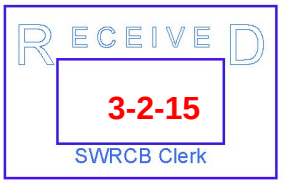
Jason Poburko, RPF

P.O. Box 244
Weaverville, CA
96093

Telephone:(530) 623-3105
E-mail:jpoburko@gmail.com



February 22, 2015

State Water Resources Control Board
Jeanine Townsend, Clerk to the Board
P.O. Box 100, Sacramento, CA 95812-2000

Attention: **State Water Resources Control Board Members and Staff.**
Re: Public Comment regarding the NCRWQCB Basin Plan Temperature Amendment R1-2014-006

My name is Jason Poburko and I am offering this public comment, as a Registered Professional Forester (RPF).

This title and its qualification were established by the CA legislature via the Professional Foresters Law and chaptered in California law in the Public Resource Coad Sections 750-783, Administration, Chapter 2.5.

This qualification is similar to other state laws governing right to title and practice, such as the Professional Engineers Law. However, this qualification is unique, in that it is only held by approximately 1,200 persons in the State of California.

An RPF is a person knowledgeable in a wide range of studies such as biology, ecology, entomology, geology, hydrology, dendrology, silviculture, engineering, business administration, forest economics, and other natural resource subjects. RPFs use their well-rounded education and experience to maintain the sustainability of forest resources like timber, forage, wildlife, **water**, and outdoor recreation to meet the needs of the people while protecting the biological integrity and quality of the forest environment.

My working career spans over 15 years of practice within the jurisdiction of this Board and 5 years of direct engagement with the NCRWQCB in its policy development with interactions with California Forests. I am also a member and past president of the California Licensed Foresters Association (CLFA) which represents many of the RPFs that work within the jurisdiction of the Board.

Though these are my personal comments, I am sure that they would be echoed by many other foresters, industry representatives and private forest landowners.

My comments are intended to provide a review of the Basin Plan Amendment in the same fashion a Timber Harvest Plan or any regulatory action should be reviewed against the standards of existing law and existing regulation.

This action is of great importance to the regulated public of California as it sets a new precedent as to the limits of jurisdictional authority of the State's Regional Water Quality Control Boards (RWQCBs) in the establishment of what constitutes a "controllable factor."

The approval of this basin plan amendment by the SWCB will grant the RWQCB the unlimited power to bind any and all conditional requirements they deem to be a "controllable factor", to the issuance of a permit associated with a pollutant regardless, if the "controllable factor" is in itself, tied to a valid pollutant under their Porter-Cologne Act (PCA) granted authority.

My comments have been limited to those that meet all of the following requirements per **(**23 Cal. Code Regs., § 3779, subd. (f)).

1. Comments must specifically address the final version of the Basin Plan amendment adopted by the North Coast Water Board.

2. If the North Coast Water Board previously responded to a similar or identical comment, the commenter must explain why and in what manner the commenter believes each of the responses provided by the North Coast Water Board to each comment was inadequate or incorrect.

3. The commenter also must include either a statement that each of the comments was timely raised before the North Coast Water Board, or an explanation of why the commenter was unable to raise the specific comment before the North Coast Water Board.

My challenges to the approval of the Basin Plan Amendment (R1-2014-0006) are based on two fundamental points of argument and the deficiencies of the responses from the NCRWQCB. The first is that changes in water temperature, as a result of incidental solar radiation, cannot under the limits of the Porter Cologne Act (PCA), constitute a controllable factor with the jurisdiction bounds of either the State or regional board(s). The second challenge to the amendment, as passed by the NCRWQCB, is that it was conducted without compliance of the requirements of "major regulation" as defined by SB617. (Government Code section 11342.548 and 11346.36 and the OAL approved CCR Title 1, Division 3 Chapter 1 Section 2000 et seq.)

I. Jurisdictional Authority

I believe that there are significant jurisdictional flaws in the approved Basin Plan Amendment (R1-20014-0006) and therefore responsible members of the regulated public are obligated to know the laws under which they are regulated, and speak up when agencies seek to take actions where jurisdiction is unclear or questionable.

