

April 15, 2019

North Coast Regional Water Quality Control Board  
Attn: Mr. James Burke  
5550 Skylane Blvd, Suite A  
Santa Rosa, CA 95503

**RE: Comments Regarding Proposed Initial Study, Proposed Mitigated Negative Declaration, and Proposed Order No. R1-2019-0021, Waste Discharge Requirements for Nonpoint Source Discharges and Other Water Quality Factors Related to Timber Operations and Associated Activities Conducted by Humboldt Redwood Company, LLC in the Upper Elk River Watershed, Humboldt County**

Dear Mr. Burke and North Coast Regional Water Quality Control Board:

The following comments are presented on behalf of the Environmental Protection Information Center—(EPIC), Humboldt Baykeeper, and Sierra Club Redwood Chapter North Group (hereafter, “Commenters”), in response to the March 13, 2019 Public Notice of Intent to Adopt and solicitation of Public Comments for the Proposed Revised Initial Study, Proposed Revised Mitigated Negative Declaration, and Proposed Order No. R1-2019-0021.

Commenters appreciate the opportunity to provide comments and requests that the Regional Board respond in writing to all comments contained herein prior to action on the Proposed Order and related documents.

**Summary**

Proposed Draft Order No. R1-2019-0021 as presented represents some positive improvements from Order No. R1-2016-004, previously adopted by the Regional Board to regulate and constrain discharges of nonpoint source sediment and other controllable water quality pollutants in the Upper Elk River Watershed. Nevertheless, the Draft Proposed Order itself is deficient in many respects as outlined herein, particularly as pertains to early wet weather season road construction restriction roll-backs.

Further, the Regional Board’s continued reliance on a Mitigated Negative Declaration as a suitable evaluating and permitting framework to comply with requirements of the California Environmental Quality Act (“CEQA”) and its implementing regulations has been and remains inappropriate as outlined herein. The Draft Proposed Revised Order and supporting analysis documents fail to adequately address critical requirements of both CEQA as well as state and federal water quality control law and policies, rendering them deficient in both aspects. Finally, both the Proposed Revised Initial Study and Mitigated Negative Declaration, and the Draft Proposed Order contain significant errors and omissions rendering them inadequate.

Continued piecemealing of adoption of plans to control nonpoint source sediment and other pollutants impairing the quality and beneficial uses and water quality objectives of Waters

of the State in the Upper Elk River Watershed and the analysis of these, while failing to acknowledge and recognize the long-standing existence of nuisance conditions that represent a pre-existing significant adverse cumulative impact on the environment and that violates State and Federal Water Quality Control Laws is a fatal flaw and error that is perpetuated in the entirety of the package provided for Notice and Comment on March 13, 2019.

Unless and until the Regional Board seeks to tailor its actions, analysis, implementation plans, and permits based on necessary legal, regulatory and public trust obligations rather than to the particulars of preferred management and economic objectives of the pollution discharges at-issue, Water Quality Objectives will not be attained and the quality and beneficial uses of Waters of the State in the Upper Elk River Watershed will not be restored and recovered or the nuisance conditions abated or prevented from reoccurring.

### **Upper Elk River Watershed Water Quality Impairment**

Historic and ongoing land management, including logging operations, have drastically altered the Elk River. The Elk River watershed is identified on the Clean Water Act Section 303(d) List of Impaired Waterbodies as impaired for sediment, meaning that sediment pollution inhibits the realization desired beneficial uses, such as recreation, domestic water supply, habitat for endangered species, such as the coho salmon. Sedimentation in the Elk River, much of which is attributable to historic and ongoing logging in the watershed, has “infilled” much of the Elk River channel, raising the natural water level of the river.

