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*Sent via electronic mail and certified mail on date shown below, return receipt requested*

May 9, 2014

State Water Resources Control Board  
Office of Chief Counsel  
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**Re: Motion for Stay of North Coast Regional Water Board Order R1-2012- 0087; Waste Discharge Requirements for Discharges Related to Green Diamond Resource Company's Forest Management Activities Conducted Within the Area Covered by its Aquatic Habitat Conservation Plan in the North Coast Region; Humboldt and Del Norte Counties (Ref: (Case No. SWRCB/OCC File no. A-2234))**

Dear Ms. Bashaw and State Water Board Officials:

The Environmental Protection Information Center ("EPIC"), and Sierra Club Redwood Chapter, hereafter "Petitioners," request a stay of the effect of North Coast Regional Water Quality Control Board ("Regional Board") Order No. R1-2012-0087. Petitioners request that the State Water Resources Control Board ("State Board") schedule a hearing on this motion for stay as provided pursuant to 23 California Code of Regulations section 2053(b)(1).

**Procedures and Substantive Requirements for a Motion for Stay**

As provided in 23 California Code of Regulations section 2053(a) a stay of the effect of an action of a Regional Board shall be granted if Petitioner(s) allege facts and produces proof of all of the following:

- (1) substantial harm to petitioner(s) or to the public interest if a stay is not granted,
- (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted, and
- (3) substantial questions of fact or law regarding the disputed action.

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A petition for a stay shall be supported by a declaration under penalty of perjury of a person or persons having knowledge of the facts alleged.

Upon a documented showing by Petitioners that the request meets these prerequisites, the State Board shall issue a notice to all interested persons that a stay is being considered. 23 CCR § 2053(b). The State Board must hold a hearing prior to issuing a stay if requested by any of the following: the Petitioner(s), the Discharger (if not the petitioner), the Regional Board, any person designated as a party by the Regional Board, or any person designated pursuant to subparagraph (2). A hearing may be held by the State Board or a member of the State Board. 23 CCR § 2053(b)(1).

If a hearing is held, notice shall be given in such manner and to such persons, in addition to the Petitioner, as the board deems appropriate. 23 CCR § 2053(b)(3). A request for a stay may be denied without a hearing. 23 CCR § 2053(b)(4). If no hearing is held, the State Board may issue a stay only after providing all interested persons with notice and an opportunity to comment on the request for stay. 23 CCR §2053(b)(5). The State Board shall review and act on the request for a stay within 60 days from the date of mailing the notification described in section 2050.5(a). This limit may be extended by written agreement from the petitioner. 23 CCR § 2053(d). Nothing in the subsection precludes the State Board from issuing a stay of the effect of a regional board action upon its own motion. 23 CCR §2053(c).

### **Statement of Facts**

On November 5, 2012, EPIC and others filed a Petition for Review of the October 4, 2012 Regional Board Order No. R1-2012-0087 with the State Board. The State Board has assigned the Petition for Review a case number. (Case No. SWRCB/OCC File no. A-2234). To date, the State Board has not responded to our Petition for Review. The Petition for Review presents sufficient facts and evidence to support issuance of a stay. *See* Declaration of Rob Di Perna, attached hereto.

### **Substantial Harm to Petitioners and the Public Interest if Stay is not Granted**

A motion for stay must establish that substantial harm will be done to the Petitioner(s) and the public interest if the stay is not granted. 23 CCR § 2053(a)(1). Failure of the State Board to consider and respond to the 2012 Petition for Review in a timely manner has aggrieved the Petitioners and has harmed the public interest.

Green Diamond Resource Company (hereafter “Discharger”) continues to operate under the approved Waste Discharge Requirement Order (Order No. R1-2012-0087) while the Petition for Review languishes at the State Board level. The failure of the State Board to promptly consider and respond to the Petition for Review has harmed Petitioners and the public interest, by failing to address and remedy significant legal and factual issues, and by allowing the Discharger to operate under a permit that is at issue pursuant to a formal administrative petition. The Discharger continues to pollute Waters of the State pursuant to the Regional Board Order, despite the existence of substantial questions relating to law and procedure. Failure of the State

Board to consider our petition for review in a timely manner has harmed the Petitioners and their rights under the law, and the public interest.