These comments are formulated on the common understanding that this State and Regional Boards' regulatory and policy powers are extremely broad, yet limited only to the clear jurisdictional scope granted by the people of California via the passage of PCA (a.k.a. California Water Code)(CWC)) and the Federal Clean Water Act(CWA). There is no language in these two laws that would authorize the SWCB or any RWQCB to expand its jurisdictional authorities beyond those established by its enabling legislation. The intent of the following comments is to

hold both the State and Regional Board accountable to operate and govern the regulated public within the limits of those powers.

No forester would state that "temperature is not an important value". On the contrary, foresters manage riparian zones for the specific avoidance of potential impacts to water from both sediment and temperature from proposed harvest activities. Required compliance with local basin plans and existing 303(d) listing where present and have been a compliance required of the California Forest Practice Rules (FPRs) for many years under 14 CCR 916.12,(936.12)). Given this fact, many RPFs would argue that the NCRWQCB is not the appropriate agency to be regulating timber operations (via permit) on forested landscapes, beyond its CWC scope (pollution caused by waste and nuisance), let alone engage in formal regulation, via Basin Plan Amendment, of a perceived temperature impacts by increasing solar radiation heat exchanges, resultant from the otherwise lawful management and alteration of stream side canopy.

This jurisdictional conflict is nothing new. The NONPOINT SOURCE BIENNIAL PROGRESS REPORT, July 2001 through June 2003, Section III, Page 3 clearly states the challenges facing the issues before us today. Even though the document is over ten years old, the "*Issues and Challenges*" remain the same. This document states;

> *"Full implementation of the NPS Forestry MMs, and resulting full protection of water quality in waters impacted by timber management activities, face many deep and difficult challenges. These include issues of severe State budget shortages, legal challenges to forestry regulations, and, primarily, differing views and perceptions between state and regional water boards, the BOF/ CDF, and environmental groups.* ***Critical issues such as forestry waivers, 303(d) listings and TMDLs for forestry-impacted waterways, and issues related to the authority of the SWRCB/RWQCBs versus that of the BOF are the subject of strong and differing opinions regarding water quality management****." **(Bold added for emphasis)***

The regulated public must, out of self-preservation in these economic times, question the authority of the SWRCB to uphold the approved NCRWQCB Basin Plan Amendment which is clearly beyond or at the extreme end of its regulatory jurisdiction and **will set precedence as to the edge of jurisdictional authority**. Therefore, I offer the following points as challenges to the amendment, which the Board must be prepared to address.

There is no point of law or regulation, that I am aware of or that has been cited, that would permit the SWRCB or and RWQCB to apply this policy to non 303(d) temperature listed water bodies (as stated in point 5 of the approved resolution R1-20014-006), as a threat to this beneficial use has not been determined to exist. If the combined activities of our unregulated past have not trended a given watercourse to 303(d) listing, then it is highly unlikely that modern practices, under the watchful eye of the NCRWQCB, in a time of environmental awareness would. The policy may be founded on the assumptions of canopy removal from historical timber harvest but fails to recognize that these affected riparian zones have been altered by successional biological processes since the time of alteration, such that most overstory canopy has not been inhibited from re-growing. Understory vegetation from these historic harvest have generally had over 30 years to re-establish and currently mimic effective shade. NCRWQCB Staff has orally compared 303(d) listing to be similar to endangered species listing, however pre-emptive protection is clearly not authorized under the ESA, or, CWA, CWC, regardless of any authority cited or claimed under the State's anti-degradation policy. The anti-degradation policy has no legal capacity to trump chaptered law or standing regulation. Furthermore as the statement in Point 6 of the approved resolution R1-20014-006,

"The Policy directs Regional Water Board staff to prevent, minimize, and mitigate temperature alterations associated with various factors through a combination of riparian management and other temperature controls as appropriate in nonpoint source control programs; permits and waivers, grants and loans, and enforcement actions; support of restoration projects; and coordination with other agencies with jurisdiction over controllable factors that influence water temperature,"

is premised on the assumption that the modulation of shade to alter the effect of natural occurring solar radiation on the surface of a watercourse is a "controllable factor" as defined by the legislative authority of PCA. This premise has not been supported in the OR and is not supported by the record of statute, regulation, or cited case law.

Region wide application of this restrictive policy is unnecessary in the absence of data demonstrating impairment. Additionally any claim that the regional policy is necessary given the large number of temperature impaired streams within the region, may on the outside appear rational, but fails to disclose the fact that most of these watersheds were 303(d) listed, in their entirety, by fiat listing in the absence of base line data. Many of these 303(d) listed watersheds would not be eligible under the State's current listing policy and proactive efforts to collect data to suggest their de-listing is currently underway.