Specifically, the Action Plan for the Upper Elk River Sediment TMDL adopted by the Regional Board states:

“Site specific assessment of water quality conditions in the Upper Elk River Watershed confirm that sediment discharges from timberlands in the upper watershed and sedimentation in the impacted reaches, combining with other natural (e.g., tectonics, geology, soil characteristics, geomorphology, climate and vegetation) and anthropogenic (e.g., pre-Forest Practices Act logging, ranching, farming, roads, and residential development) factors exceed the water quality objectives for sediment, suspended material, settleable matter, and turbidity and result in adverse impact to several beneficial uses, including domestic water supplies (MUN), agricultural water supplies (AGR), cold water habitat (COLD); spawning, reproduction and early development (SPWN); rare, threatened, or endangered species (RARE), and recreation (REC-1 and REC-2). Sedimentation in the impacted reaches also has resulted in conditions of nuisance, including increased rates and depth of annual flooding and loss of property, use of property, access to property, and risk to human health and welfare. The impacted reach extends from the confluence of Brown’s Gulch on the North Fork Elk and Tom Gulch on the South Fork Elk to the mainstem Elk River at Berta Road and is contained within the delineated boundaries of the Upper Elk River Watershed.” (TMDL Action Plan, I. Problem Statement, p. 2)

The Action Plan also describes the compounding and cumulative effects of sediment deposit aggradation that continues to exacerbate and perpetuate nuisance conditions in the Upper Elk River:

“Sediment transported from the upper sub-watersheds has deposited in low gradient channel and floodplain reaches, impacting residential and agricultural communities with increased incidence of overbank flooding, defined as nuisance conditions. Ongoing sediment loading continues to result in aggradation of fine sediment, encroachment of riparian vegetation, and impairment of beneficial uses, though the total volumes of delivered sediment have decreased since the 1988-1997 time period.” (*Ibid.*, p. 3)

The California Water Code at 13050(m) defines nuisance to mean “anything which meets all of the following requirements: (1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (3) Occurs during, or as a result of, the treatment or disposal of waste.”

A nuisance condition as defined at California Water Code 13050(m) exists and is acknowledged in Upper Elk River TMDL Sediment Source Analysis Synthesis (Tetra Tech 2015), the Action Plan for the Upper Elk River Sediment TMDL contained in the North Coast Regional Water Quality Control Plan, and in the recently-released Elk River Recovery Assessment Framework Draft (CalTrout, Stillwater Sciences, and Northern Hydrology and Engineering, 2018)

The Proposed Draft Revised Initial Study, Proposed Draft Revised Mitigated Negative Declaration, and the Proposed Draft Revised Order, however, all in some way refer to “preventing,” or “abating,” nuisance. Commenters are at a loss to understand how nuisance can be prevented or abated by adoption and implementation of the Draft Proposed Revised Order given that one clearly already exists and is ongoing. Nuisance conditions have been occurring and have existed now for two decades in the Upper Elk River watershed, and the beneficial uses of water have been impaired, and water quality objectives unattained with the goal of ever attaining those objectives now seemingly a far-off hope.

### **Procedural History for Upper Elk River TMDL and TMDL Action Plan and WWDRs**

The Upper Elk River Watershed was listed in 1998 as sediment impaired pursuant to section 303(d) of the federal Clean Water Act, with industrial logging and timber harvest identified as the major anthropogenic factor contributing to the sediment impairment. Despite this, and a 2002 MOU with the federal Environmental Protection Agency (EPA), the Regional Board did not adopt a Total Maximum Daily Load or Load Allocation for the Upper Elk River Watershed until 2016.

The Regional Board held numerous meetings and workshops in the intervening years. Finally, 18 years later, the Regional Board produced a public Notice of Intent to Adopt a TMDL

Action Plan and Basin Plan Amendment for the Upper Portions of the Elk River watershed on December 23, 2015. The Regional Board issued a concurrent Notice of Intent to Adopt a revised WWDR for Humboldt Redwood Company Timber operations in the Upper Elk River watershed that included an early version of the Adopted Order, on that same date.

The Upper Elk River TMDL Action Plan and Basin Plan Amendment (TMDL Action Plan) were adopted by the Regional Board on May 5, 2016.

The TMDL Action Plan contemplates a three-part strategy for controlling sediment discharges and remediating impaired water quality conditions. These are: (1) revised WDRs for potential sources of discharges, including revised WDRs for the two industrial timberland owners in the upper watershed (Humboldt Redwood Co., LLC (HRC) and Green Diamond Resource Company), a revised WDR for NTMP holders in the watershed, and enrollment of activities restoration activities conducted by the Bureau of Land Management in the Headwaters Forest Reserve under a WDR permitting framework; (2) The Elk River Recovery Assessment Program, and; (3) the Elk River Stewardship Group, a watershed stakeholder group.

