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Via Electronic Mail

Mr. John W. Corbett, Chair  
Board Members  
Mr. Matthias St. John, Executive Officer  
North Coast Regional Water Quality Control Board  
5550 Skylane Blvd. Ste. A  
Santa Rosa, CA 95403

Re: Proposed Draft Basin Plan Amendment to the Water Quality Control  
Plan for the North Coast Region for the Upper Elk River Sediment  
Total Maximum Daily Load and Action Plan

Dear Chairman Corbett, Members of the Regional Water Quality Control Board and  
Mr. St. John:

We file these comments on behalf of Humboldt Redwood Company (“Humboldt Redwood”) and Green Diamond Resource Company (“Green Diamond”) in (collectively referred to as the “Companies”) connection with the above-referenced proposal for the Upper Elk River Total Maximum Daily Load (“TMDL”) and Action Plan. These comments supplement those filed on this proposal by each of the companies and by Dr. Lee MacDonald. We incorporate applicable comments filed in connection with the proposed Waste Discharge Requirement (“WDRs”) for Humboldt Redwood, as well as previous comments of Humboldt Redwood, Green Diamond and their representatives and experts on Upper Elk River TMDL matters.

**I. Green Diamond’s and Humboldt Redwood’s Legal Objections to the TMDL and TMDL Action Plan.**

Our legal objections are premised on the issues and circumstances described in Green Diamond’s and Humboldt Redwood’s comments and Dr. MacDonald’s extensive technical report. To summarize, the Regional Board’s proposed TMDL and Action Plan effectively ignore the extensive empirical information and analysis that Green Diamond and Humboldt Redwood have submitted in support of their current timber

harvest operations and long term management plans. This information, including many years of monitoring data, confirms that implementation of Green Diamond's and Humboldt Redwood's management plans have resulted in a net reduction of sediment loading from the Upper Elk in relation to baseline conditions. In other words, the science shows that Green Diamond's and Humboldt Redwood's operations in the watershed are already achieving the TMDL's objective of reducing sediment inputs from current and legacy sources associated with timber operations in the Upper Elk watershed. The companies' operations have reduced and continue to reduce sediment inputs in the Upper Elk in relation to inputs that would occur without Humboldt Redwood's and Green Diamond's operations.

In addition, contrary to the Regional Board's assertions, the TMDL and Action Plan do not represent the best available science because the Regional Board is ignoring a great deal of watershed-specific scientific information and monitoring data supplied by the companies, their experts and other agencies. Rather, the best available science clearly demonstrates that the sediment aggradation problem in the Lower Elk River has multiple causes and current contributors aside from historical timber harvesting. River hydraulics and sediment transport capability have been affected by sea level rise and associated land subsidence in the Humboldt Bay area. In addition, aside from historical timber harvesting practices, there are significant human caused contributions to the deficient sediment transport and assimilation capacity of the Lower Elk River, including:

- road building and diking in the floodplain itself,
- lack of channel maintenance and riparian vegetation management, and
- navigation improvements and hardening of the shoreline in Humboldt Bay.

These factors have adversely affected sediment transport, deposition and accretion in the Elk River floodplain. They have caused extensive sand deposition and channel alteration in the storage portion of the watershed and at the mouth of Elk River.

Tetra Tech and the Regional Board have acknowledged these other causes and the underlying science demonstrating their contribution. Nevertheless, the Regional Board proposal reflects an inexplicable choice of ignoring those causes and contributors in the regulatory elements of its proposed TMDL and Action Plan, including the load allocation. The TMDL and Action Plan are based on the unfounded conclusion that, because the problem in the Lower Elk is not improving, the problem must be associated with Humboldt Redwood's or Green Diamond's current operations in the Upper Elk. The allocation in the TMDL Action Plan fails to account for other factors that are contributing to the sediment problem in the Lower Elk or are preventing its recovery. Rather, through its "zero load allocation" to Upper Elk forest management, the TMDL and Action Plan allocate all regulatory

responsibility to Upper Elk River forest management and would impose extensive additional restrictions and management measures on the Companies' current operations. The great irony of this allocation is that the Companies' management methods are, in fact, contributing to the solution, rather than the problem.

Humboldt Redwood and Green Diamond have voluntarily supported stewardship efforts to improve impaired conditions in the Lower Elk; but have consistently objected to any imposition of regulatory remediation obligations as a condition upon their operations. Although the Action Plan characterizes the remediation efforts as non-regulatory, it improperly ties remediation to the regulatory obligations the Action Plan assigns only to the timber companies. This quid pro quo is improper.