As recognized in the NCRWQCB response to comments, the legislative intent of the PCA does offers some potential for broad interpretation of the powers, though limited, granted to the State and Regional Boards. The intent is included with bold used to emphasize the points to be discussed:

The legislature finds and declares that the people of the state have a primary interest in the ***conservation****, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.*

The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which ***is reasonable****,* ***considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.***

The Legislature further finds and declares that the ***health, safety and welfare of the people of the state*** *requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state* ***are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development*** *vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.*

It must however, be clearly recognized by this Board that "conservation" is different from "preservation."

Conservation is protection or careful management of the environment and natural resources such as forests, wildlife, soil, and water, while ***Preservation*** is the act of keeping safe or free from harm or decay.

As responsible stewards of the land and water resources of the state, RPFs and forest landowners must engage daily in conservation. Attempts to preserve the natural environment will always fail, as we attempt, in our folly, to vainly hold a dynamic system static, out of fear that things might and will change. The proposed Basin Plan Amendment and staff report clearly demonstrates an absence of understanding of the difference between these two concepts and the NCRWQCB has failed to recognize that preservation is neither a jurisdictional authority identified by the CWC intent, or even a real word probability given the dynamic nature of our environment.

Furthermore in the intent the statement of,

> "*attain the highest water quality* ***which is reasonable, considering all demands being made and to be made on those waters*** *and the total values involved, beneficial and detrimental, economic and social, tangible and intangible,"*

must be interpreted that as a society, we will always place pressures on our natural environment and must make choices as to how to conserve the values of beneficial uses in light of economic and social values. It was for this reason that Boards like the NCRWQCB are seated with members of recognized user groups, in addition to public members. It is the diverse backgrounds of the board members that provide the balancing of these values, regardless of the policies sought by the agency. It is this Board's due responsibility to recognize its jurisdictional limitations and direct its RWQCBs to recognize these in kind.

From the Act's intent, the potential sources of degradation were clearly listed as,

> ***"inter-basin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development...,"***

however, forestry or forest management was not listed as a source of potential degradation in the intent. Additionally it cannot be lumped with agriculture as the two are addressed and named separately in other components of the law under the CWA. Silviculture was not listed in the intent, as it was recognized then, as it should be now, that these activities maintain the land use in a condition that is hydrologically similar to the natural environment. Furthermore this recognition is supported by the absence of a forest representative within the required structure of the RWQCB's membership. Based on this absence of required representation, it is potentially arguable that the RWQCBs were never envisioned by the authors of the CWC to regulate Forest Operations, as the Board of Forestry was already in existence, as were the FPRs. In fact, the only clear requirement contained in the CWC for forestry, beyond a clear intent that these operations were covered by waiver, is to obtain a discharge requirement, for the agronomic applications of sewage sludge and other biological solids and the use of that sludge and those other solids (real defined waste) as a soil amendment (PCA § 13274). This is clearly an application where "real" waste could have the potential to cause pollutions, versus the flawed hypothesis of this NCRWQCB approved Basin Plan Amendment.

This basin plan amendment is requested based on an extremely loose and unjustified interpretation that the solar radiation, via its inverse, shade, is a "**controllable factor"** under the

definitions of CWC. The authority of the regional boards was never intended to be unlimited, or all encompassing, as is the case with the current NCRWQCB definition of "controllable factors," as contained in the North Coast Basin Plan which states:

> *"Controllable water quality factors are those actions, conditions, or circumstances resulting from man's activities that may influence the quality of the waters of the State and that may be reasonably controlled."*

To the contrary, the powers and authority of the RWQCB or any government agency are always limited. Any interpretation that the people California would grant unlimited authority to any agency offends reason. This board's authority was not authorized to extend to **any factor that may be controlled,** as is the current interpretation regarding this Basin Plan Amendment. These limitations are recognized by the SWCB approved CVRWQCB definition of "controllable factor", which states;

> *"Controllable water quality factors are those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the State, **that are subject to the authority of the State Water Board or the Regional Water Board**, and that may be reasonably controlled. Controllable factors are not allowed to cause further degradation of water quality in instances where uncontrollable factors have already resulted in water quality objectives being exceeded. The Regional Water Board recognizes that man made changes that alter flow regimes can affect water quality and impact beneficial uses." (**bold added for emphasis**)*

It must be clearly recognized by this Board and the NCRWQCB there are factors beyond their jurisdictional scope and that these factors must, based on their enabling legislation, be found on the control of pollution from waste (discussion to follow) or be disallowed as being extra jurisdictional.