Order No. R1-2016-004, the current Waste Discharge Requirement for Humboldt Redwood Company, and which the Draft Proposed Order is intended to revise and replace, was adopted by the Regional Board on November 30, 2016.

The Regional Board will recall that Order No. R1-2016-004 is a substantially weakened version of the Order that had been originally circulated to the public for review. The Regional Board issued a Notice of Intent to Adopt an earlier version of the order for its April 7, 2016 Board meeting, but no action was ultimately taken at that time. Again, the Regional Board then issued Notice of Intent to Adopt an earlier version of the order at its May 5, 2016 Board meeting but took no action. Then, the Regional Board issued its August 30, 2016 Notice of Intent to Adopt the Adopted Order at its November 30, 2016 meeting.

At its November 30, 2016 meeting, the Regional Board made three substantive changes to the order from the dais prior to ultimately deciding to promulgate the now-Adopted Order. The version of the order upon which Board Members took action was itself a changed version from that circulated to the public for comment as part of the August 30, 2016 Notice of Intent, which was the version to which the Regional Board provided formal written response to public comments.

The three substantive changes made by the Regional Board to the now-Adopted Order from the dais without re-notice or opportunity for public comment were: (1) Changing from delineation of five “high-risk sub-watersheds,” to the much less restrictive “high-risk areas,” defined by Hookton soil formation; (2) Applying enhanced Riparian Management Zone (RMZ) protective measures only to the so-called “high-risk areas,” as opposed to those applying to the entire HRC ownership in the watershed; and (3) Deleting enhanced wet-weather road use restrictions present in previous iterations of the Order.

On August 1, 2017, the State Water Resources Control Board held hearing and ultimately approved the Regional Board’s adoption of the Upper Elk River TMDL for Sediment and the

Action Plan for the Upper Elk River TMDL for Sediment, now chaptered in Section IV of the North Coast Regional Water Quality Control Plan (hereafter, “Basin Plan”). The State Board adopted Resolution No. 2017-0046, in which it ratified the adoption of the Upper Elk River TMDL for Sediment and the Action Plan, rendered clarifications of its understanding of the meaning of certain sections of the TMDL and TMDL Action Plan, and issued directives to the Regional Board based upon its clarifications and understandings.

As stated in the Regional Board’s March 13, 2019 Notice:

On May 12, 2016, the Regional Water Board approved the Action Plan for the Upper Elk River Sediment TMDL (TMDL Action Plan). On April 4, 2018, the United States Environmental Protection Agency approved the TMDL Action Plan, the final step in the process necessary for the Action Plan to be amended into the Basin Plan, following approvals by the State Water Resources Control Board on August 1, 2017, and the Office of Administrative Law on March 8, 2018.

The Program of Implementation, one of the key components of the TMDL Action Plan, identifies a combination of regulatory and non-regulatory actions that will lead to the attainment of water quality objectives, recovery of beneficial uses, protection of high-quality waters, and abatement of nuisance conditions in the Upper Elk River Watershed. Due to continued impairments in the watershed and the inherent uncertainty with existing sediment transport processes, the Program of Implementation is an adaptive management program that includes sophisticated watershed modeling, collaborative watershed stewardship, and experimental pilot remediation projects. In November 2018, the Regional Water Board received the report *Elk River Recovery Assessment: Recovery Framework* from the ERRA Project Team. A pilot sediment remediation project was also required and has been completed. The pilot project was co-funded by the Coastal Conservancy, with cost shares from CalTrout and HRC. This project involved the removal of the road base at the Elk River Steel Bridge and removal of trees and sediment from a portion of the connected floodplain. CalTrout and its subcontractors successfully completed construction of this project in September 2017. The Regional Water Board serves as the lead agency for two additional sediment remediation pilot projects in the impacted reach of the Elk which are currently in the CEQA permitting phase.