**A. The TMDL Action Plan Conflicts With the Regional Board's Statutory Authority and Would Lead to Violations of Water Code Section 13360 in the Permitting Process.**

The Action Plan would result in the imposition of management measures and restrictions that are outside the scope of the Regional Board's regulatory authority. The Regional Board's authority extends to the control of discharges, but it does not authorize the Regional Board to establish the exclusive means of managing the landscape. As reflected in the Regional Board's proposed WDRs for Humboldt Redwood—which states it is based on the proposed TMDL Action Plan—the implementation strategy would dictate specific management measures and thereby preempt the forestry-related management decisions of Humboldt Redwood and Green Diamond that are already regulated by the Department of Forestry under the Forest Practice Act. Although the Water Code authorizes the setting of standards to ensure that any authorized discharges meet water quality standards, the Water Code does not authorize the Regional Board to dictate the silvicultural prescriptions, harvest rates and other land use management decisions themselves. The approach reflected in the Action Plan is inconsistent with this authority. Further, the Action Plan proposes management measures that are not feasible for Green Diamond or Humboldt Redwood to implement. Feasibility is a primary consideration in the TMDL process, and it has not been given proper consideration here. See State Water Board Impaired Waters Guidance 5-19 (2005).<sup>1</sup> Green Diamond and Humboldt Redwood are concerned that the Regional Board's proposal is inconsistent with the State's and EPA's TMDL guidance and the Regional Board's authority in multiple respects.

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<sup>1</sup> State of California, S.B. 469 TMDL Guidance, *A Process for Addressing Impaired Waters in California (2005; approved by OAL in 2006)*

**B. The Failure to Consider Alternatives and the Economic Impacts of the Regional Board’s Proposal in the TMDL Action Plan Are Serious Flaws.**

The Companies have repeatedly recommended alternatives to the TMDL allocation and implementation methods proposed in the Tetra Tech Report and proposed Action Plan. However, the Regional Board has not given these alternatives—or indeed any alternatives—fair and adequate consideration. Numerous authorities require the Regional Board to evaluate reasonable alternatives and consider economics in adopting a Basin Plan Amendment and TMDL, including the State Water Board’s own guidance, the regulations governing substitute environmental documentation, and CEQA. See, e.g., State Water Board Guidance at pages 3-5, 5-19, 6-5.

Under State Board regulations, any basin plan amendment must be supported by substantial evidence and include a Substitute Environmental Documentation (“SED”). 23 C.C.R. § 3777(a). At a minimum, the Draft SED should contain “an analysis of reasonable alternatives to the project and mitigation measures to avoid or reduce any significant or potentially significant adverse environmental effect.” 23 C.C.R. § 3777(b)(2). Further, the SED should also include a discussion of both “reasonably foreseeable methods of compliance” and “reasonably foreseeable alternative methods of compliance.” 23 C.C.R. § 3777(b)(4). The proposed TMDL and Action Plan contain no discussion of alternatives, yet the public notice claims to have satisfied the requirements of CEQA as a certified regulatory program.<sup>2</sup> This failure should be corrected before the Board adopts a TMDL Action Plan.

**C. Adoption of the TMDL Action Plan as Proposed Would Violate Applicable Requirements of California’s Administrative Procedure Act.**

Under the circumstances described above, adoption of the TMDL Action Plan would violate the essential requirements of the California Administrative Procedure Act (“APA”) that govern the basin plan amendment process and approval of the proposed TMDL Action Plan.

Government Code Section 11353(b)(4) provides that all basin plan amendments proposed by the Regional Board must meet the standards of necessity, authority,

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<sup>2</sup> The requirements for certified regulatory programs, including consideration of mitigation measures and alternatives, are set out at Public Resources Code Section 21080.5.

clarify, consistency, reference and nonduplication established in the California Administrative Procedure Act. Without correcting the failures described above, the Action Plan cannot satisfy the necessity and consistency requirements of the APA

The proposed Action Plan fails to satisfy the necessity standard. In order to meet it, the record of the rulemaking must demonstrate by substantial evidence the need for a regulation. Gov. Code § 11349(a). The information provided by Green Diamond and Humboldt Redwood, as well as numerous agency comments, demonstrate that the Regional Board proposal does not satisfy the necessity standard. The TMDL Action Plan and its attendant restrictions are not supported by substantial evidence. The Regional Board has ignored a wealth of evidence demonstrating that the timber harvesting operations contemplated by the Companies will not contribute to the sediment difficulties in the lower reach of the Elk River. Further, Green Diamond and Humboldt Redwood have demonstrated through ongoing monitoring of their operations that their operations result in a net reduction of sediment inputs and, therefore, are not contributing to the sediment aggradation problem in the lower Elk. In other words, continuing the companies' operations as proposed by them reduces sediment inputs more than if they were not allowed to operate and baseline conditions continued. Similarly, the Regional Board has offered insufficient evidence to show that implementing the severe restrictions on Upper Elk landowners contemplated under its proposed Action Plan would actually resolve the ongoing problem, which the record reflects has significant causes that are improperly excluded from the Regional Board's load allocations and Action plan. Under these circumstances, the Regional Board cannot satisfy the necessity standard of the APA.