Additionally PCA Section 13002 states clearly states that,

> "*No provision of this division or any ruling of the State Board or a regional Board is a limitation on the power of a state agency in the enforcement or administration of any provision of law which is specifically permitted or required to enforce or administer."*

The approved order acknowledges this fact in point 7, where it states,

> *"Other Policy components rely on the actions of other agencies, such as the Division of Water Rights, and cannot be specifically scheduled or otherwise dictated by the Regional Water Board."*

However this Basin Plan Amendment will, regardless of staff and Board claims to the contrary, result in a limiting factor to the CA Board of Forestry in the fulfillment of its duties regarding the promulgation of existing Forest Practice Rules pertaining to riparian areas and potentially limit the ability of the Department of Fish and Wildlife to issue Stream and Lake Bed Alteration Agreements under FCG 1600 seq. et. , based on the limitations set by the introduced concept of "*Site-specific potential effective shade.*" The options for these sister public resource agencies become extremely limited when the RWQCB maintains a policy that, "*Compliance is generally achieved by not removing or hindering vegetation that provides shade to a waterbody*." The approved resolution also states, "*This is accomplished by managing riparian areas*

differently than the surrounding land." However without the ability to remove and reduce canopy, the options to management becomes so limiting that management is essentially eliminated, creating a contravention of PCA Section 13002.

As pertaining to the NCRWQCB response to **General Comment #10: Regulation of Controllable Factors.** The response's claim regarding controllable factors that, "*one region's Basin Plan does not condition the contents of another region's Basin Plan,"* is not a point of contention in this case. The CVRWQCB definition of controllable factor was used to support that the scope of jurisdiction of controllable factor based on the authority granted by PCA. This limited jurisdiction must be upheld by the SWRCB and should result a revision to the NCRWQCB Basin Plan definition of a controllable factor to recognize the limitations of authority granted by the people of California.

Furthermore the claim that the, "*The North Coast Basin Plan is very clear that controllable factors are those actions, conditions, or circumstances resulting from anthropogenic activities that may influence the quality of the waters of the State and that may be reasonably controlled,*" is made by the NCRWQCB without recognition of the jurisdictional limitation established by PCA, to control pollution from waste.

As it pertains to this Approved Basin Plan Amendment, solar radiation or its inverse, shade, is clearly an attempt to define the effects of the sun, on the surface of the earth, as a "controllable factor". The effects of the sun on the earth, regardless of anthropogenic activity are clearly not subject to the authority of this Board. In a vain attempt to protect the environment, the NCRWQCB has attempted to justify that environment itself is a cause of degradation of the environment.

To qualify as a controllable factor the actions to be regulated must produce pollution as defined in the PCA, which defines the following;

> *f. "**Pollution**" means an alteration of the quality of the waters of the State **by waste** to a degree which unreasonably affects: (1) such waters for beneficial uses, or (2) facilities which serve such beneficial uses. "Pollution" may include "contamination". (**Bold added for emphasis**)*
>
> *And*
>
> *a. "**Waste**" includes sewage and any and all other substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal.*

Therefore ***pollution,*** as defined the basin plan, must come from ***waste***. However In the OR to **General Comment #11 "Heat as a Pollutant,"** the NCRWQCB clearly concedes that, "*Heat is not considered a waste in Porter-Cologne for the purpose of the Regional Water Board's waste discharge permitting authority*," and further proclaims to have a planning authority (unbounded by any limitation within Porter-Cologne) to address "*pollution*" not associated with waste discharges, or ability to condition controllable factors associated with an activity that does discharge waste. If Heat as a pollutant is not within the permitting authority, where does the NCRWQCB find such planning authority, which is not clearly delineated to the public and the

agency in the chaptered text of PCA? In Response to **General Comment #10** staff cite, (Wat. Code, § 13050, subd. (i).) (Wat. Code, § 13050, subd. (i).) which states,

> *"Water quality control" means the regulation of any activity or factor which may affect the quality of the waters of the state and includes the prevention and correction of water pollution and nuisance.*

This code sections offers no clarification to the concept of planning vs. permitted authority, but does recognize the limitations of control factor as being limited to pollution or nuisance.