In Resolution No. 2017-0046 adopting the TMDL Action Plan, the State Water Resources Control Board included findings that described its understandings of the TMDL Action Plan’s requirements: “(1) that hillslope indicators and numeric targets in Table 2 apply throughout a discharger’s area of land ownership and not solely in areas of active harvest, (2) that the North Coast Water Board’s WDRs and any other orders for the two major landowners that conduct timber harvesting will incorporate specific provisions that implement all of the hillslope indicators and numeric targets in Table 2, unless the regional board makes specific findings about why any omitted hillslope indicators or numeric targets are not appropriate or feasible, (3) the WDRs and any other orders for the two major landowners will also contain any additional specific provisions to ensure that all anthropogenic discharges of sediment are minimized and eliminated, and (4) in the absence of a future amendment to the TMDL Action Plan, including an amendment based

on successful implementation of the Watershed Stewardship Program resulting in expanded sediment loading capacity in the impacted reach, the WDRs and any other orders will require the landowners to achieve the zero load allocation for all anthropogenic discharges of sediment as soon as feasible, but no later than 2031.” (Regional Board Notice of Intent to Adopt and Notice of Public Hearing, p. 2, March 13, 2019)

This excerpt from the March 13, 2019 Notice fails to include recognition of an additive feature of the State Board’s directives to the Regional Board, specifically, that necessary revisions to the WWDRs be accomplished as soon as possible but by no later than January 2019. The Regional Board has failed to act to meet this prescribed timeline and is only proposing to consider revisions to one of the two WWDRs as part of the March 13, 2019 Notice, with a hearing to consider adoption not scheduled until June 2019.

The Proposed revised Initial Study, Proposed Revised Mitigated Negative Declaration, and the Proposed Draft Revised Order all must be viewed in the context of attaining and demonstrating compliance with the Action Plan for the Upper Elk River TMDL for Sediment and also those explicit clarifications pertaining to the anthropogenic contribution to the load allocation made by the State Water Resources Control Board as well as the directives to the Regional Board by the State Board as revised, in adopting Resolution No. 2017-0046.

Although there are some substantive improvements from the previously-adopted Order No. R1-2016-004, other provisions are inappropriately proposed to be relaxed, with little to no evidence as to how such easing of restrictions is appropriate or how the very clear legal, regulatory, and directive mandates with which the Regional Board must comply will be satisfied.

The Regional Board can and must do better to ensure compliance with all applicable legal and regulatory requirements as well as taking into account the uniquely-challenging realities of a nuisance condition and continued-realities and overwhelming evidence that current ongoing timber harvest in the Upper Elk River watershed by both HRC and Green Diamond Resource Company are simply inappropriate and contrary the interest of the people of the State of California and violate legal and regulatory mandates. Unless and until evidence can demonstrate that Water Quality Objectives are on a trajectory toward attainment and beneficial uses waters restored and nuisance no longer exists, the Regional must do more and must do better.

### **Specific Comments Regarding March 13, 2019 Notice and Related Documents**

The following comments pertain to the Proposed Revised Draft Initial Study, the Proposed and Revised Draft Mitigated Negative Declaration, and the Revised Draft Proposed Order, Order No. R1-2019-0021.

Comments regarding the Proposed Revised Initial Study and Proposed Revised Mitigated Negative Declaration and other relevant issues concerning compliance with the California Environmental Quality Act (CEQA) and its implementing regulations are presented first, followed by comments regarding the Draft Proposed Revised Order and issues pertaining to compliance with the California Porter-Cologne Water Quality Control Act, all aspects of its

implementation, state water quality control policy, and applicable federal requirements, obligations and standards relevant to the Proposed Action.

**California Environmental Quality Act (CEQA) and Implementing Regulations as pertains to the Proposed Action**

The following comments pertain specifically to compliance of the Proposed Action from the March 13, 2019 Notice with provisions of the California Environmental Quality Act (CEQA) and its implementing regulations. For additional comments specific to this topic, please refer to the April 10, 2019 Legal Analysis of Draft Order No. R1-2019-0021 prepared by Michael Golz, Certified Law Student at the Stanford University Environmental Law Clinic. (**Attachment-A**)

The California Environmental Quality Act (CEQA), California Public Resources Code 21000 et. seq, and its implementing regulations at Title 14, Division 6, Chapter 3, California Code of Regulations 15000 et. seq. are applicable to the projects and activities of the Regional Board irrespective of the Functional Equivalent and Certified Regulatory Program that allows for expedited and activity-specific analysis and permitting.