The proposed Action Plan would violate the APA's consistency and nonduplication standards as well. In order to satisfy the consistency standard, the proposal must be "in harmony with, and not contradictory to, existing statutes, court decisions, or other provisions of law." In order to satisfy the nonduplication standard, the proposal must not serve the same purpose as a state or federal statute or other regulation.

As explained herein, the Action Plan is not consistent with the Regional Board's authority or the TMDL Guidance. Further, the Regional Board's efforts to regulate forest management activities duplicate and are inconsistent with the forest regulation program of CalFire under the Forest Practice Act. Public Resources code §§ 4511-4629.13; 14 C.C.R. §§ 895-1115.3. Under the Forest Practice Act, the Legislature has directed the Board of Forestry to adopt regulations "to assure the continuous growing and harvesting of commercial forest tree species" while protecting "the soil, air, fish and wildlife, and water resources, including, but not limited to, streams, lakes and estuaries." Pub. Res. Code § 4551. Implementation of this regulatory system is the purview of CalFire, which regulates forest management activities, not the Regional Board. In the Timber Harvesting Plan review process, CalFire receives input from

the Regional Board through the Timber Harvest Plan process to ensure that those forest management practices will not result in a discharge to a watercourse that would cause or contribute to a violation of the Regional Board's water quality control plan. Pub. Res. Code § 4582.7. In addition, the Regional Board regulates discharges of pollutants based on its evaluation of how management activities that result in pollutant discharges may affect water quality in that process. However, the Regional Board is not authorized to dictate the forest management practices themselves. The Regional Board's efforts to specify these practices—without recognizing the necessity of providing for management flexibility in meeting water quality standards and particularly without considering alternatives—not only exceed its authority but violate the APA standards of authority, consistency and nonduplication.

**D. The TMDL Action Plan Violates Constitutional Limitations on Agency Regulatory Actions.**

Our legal comments on the proposed WDRs for Humboldt Redwood explained how they violate constitutional limitations on regulatory requirements imposed by regulatory agencies, as set forth in the Supreme Court's *Nollan* and *Dolan* decisions. As the foundation for the proposed WDRs and future revisions to Green Diamond's WDRs, the Regional Board's proposed TMDL Action Plan is similarly flawed.

Essential Nexus. The proposed TMDL and Action Plan lacks the necessary essential nexus to a legitimate government interest. The Regional Board is charged with the protection of waters within its jurisdiction. As shown in our comments, the evidence demonstrates that Humboldt Redwood's and Green Diamond's operations each have reduced and continue to result in a net reduction of sediment loading from current and historic operations. The Regional Board has not established a sufficient cause and effect connection between these operations and the result it seeks to achieve in the Lower Elk. Therefore, there is no essential nexus between the requirements and restrictions the Regional Board seeks to impose through the TMDL Action Plan in the Upper Elk and the conditions it seeks to improve in the Lower Elk.

Proportionality. In addition, the proposed Action Plan violates the *Dolan* rough proportionality standard. As the California Supreme Court has explained, the conditions must differentiate between the effects of the proposed project and those that are not—the regulated entity cannot be required to do more than mitigate the effects of its proposed activity.

As explained above, the Action Plan and its implementation measures are not supported by substantial evidence and are not adequately linked to Green Diamond's or Humboldt Redwood's timber operations in the Upper Elk watersheds. Thus, the

regulatory burden that would be imposed under the Action Plan far exceeds the impacts of Humboldt Redwood's and Green Diamond's operations.

**E. Adoption of the TMDL Action Plan as Proposed Would Be Arbitrary and Capricious.**

The imposition of highly burdensome measures outlined in the TMDL Action Plan without adequate consideration of the evidence submitted by the Companies would be arbitrary and capricious. Humboldt Redwood, Green Diamond and Dr. MacDonald, have provided scientific findings from an array of local studies and monitoring efforts that call into question the conclusions of the Tetra Tech report and the Action Plan implementation measures. The TMDL is unjustified both substantively and procedurally by law, facts, and science, including:

- Forcing the Companies to accept responsibility for remediation of excess sediment without regard to cause or contribution
- Holding the existing management programs, which have achieved and continue to achieve significant reductions in sediment inputs from the Upper Elk over historic levels, hostage to offsite remediation efforts.
- Replacing Humboldt Redwood's and Green Diamond's management prescriptions for the watershed with the staff's approach.
- Imposing regulatory requirements exclusively on Green Diamond and Humboldt Redwood in spite of the scientific information, acknowledged by the Regional Board, showing that other sources are causing or contributing to the problem in the Lower Elk.