Again the NCRWQCB staff have already conceded that the heat in this case is not a pollutant and therefore cannot represent a discharge of waste within the regulatory or "permitting authority" of any RWQCB. From a permitting and planning stand point, in the absence of waste, this policy is extra jurisdictional and the SWRCB must deny the amendment and remand it to the NCRWQCB for further consideration or seek an Attorney General opinion prior to approval. However, any opinion from the AG simply represents the opinion of a single person and does not carry the power of law.

The response to General Comment #11, also suggests that the NCRWQCB has a non-bounded jurisdiction pertaining to its ability to "condition controllable factors associated with an activity that does discharge waste." Again the SWCB must hold the NCRQWCB accountable to operate within the limits of its enabling legislation. The concept of conditioning controllable factors unrelated to a permitted pollutant to achieve some desired condition not associated with the regulated pollutant, based on a non-supported concept of "planning authority," appears extremely extra jurisdictional and without bounds. No rational act of the legislature would have assigned such omnipotent power to any such agency.

I have previously conceded that in the Basin Plan, Appendix 3, "Thermal waste" is clearly included in the definitions as;

> *"Thermal Waste - Cooling water and industrial process water used for the purpose of transporting waste heat."*

However, this definition is clearly not applicable to the current Basin Plan amendment. Solar radiation cannot reasonably be treated as a waste, a controllable factor, or a pollutant under the jurisdiction of the RWQCB or SWCB within the definitions contained in CWC or CWA based on its origin, which is the fission of helium and other gases on the surface of the sun. There is no existing PCA or NC Basin Plan language to apply this definition of "Thermal Waste" to this amendment.

The statement made in **General Response #11** by the NCRWQCB citing that, heat is recognized as a pollutant under federal law.

> "*Section 502 of the Clean Water Act [33 U.S.C. 1362], General Definitions, states that the term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, **heat**, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water (emphasis added)*,"

also does not support the argument at hand, as the CWA is pertinent to point-source pollutants only and solar radiation has already been conceded to not represent a pollutant point source or non-point source.

II. Required Compliance with the requirements of SB617.

I would also suggest to the Board that the actions of the NCRWQCB with regard to the Basin Plan amendment will be fairly challenged, by the Office of Administrative Law (OAL) and the regulated public to fall within the definition of "Major Regulation" (Government Code *SECTION 1. Section 11342.548)* and the actions of the NC Board have failed to demonstrate compliance with chaptered law as approved under SB 617, signed by the Governor on October 5, 2011.

Per the NCRWQCB General Comment #33: SB 617 Compliance "*Several comments raised the issue of compliance with the newly enacted Senate Bill 617. Specific comments embedded under this comment were addressed individually in response to the specific contention, i.e. adequacy of science, and need for regulation"*

The NCRWQCB states that, The Administrative Procedure Act (APA) establishes rulemaking procedures and standards for state agencies in California (Gov. Code, §§ 11340 *et. seq*.) to ensure that regulations are clear, necessary and legally valid. The claim is that SB 617 "appears" to amend existing OAL requirements to require a "standardized regulatory impact analysis" for a major regulation suggests an attitude of confusion as to its appearance of applicability. The required actions per SB617 are clear and transparent and represent an action of the people of California via the legislature. The claim that Chapter 3.5 of the APA (as amended by SB617) "generally" does <u>not</u> apply to the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with Section 13000) of the Water Code pursuant to Government Code section 11353 is without technical merit .

CGC 11353(b)(1) states,

> (*a) Except as provided in subdivision (b), this chapter does not apply to the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with Section 13000) of the Water Code.*

It appears, that the NCRWQCB attempted to use a literal interpretation of the printed law, by claiming that Chapter 3.5 of the APA does not apply to the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7, does not apply to the Basin Plan amendment. This may be interpreted as a correct statement, if the policy approved by the NCRWQCB was maintained by the NCRWQCB as a simple policy, however the statement may be considered invalidated when the NCRWQCB chose to amend the policy to the Basin Plan. Additionally implied reliance on CGC 11353(b)(1)(a) for non APA compliance based on the claim that the "Basin Plan" is just a "plan" represent a mis-use of the printed law. The "Basin Plan" is not clearly just a "plan" but represents the binding regulatory structure of the NCRWQCB. Claims that these documents are just "plans" and "policies" represents an intentional *play on words* to support the agencies OR and should not be supported by the SWCB.