Even with a Certified Regulatory Program approved for the State and Regional Boards by the California Secretary of Natural Resources, all agencies, boards, and commissions with such programs must still comply with all substantive and procedural requirements of CEQA and its implementing regulations from which it has not been explicitly exempt by the Legislature in Statute.

California Public Resources Code 21080.5 creates the legal framework for certification of a Certified Regulatory Program. Title 14, Division 6, Chapter 3, section 15250 provides the framework for implementing regulations pertaining to certification of a regulatory program. Title 14, Division 6, Chapter 3, section 15251(g) identifies that the California Water Resources Control Board and California Regional Water Boards are certified for its regulatory programs, but only as pertains to the Water Quality Control Basin Planning Programs aspects of State and Regional Board permitting.

To the extent the Regional Board would argue that the Proposed Action falls under and is thereby governed by its Basin Planning authority and thereby covered by its Certified Regulatory Program, this would be all the more reason to conduct a proper and thorough review of all actions part-and-parcel to the Program of Implementation and not compartmentalized these in a piecemealed manner.

Title 14, Division 6, Chapter 3, California Code of Regulations 15063(b)(1) provides that If an agency determines that there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial, the Lead Agency shall do one of the following: (A) prepare and EIR; (B) use a previously-approved EIR which the Lead Agency determines would adequately analyze the project at hand; or (C) determine that pursuant to a Master EIR, Tiering or some other appropriate process to ensure that a projects potential impacts were adequately examined.

The Proposed Revised Initial Study and subsequent Proposed Revised Mitigated Negative Declaration do not comply with these provisions and consequently, both must be deemed inadequate for purposes of demonstrating CEQA compliance for the Proposed Action.

Substantial evidence exists that a significant adverse and cumulative impact on the environment already exists and is ongoing. Therefore, even if the adoption of the Proposed Action may have some beneficial environmental components, CEQA clearly requires full, thorough and rigorous analysis and a different vehicle to analyze and address the potential for the Action as proposed to result in cumulatively considerable adverse cumulative environmental impacts to water quality and beneficial uses of water in the Upper Elk River Watershed other than a Mitigated Negative Declaration.

Relevant and additive to this are provisions in CEQA and its implementing regulations that clearly spell out the only acceptable circumstances in which a lead agency, board or commission may execute a Mitigated Negative Declaration.

A Mitigated Negative Declaration (MND) is not the proper vehicle for analysis of potentially significant adverse environmental effects of the Adopted Order for the purpose of demonstrating CEQA compliance. California Public Resources Code section 21064.5 defines the criteria for an agency to rely upon an MND:

[A] negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant *before* the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment. (Emphasis added). (*See also* 14 CCR 15369.5.)

As noted previously in these comments, in adoption of Order No. R1-2016-004, the Regional Board also relied upon an Initial Study and eventually executed a Mitigated Negative Declaration, and it was apparent that neither condition required to satisfy the execution of the MND based on the Initial Study existed.

The Regional Board and HRC were not in agreement about all terms of the Order, as addressed previously. Second, the Regional Board presented no argument or evidence to suggest that no substantial evidence existed in light of the whole of the record before it that the Order had no potential to result in a significant adverse impact on the environment.

The Proposed Revised Initial Study perpetuates many of the same errors and insufficiencies of the Initial Study conducted for adopted Order No. R1-2016004, thereby questioning the validity of the choice to execute the Proposed Revised Draft Mitigated Negative Declaration.

For example, while the Draft Proposed Revised Initial Study mentions aspects such as the Elk River Recovery Assessment Framework and the Elk River Stewardship Group (*See*: p. 24), it fails to consider, disclose or analyze the impacts of the timber harvesting and related activities of Green Diamond Resource Company in the Upper Elk River Watershed. Green Diamond's timber harvesting activities in the Upper Elk River Watershed and revisions to its South Fork Elk River Management Plan comprise components of the Action Plan for the Upper Elk River Sediment TMDL, and all constitute part of the Regional Board's Program of Implementation to comply with state and federal water laws.

The Proposed Revised Draft Initial Study circulated as part of the March 13, 2019 Notice references Green Diamond Resource Company twice on page 6, and only in passing as an additional industrial timberland owner in the Upper Elk River Watershed. No discussion of Green Diamond, its timber operations, or the State Water Board directive to also revise Green Diamond's South Fork Elk River Management Plan (Order No. R1-2012-0087, Attachment-C), is otherwise included.

