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6/7/06 Bd Mtg: Scott River-
Item__Deadline 5/10/06

BY E-MAIL AND FACSIMILE

Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Re: *Comment Letter Sediment and Temperature TMDL in the Scott River Watershed*

Dear Board Members:

These comments are in response to the Notice of Opportunity for Additional Comment on the Scott River TMDL published April 27, 2006. This firm represents Save Our Shasta and Scott ("S.O.S.S."). S.O.S.S. is an organization of concerned citizens who live and work in the Shasta and Scott River Valleys in Northern California. Members of S.O.S.S. are vitally interested in proposed and existing regulation of water resources in their valleys. They are concerned that additional regulation may disrupt and undermine their livelihoods and communities. In addition, landowners and public agencies in the Shasta and Scott River valleys have been very active in pursuing conservation and restoration measures to benefit anadromous fish. Those voluntary conservation efforts become more difficult in an environment of increased regulation.

The notice seeks comment concerning "how to improve the implementation plan and specific recommendations on flow options that the State Water Board might take in the watershed." This letter addresses four legal issues raised by this scope.

Comment No. 1: At this juncture, the State Board's options are limited to approving the basin plan amendment as submitted, or returning it to the Regional Board for further consideration and resubmission.

The scope of requested comments suggests that the State Board may be considering making amendments to the implementation plan, including adding "flow options." It is not clear when the State Board proposes to make such amendments. At this juncture, at least, the State Board has no authority to revise the plan.

The question before the State Board is whether to approve an amendment to the Water Quality Control Plan for the North Coast Region, as proposed by the North Coast

Regional Water Quality Control Board. The State Board conducts such review pursuant to Water Code section 13245. That section provides in pertinent part as follows:

The state board may approve such plan, or return it to the regional board for further consideration and resubmission to the state board. Upon resubmission the state board may either approve or, after public hearing in the affected region, revise and approve such plan.

The State Board has two options. First, it may approve the plan amendment as proposed by the Regional Board. Alternatively, it may return the plan to the Regional Board for further consideration and resubmission to the State Board. And, the State Board is required to act within the time frames set forth in Water Code section 13246.

The State Board cannot itself adopt revisions to the basin plan, at least not yet. It must first allow the Regional Board an opportunity to reconsider and resubmit the plan. Only "upon resubmission" may the State Board revise the plan. Water Code section 13245 reflects a policy judgment by the Legislature that basin plans are best developed at the regional level. In furtherance of that policy, the Legislature has required that State Board allow the Regional Board an opportunity to address any perceived deficiencies in the basin plan amendment. Water Code section 13245 does allow the State Board to revise the plan after resubmission by the Regional Board. However, in another requirement reflecting the Legislature's judgment that regional input is important, the State Board may do so only after conducting a public hearing held in the affected region.

Comments gathered in response to the April 27th notice might prove useful for the purpose of suggesting potential revisions to the plan. But if the State Board does not approve the proposed plan at its June 7th meeting, its only alternative is to return the matter to the Regional Board for further consideration and resubmission.

Comment No. 2: The State Board does not have water rights permitting authority over many of the existing diversions in the Scott Valley.

The reference to "flow options that the State Water Board might take in the watershed" does not shed much light on what particular actions the State Board may be considering. If the State Board had been more specific, S.O.S.S. might have more specific comments in response. As a general comment, to the extent that the State Board is considering restricting existing diversions to increase instream flows, it must be cognizant of the limits of its water rights permitting authority. In the Scott Valley, many of the water rights are pre-1914 rights, and therefore not subject to the State Board's permitting jurisdiction. *People v. Shirokow*, 26 Cal.3d

301, 309 (1980). Likewise, users of percolating groundwater in the Scott Valley are not subject to the State Board's permitting jurisdiction. Water Code § 1200.

In addition, the rights of most of the diverters within the Scott Valley are the subject of one of three judicial decrees. The Superior Court for Siskiyou County has retained jurisdiction over such water rights. The Superior Court, not the State Board, is the appropriate forum for any proceedings involving amendment or adjustment of such rights, assuming any such adjustment were appropriate.

Comment No. 3: No one's water rights can be amended in this proceeding.

In response to the broad reference in the notice to "flow options that the State Water Board might take in the watershed," we make what may seem an obvious point but one that nonetheless is important. The only action noticed by the State Board is whether to approve the basin plan amendments proposed by the North Coast Regional Water Quality Control Board. Without suggesting that the State Board actually intends to modify anyone's rights in this proceeding, it has not provided adequate notice to do so in this proceeding. Any proceeding to amend water rights requires fair notice and an opportunity to be heard on all the many issues involved in such a proceeding.

Accordingly, whatever "flow options" the State Board decides may be appropriate for the watershed, to the extent they involve limitations upon water rights, they may be implemented only through separate and duly noticed water rights proceedings.

Comment No. 4: The Regional Board and State Board should maintain flexibility in any implementation plan.

The Regional Board's approach to implementation of the Scott River TMDL maintains flexibility. That is a sound approach. The State Board should be careful to avoid revisions to the implementation plan that would constrain that flexibility.

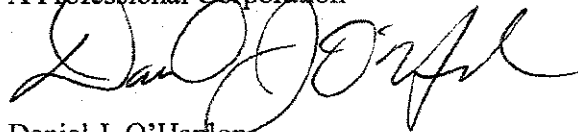
The recent decision in *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674 (2006) (*petitions for review pending*) illustrates the problems that can arise from not allowing for flexibility in implementation. There, the Court of Appeal found that the State Board had not adequately implemented a portion of the 1995 Bay-Delta Plan, because Revised Water Rights Decision 1641 allowed for phased implementation of the Vernalis pulse flow objective, and allowed various parties to pursue the Vernalis Adaptive Management Program. The Court of Appeal did not question the merits of phased implementation, or of adaptive management. But, it found that the language of the 1995 Bay-Delta Plan did not allow for those approaches. It found that Revised Water Rights Decision 1641 was flawed because the State Board's authority

"to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing." 136 Cal.App.4th at 729. Accordingly, the State Board should be careful to avoid changes to the Regional Board's plan that would constrain flexibility in achieving water quality objectives. The issues are complex, and the consequences of a particular approach may not be apparent today. The proposed plan allows for adjustment in response to experience and actual conditions. It would be unwise for the State Board to promote or adopt amendments now that would constrain that flexibility, and thereby foreclose reasonable options in any future water rights proceedings.

We thank you for the opportunity to submit these comments. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

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A Professional Corporation



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