaking process. However, while the Board can comply with CEQA through a Supplemental Environmental Document (SED) under Public Resources Code sections 21080.5 and 21159, it must still undergo tribal consultation pursuant to AB 52, environmental justice considerations under AB 2108, scientific peer review under Health and Safety Code 57004, and antidegradation analysis under the Clean Water Act and Resolution 68-16. Further, the Board's discretion is limited, as it must balance the factors outlined in water code section 13241, including economic impact.

Moreover, the heart of the Shasta Watershed, and what has made it such incredible habitat for salmonids, are the cold spring-flows that make up 95% of the baseflow during irrigation season.<sup>19</sup> By focusing solely on a policy for water quality control for flows, the Board could spend years of effort to acquire sufficient

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<sup>19</sup> Deas and Null, TECHNICAL MEMORANDUM: YEAR 2000 UNIMPAIRED SHASTA RIVER MODEL SIMULATION FOR FLOW AND WATER TEMPERATURE, prepared for the North Coast Regional Water Quality Control Board (2007).

flows of insufficient temperature, failing to protect salmonids. Accordingly, in weighing this option, the Board must additionally consider adopting a second policy for temperature alongside flows.

In addition, water quality objectives are not self-implementing and implementation will take additional regulatory time and resources. Relying on this tool may require the Board to adopt an additional regulation, leading to the same requirements as formal rulemaking, or modify water rights through a water right proceeding (discussed in further detail below). This two-step process may take more time and resources than a single regulatory action. Shasta River coho could go extinct before this process is complete, as could coastal commercial salmon fishermen.

Finally, while Petitioners note that a well-executed and implemented policy for water quality control can create flows and temperatures sufficient for salmonid recovery, the Board must look to its analogous actions throughout the state in determining whether this is the best course of action considering the urgency of the issue. For example, in the Bay Delta, efforts to protect instream flows through water quality control plans have taken decades. As part of the update to the Bay Delta Water Quality Control Plan, the Board initially proposed base flows for the San Joaquin River tributaries in 2012 yet it was not until 2018 that the Board adopted final base flows for these tributaries, and it was not until 2024 that these base flows were upheld by Sacramento County Superior Court.

The salmon stocks in the Shasta River are in a perilous condition and do not have 12 years to wait. Additionally, the resulting water quality objectives fall short of protecting Tribal beneficial uses and delisting of endangered species. The instream flows recommended to achieve water quality objectives are still being challenged.

**c. Water Rights Proceeding.**

Once an instream flow target is established using any of the Board's available tools, a water rights proceeding has the potential to more equitably divide the burden of limiting water diversions to protect salmonids. This is because the Board has the authority to limit individual water rights using its waste and unreasonable use and public trust authority, rather than curtail based solely on priority.<sup>20</sup> However, these proceedings are historically long and contentious issues. Every water right holder in the watershed has a right to be heard in Court, potentially drawing out the proceedings for decades. Moreover, only water right holders may be heard in court, excluding many stakeholders who would otherwise bring key insight into the process, such as environmental advocates, tribal groups without federally recognized water rights, and groups that will be impacted by these actions, such as the Hmong people who rely on purchasing Shasta River water.

Further, the Board cannot successfully protect salmonids in the Shasta Watershed without consideration of cold spring-fed groundwater. In the Shasta, where groundwater and surface water are so intertwined, a water rights proceeding which only focuses on surface water appropriations is likely to miss the mark. For that reason, if the Board were to choose to use this regulatory tool, it would need to take additional actions, which could include a formal rulemaking or separate public trust hearings to regulate

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<sup>20</sup> See, e.g. *Light v. State Water Resources Control Bd.*, 226 Cal.App.4th 1463, (Cal. Ct. App. 2014); *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 420 (Cal. 1983).



groundwater users. These separate hearings are likely to be legally contentious, draining the Board's time and resources while fish continue to suffer.

**d. Utilizing the Water Board's Waste and Unreasonable Use Authority to Implement the Existing Shasta Temperature TMDL.**

An additional tool available to the Board is a collaborative approach with the North Coast Regional Water Quality Control Board to use the State Board's water rights and waste and unreasonable use authority to help implement the temperature and dissolved oxygen TMDL for the Shasta Watershed.<sup>21</sup> Although compliance with the temperature and dissolved oxygen TMDL will not lead to flows and temperatures sufficient to recover salmonids, this is a potentially quick action the Board can weigh to mitigate harms while it partakes in more comprehensive long-term strategies. Although the recent Los Angeles Waterkeeper case calls into question Regional Board's ability to wield the Constitutional waste and unreasonable use authority, that case also made clear that the "neither that constitutional provision nor the Water Code imposes any limits on the State Board's discretion in regard to preventing unreasonable use of water."<sup>22</sup>

Accordingly, the Board could work with the North Coast Board to implement the dedicated flow requirement component of the water quality compliance scenario within the temperature TMDL. That TMDL has recommended managing three factors to control temperature in the Shasta: (1) increasing riparian shade, (2) ensuring no increase in temperatures from tailwater flow, and (3) having dedicated cold water instream flows. That report states that "[i]ncreased dedicated cold water instream surface flow that results in temperature reductions of 1.5C, 1.2C, and 2.1C at [specified] compliance locations constitute the load allocation to flow."<sup>23</sup> While the Regional Board has identified methods of creating that dedicated cold water flow, including a "45 cfs Big Springs Creek complex flow increase," it lacks the authority to implement the necessary curtailments or modifications to water rights necessary to achieve this water quality objective.

Importantly, flows recommended by this compliance scenario on their own will not result in compliance with the temperature TMDL, nor is the temperature TMDL designed to recover salmonids. Yet implementing these actions will contribute toward the recovering salmonids as long as that action is paired with others flow and temperature recovery. Accordingly, this is something the Board should consider as it makes its decision on how to manage flows and temperature in the Shasta Watershed.

**V. Conclusion.**

It is undeniable that state intervention is necessary to protect salmonids in the Shasta Watershed. Moreover, as the regulatory agency tasked with balancing water resources in the State, the State Water Board is best suited to exercising its authority to protect Shasta salmonids. However, the Board's inaction

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<sup>21</sup> *Los Angeles Waterkeeper v. State Water Resources Control Board*, Case No. B309151 (2d Dist. 2023).

<sup>22</sup> *Id.*

<sup>23</sup> North Coast Regional Water Quality Control Board, Staff Report for the Action Plan for the Shasta River Watershed Dissolved Oxygen and Temperature Total Maximum Daily Loads, (Jun. 28, 2006), at 6-17, [https://www.waterboards.ca.gov/water\\_issues/programs/tmdl/records/region\\_1/2010/ref3721.pdf](https://www.waterboards.ca.gov/water_issues/programs/tmdl/records/region_1/2010/ref3721.pdf).

has allowed for the system to fall well out of balance, harming California's vital salmon resources and the people and communities that rely on them.

The State Water Board has made clear that it understands both the gravity and urgency of the situation yet has offered only short-term actions and promises of prioritization. Short-term actions expire, and new promises only work to highlight the ineffectiveness of the old. It is time for the Board to commit itself to action for a permanent solution.

Petitioners Respectfully urge the State Water Board to reconsider its denial of the Petition and consider taking other appropriate action warranted by the Petition.

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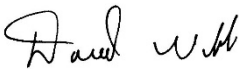
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