Additionally, CGC 11353(b)(2) states,

> *(b) (1) Any policy, plan, or guideline, or any revision thereof, that the State Water Resources Control Board has adopted or that a court determines is subject to this part,* ***after June 1, 1992, shall be submitted to the office[OAL].***

CGC 11353(b)(2) clearly states that adoptions of policies, plans or guidelines adopted after June 1, 1992 are subject to Chapter 3.5 of the APA.

Furthermore as stated by the NCRWQB in its OR, "*Even if provisions of SB617 did apply to Basin Plan amendments, SB 617 requirements apply to a major regulation proposed on or after November 1, 2013. The Temperature Policy was proposed as early as November, 2011*," represents a willful attempt by the NCRWQCB to disenfranchise the people of the state by discounting the free act of the legislature that assigned the authority of the NCRWQCB and the SWRCB in the first place. The claim that the Basin Plan amendment is exempt from the new provision of SB617, based on claims of initiating the process prior to the implementation date discounts the fact that the first hearing on the amendment is dated **November 20, 2013**. CEQA compliance of the Board's resolution was then finalized on **March 13, 2014**, with full knowledge of the new requirements, raised during public comment. This circumvention if the will of chaptered law by the NCRWQCB should not be supported by the SWCB.

SB617 also stated;

> *SECTION 1. Section 11342.548 Government Code "Major regulation" means any proposed adoption, amendment, or repeal of a regulation subject to review by the Office of Administrative Law pursuant to Article 6 (commencing with Section 11349) that will have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars ($50,000,000), as estimated by the agency.*

The impacts of requiring forest landowners to retain, "shade" would result in the encumbrance of extensive tracks of private timber and productive agricultural land value for public benefit. The value of those lands would be essentially "taken" for the public good, without compensation, which is unlawful. The cost of this private property, its potential associated resource value, and downstream impacts to the CA economy, can conservatively be assumed to exceed fifty million dollars in a single county.

As addressed in, **General Comment #34: Taking of Private Property, staff claim that** taking occurs when a landowner is deprived of all economic use of their property, however this limited definition of "take" is not supported by citation. Take may be defined as when the government acquires private property and fails to compensate an owner fairly, however a taking can occur even without the actual physical seizure of property, such as when a government regulation has substantially devalued a property. Secondly staff claims that the, *"Policy is clear that riparian management can be tailored for a specific activity or geographic area, and relevant factors can be considered before defining the precise nature of a management measure,"* does very little to provide regulatory assurances that a landowner project or projects can be developed based on the known rules of state, only to be significantly modified after project submission and review adding undue cost to the landowner.

As to , **ECON Comment #1, the NCRWQCB, r**egardless of any implied misunderstanding by the commenter, in the response to **ECON Comment #1, the NCRWQCB response claims,**

> *"The foregone profit associated with canopy retention cost and the preservation of shade on timberlands would require a project level analysis and is beyond the scope of this analysis. . ."*

However without some level of analysis within the scope of the CEQA document there is no ability for the public to evaluate the true economic impacts of the action taken and approved by the NCRWQCB.

As to the claim reported by the NCRWQCB in response to ECON Comment #2,

> "*that the economic consideration related to individual harvest plans are too complex to estimate at a regional policy level*,"

is not supported by evidence or citation. A preliminary analysis must be required and at least attempted. This may require the NCRWQCB to contract with a specialist, as their current staff matrix is absent of individuals legal qualified to conduct the assessment (see Professional Foresters Law pertaining to economic evaluations on forested landscapes).

The economic analysis contained in the staff report is inadequate as it provides no real analysis and fails to evaluate the total opportunity cost born by the regulated public pertaining to the implementation of the amendment and only address the cost born to comply where compliance is lacking and restoration is required.

Furthermore even when the values as citied by, **Practice 391 Riparian Forest Buffer Scenario #2-#4** are averaged, at a cost of $**3595.86 per acre**, the definition of major regulation is met with the application of restoration establishment on approximately 13,900 acres. This acreage represents on a small fraction of the area of the jurisdiction of the NCRWQCB and given the cited problem of wide spread 303(d) temperature impairment, must represent a small fraction of area requiring restoration to achieve temperature attainment. Clearly the implementation of the policy will meet the SB617 standard of major regulation.