**No Substantial Harm will be Done to Other Interested Parties or the Public Interest if Stay is Granted**

Neither the Discharger, nor the public interest generally will be harmed if the motion for stay is granted. The Discharger would still have the opportunity to continue its forest management operations via application for enrollment in the North Coast Regional Board's General Waste Discharge Requirement program for non-federal lands (Order No. R1-2004-0030), or by applying for enrollment in the Categorical Waiver of Waste Discharge Requirements program (Order No. R1-2009-0038). The Discharger also will be able to continue its forest management operations related to its road discharges pursuant to Order No. R1-2010-0044. There is no reasonably foreseeable adverse impact to the Discharger, or the public interest should the State Board issue a stay of Order No. R1-2012-0087.

**Substantial Questions of Fact or Law Regarding the Disputed Action**

A stay is necessary to address the Regional Board's action as inappropriate and improper, because it does not improve water quality in the affected watersheds and violates state and federal laws. All issues raised in the Petition for Review were presented to the Regional Board before the Regional Board acted. The Petition for Review specifically identified several disputed substantial questions of fact or law. These substantial questions of fact or law include: 1) violations of the California Environmental Quality Act ("CEQA"); 2) violations of California Endangered Species Act ("CESA"); and 3) violations of the federal Endangered Species Act ("ESA").

*1. Violations of California Environmental Quality Act*

As identified in the Petition for Review, the Regional Board violated CEQA by failing to prepare an Environmental Impact Report ("EIR") and for filing deficient environmental documentation. The Regional Water Board prejudicially abused its discretion in violation of CEQA by relying on inadequate informational documentation, and not supporting its actions with substantial evidence in the record.

The Regional Board further failed to comply with CEQA by relying on the analysis contained in the Environmental Impact Statement ("EIS") for the Discharger's Aquatics Habitat Conservation Plan ("AHCP"), rather than conduct a Regional Board analysis in the form of an EIR.

Furthermore, the Regional Board failed to sufficiently address and mitigate for cumulative impacts to water quality and other resources from logging within impaired watersheds. "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (Title 14 CCR §15355). "The cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (*Id.*, subd. (b)).

Petitioners presented evidence of cumulative impacts from clearcut logging, and as documented in recent peer review scientific literature, including Klein et al. (2012). The Regional Board failed to present substantial evidence to counter Petitioners' comments, including specific comments from Klein and other researchers.

### 2. Violations of California Endangered Species Act

The Regional Board abused its discretion and violated CESA by failing to consult with the California Department of Fish and Wildlife ("CDFW") over state-listed species not analyzed in the EIS for the Discharger's AHCP. The Longfin Smelt (*Spirinchus thaleichthys*) is listed under CESA as a "threatened" species as of 2009. This species was not analyzed and no Incidental Take Permit ("ITP") is authorized.

Under CESA, the Regional Board is required to consult with the California Department of Fish and Wildlife over impacts to species listed under CESA or the ESA and acquire an ITP. (See CA Fish and Game Code 2080.1 & CA Fish and Game Code 2081.). The Regional Board abused its Discretion, and violated CESA by failing to consider, analyze, or consult for this species.

### 3. Violations of Federal Endangered Species Act

The Regional Board has violated the ESA by failing to consult over potentially significant impacts to Pacific Eulachon (*Thaleichthys pacificus*) a species that is federally-listed as "threatened." The EIS for the Discharger's AHP did not analyze potential significant adverse impacts to this species, and no ITP for this species is issued.

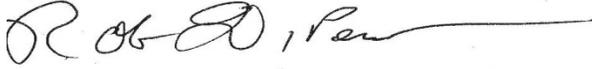
Under the federal ESA, again, consultation is required to take place and take permits issued. 16 U.S.C. §§ 1531 *et seq.* The Discharger's Aquatic HCP and Incidental Take Permit do not allow for "take" of Pacific Eulachon, and therefore the company is in ongoing violation of the terms for reinitiation under the ESA. The Regional Board's failure initiate consultation for the Pacific Eulachon subjects the Regional Board to liability,

### **Request for Stay**

Pursuant to Water Code section 11321 Petitioners hereby move for a stay of the effect of Regional Board Order No. R1-2012-0087. Petitioners have met the pre-requisites for a stay, and submit the Declaration of Rob Di Perna to attest to the facts alleged. Petitioners request that the State Board promptly schedule a hearing on this matter as provided pursuant to 23 California Code of Regulations section 2053(b)(1)).

Please do not hesitate to contact me at the number provided below as necessary to discuss this matter further. We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Rob DiPerna", with a long horizontal flourish extending to the right.

Rob DiPerna  
California Forest and Wildlife Advocate

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