In addition, the Regional Board has itself acknowledged that the zero loading capacity determination, which is used to develop the implementation plan limits, is "conceptual." The Regional Board acknowledges that "there is no amount of land use restriction and channel restoration that can physically result in zero loading of sediment." Nonetheless, the Regional Board imposes the zero load allocation across all Green Diamond and Humboldt Redwood activities in the Watershed without regard to the actual positive contribution to the sediment problems under current management and without substantial evidence to show that the restrictions the Regional Board proposes would result in additional water quality improvements. Such action is the very definition of arbitrary.

**F. Adoption of the TMDL Action Plan as Proposed Be Inconsistent With CEQA.**

In addition to the concerns raised above about the lack of an alternatives analysis and failure to include economic considerations, the Regional Board's proposal raises other concerns about CEQA compliance. The companies have demonstrated that the measures the Regional Board proposes as mitigation measures are not necessary to mitigate or avoid any significant individual or cumulative effect, given that the companies have demonstrated that their operations result in net sediment benefits. In addition, CEQA requires that any measures required to mitigate or avoid significant environmental effects be feasible. However, the Companies comments demonstrate that the measures the Regional Board has proposed do not satisfy the feasibility requirement.

Further, the Regional Board proposes to rely on a number of other CEQA documents, including the as yet-uncertified proposed Mitigated Negative Declaration ("MND") prepared in support of the proposed WDRs for Humboldt Redwood. However, the MND does not provide adequate support for the basin plan amendment. As discussed above, any amendment to a basin plan must include an alternatives analysis. The MND provides no such analysis, and the Regional Board has offered no other consideration of alternatives or economics in the context of the specific circumstances involved in the Elk River Watershed. The Regional Board would, therefore, be in violation of Section 377(b)(4) if it were to proceed with adoption without—at the very least—carefully evaluating the alternatives proposals put forward by Humboldt Redwood and Green Diamond during this process.

The Regional Board has also expressed its intent to rely on the analysis provided in its review of Resolution No. R1-2014-0006 the Regional Board's Policy for Implementation of the Water Quality Objective for Temperature and Resolutions and the Policy in Support of Restoration in the North Coast Region. However, the Public Notice merely states that the various projects implemented under the Tetra Tech Report and Action Plan are similar to the projects described in Resolution No. R1-2014-0006. The Regional Board makes no similar statement with regard to the alternatives. In fact, the alternatives available to the Regional Board are quite different in the context of a sediment TMDL. The Companies have proposed and are currently implementing comprehensive, aggressive actions to fully offset and in fact improve upon conditions in the Elk River. However, the Regional Board has failed to give adequate consideration to these alternatives. In order to fulfill its obligations under these provisions, the Regional Board must actually consider alternatives to its proposal as well as the economic implications of its proposal and the alternatives.



**G. The TMDL and Action Plan Violate the Clean Water Act, regulations and guidance.**

The Regional Board's proposed TMDL is also inconsistent with federal TMDL requirements and EPA's guidance on the proper development of TMDLs for many of the same reasons the TMDL is inconsistent with State law. *See* 40 C.F.R. § 130.7. For example, as reflected above, the Regional Board's exclusion of the non-forest management source that are contributing to the ongoing sediment problem in the Lower Elk River watershed in the proposed allocation is inconsistent with the Regional Board's authority under State Law. In addition, it is inconsistent with EPA's guidance on developing TMDLs:

The allowable pollutant load, in whatever way it is expressed, may be allocated in many ways, allowing for trade-offs among sources. However, It is critical that all sources of a pollutant be accounted for in computing the load capacity. . . . [I]f nonpoint sources are not causing or contributing to the impairment or threat to the waterbody, the allowable portion of the overall load to nonpoint sources for that waterbody would be their existing nonpoint load of the pollutant.

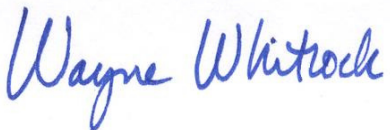
*EPA Guidance for Water Quality-Based Decisions: The TMDL Process* (1999) at page 3-5. The Regional Board's current proposed allocation clearly violates this direction.

**II. CONCLUSION AND REQUESTED ACTION**

The Regional Board should not adopt the TMDL and Action Plan as proposed. We request that the Regional Board direct the reevaluation and revision of its proposal to be consistent with these comments and those of Humboldt Redwood Company and Green Diamond Resource Company.

Thank you for your consideration.

Sincerely,



Wayne M. Whitlock

cc: Humboldt Redwood Company Distribution  
Green Diamond Resource Company Distribution