SB617 additionally states;

> *SEC. 2. Section 11346.2 of the Government Code, as added by Section 2 of Chapter 398 of the Statutes of 2010, is amended to read:*
>
> *11346.2. Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:*
> *(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:*
> *(1) A statement of the specific purpose of each adoption, amendment, or repeal, **the problem the agency intends to address**, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall **enumerate the benefits anticipated** from the regulatory action, including the benefits or*

*goals **provided in the authorizing statute**. The benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.*

The existence of, "*the problem that agency intends to address*," has not been clearly demonstrated or that a problem even exists in reality, based on observed data. The NCRWQCB OR fails to address and defend the deficiencies of a problem statement. Additionally the statement does not, "*enumerate the benefits anticipated from the regulatory action*."

Demonstrated compliance with SB 617 must be achieved prior to any further action by the SWCB. Based on the deficiencies previously identified, any Board action to approve the amendment as noticed will open exposure to the subsequent risk of legal challenges by countless private landowners, which will be able to demonstrate significant financial harm or takings by the NCRWQCB.

CONCLUSIONS

- Based on the legislative and regulatory record demonstrated above, the controllable factors of this Board's authority are clearly intended to be broad, yet limited in scope. Solar radiation is clearly not a controllable factor, within the constructed jurisdictional authority of this or any other level of state board based on the enabling legislation of PCA.

- Any reference to the impacts of solar radiation, or its inverse, shade as a controllable factor, with regards to the temperature Basin Plan amendment, should be removed. The authority granted to the SWCB and RWQCBs is limited in scope to the impacts of "pollution" caused by "waste", as stated in the basin plan, and defined in the PCA.

- The actions of the NCRWQCB are not in compliance with existing state law as amended by, SB617.

Please deny this Basin Plan Amendment and clearly direct the NCRWQCB to fairly maintain the public's interest in the waters of the state and demand the balancing of values to maintain the highest water quality that is **reasonable,** given its other demands, rather than singling out a single beneficial use. Furthermore provide clear guidance to the NCRWQCB that planning authority is in fact limited to controllable factors within the permitting jurisdiction as defined by PCA and are not unlimited to any imaginable factor as is being claimed by the "planning authority" of the NCRWQCB**.**

Actions requested of this Board prior to any future adoption.

- Seek clarification of legal authority, given the lack of precedent of authority regarding the interpretation of shade, not associated with pollution from waste, as a controllable factor under the PCA
- Require the NCRWQCB to demonstrate required compliance with existing State Law as amended by SB617.

We live in a world governed by the clear language of the printed law. Desire conditions pertaining to the quality of the waters of the state is a noble goal, that should be valued by all stakeholders, but any individual agency's attempt to regulate conditions to any desired condition are clearly bound by jurisdictional side bars. No single agency has been given the authority to regulate to Utopia, or has the authority over all factors simply because there is a perception of the authority to control them.

Any staff considerations of the "natural" world must be made with the people of California being part of it. As stated in CEAQ Chater 3 Article 20 **§ 15360,**

> *"Environment" means the physical conditions that exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, or objects of historic or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The "environment" includes both natural and man-made conditions.***"**

Due to this fact, we must collectively conserve verses preserve our natural resources. The application of this or any blanket policy will fail to achieve the maximum benefit to the people of California due to its nature to simplify the observed diversity of conditions present within the jurisdiction of the North Coast Regional Water Quality Control Board.

Again it is my utmost hope that these comments are not taken as confrontational, but instead they are offered as constructive comment. However, a very wise forester told me once that,

-"Relationships can always be mended, but bad policy and regulation lingers for generations."

Thank-you to the Board members of the SWCB for the opportunity to provide these comments and a special thanks to the Board members and Staff of the NCRWQCB that has worked long and hard on this project and engaged in outreach to the regulated community, which was greatly appreciated, though the outcome has been less than satisfactory to many. I look forward to future opportunities to collaborate on matters pertinent to the nexus of the quality of the State's waters and its forests.

Sincerely,

Jason Poburko

Jason S. Poburko
RPF # 2769

Cc: Keith Gilles, Chair, California Board of Forestry
George Gentry, RPF, Executive Officer of Board of Forestry

Matt Dias, RPF, Executive Officer, Foresters Licensing
Dave Bischel, President CAL Forest
Jack Rice, California Farm Bureau Legal Council
Kevin Conway, RPF, President California Licensed Foresters Association
Larry Camp, RPF, President California Forest Land Owners Association
Claire McAdams, The Buckeye Conservancy