The Proposed Revised Draft Initial Study is deficient because it fails to analyze and fully address all aspects of the project, and because it fails to consider similarly-related past and reasonably foreseeable future projects in the same watershed, of the same nature, and under the shelter of the exact same Program of Implementation. It also fails to show what, if any, equally feasible, potentially less-damaging alternatives may have been considered, and why these were rejected, to the extent any other alternatives may have been examined.

The Regional Board has erred in not conducting an Initial Study that includes consideration of all aspects of the Action Plan for the Upper Elk River Sediment TMDL and The Basin Plan Amendment that constitutes the Action Plan and Program of Implementation. The WDRs, the Recovery Assessment and Stewardship Program are all one project as they are all part-and-parcel to the Regional Board's Program of Implementation to address nonpoint-source sediment impairment and nuisance conditions in the Upper Elk River Watershed. The Proposed Draft Revised Initial Study circulated as part of the March 13, 2019 Notice fails to analyze all aspects of the project, which is the Regional Board's Program of Implementation, not a discrete single Waste Discharge Requirement Order.

Additionally, Title 14, Division 6, Chapter 3, California Code of Regulations 15064(a)(1) provides, "If there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR."

There is not only evidence but outright acknowledgement of the existence of a significant adverse and cumulative impact on the environment in the Upper Elk River Watershed, the primary genesis of which is water quality beneficial use impairment and nuisance conditions tied to anthropogenic nonpoint source pollution discharges exclusively resulting from past and ongoing timber harvesting.

The Proposed Revised Draft Initial Study refers alternately to "preventing" or "abating" nuisance as the intended goal and outcome of adoption of the Draft Proposed Revised Mitigated Negative Declaration and Draft Order No. R1-2019-0021.

To begin with, it is again questioned how the Proposed Action and its implementation can prevent or abate a nuisance condition that clearly already exists. Second, the existence of impaired water quality objectives to the point of needing a TMDL and TMDL Action Plan, combined with the existence of a nuisance condition all point to the fact that a significant adverse cumulative impact on the environment exists, and yet the Proposed Revised Draft Initial Study fails to fully acknowledge or assess this as the baseline condition as is evident by language included and cited here.

How is it possible for the Regional Board to conclude that the Proposed Action has no potential to result in a significant adverse cumulative impact on the environment and water quality when nuisance exists and a target of attaining a zero anthropogenic load allocation to the extent feasible is called for as soon as possible but by no later than 2031? Further, how is this possible when the Proposed Action will clearly permit additional anthropogenic nonpoint source sediment pollution resulting from continued-permitting of new and additive timber operations by HRC?

CEQA requires that the Regional Board support any findings with substantial evidence in light of the whole of the record. There is a disconnect between the asserted assumptions of the Proposed Revised Draft Initial Study and subsequent Draft Proposed Revised Mitigated Negative Declaration, the actual baseline condition, and substantial evidence to support the findings proposed and the Proposed Action. Simple reliance upon, and/or referral to HRC's Habitat Conservation Plan and relevant requirements does not in and of itself create an evidentiary linkage to support the Regional Board's findings that a Mitigated Negative Declaration is the appropriate CEQA permitting vehicle and does not present necessary evidence and disclosure to satisfy CEQA, irrespective of the vehicle chosen.

Irrespective of the vehicle chosen to demonstrate CEQA compliance, all pieces of the Proposed Action must meet CEQA mandates for full disclosure and analysis of environmental effects, analysis and disclosure equally-feasible and potentially less-damaging alternatives, and analysis and disclosure of measures constituting mitigation or avoidance of significant, adverse and cumulative impacts – with findings and supportive evidence fully disclosed to the public so as to demonstrate that the decision is predicated upon substantial evidence in light of the whole of the record before the Regional Board.

A substantial evidentiary basis for choosing to adopt the Proposed Action that clearly draws linkage between proposed activities and ongoing significant adverse cumulative impacts and/or mitigation or avoidance of these by implementing the Proposed Action is not provided in the package circulated as part of the March 13, 2019 Notice. This is a fatal flaw that must be remediated.

The Regional Board must not rely on half-measures, shortcuts, selective memory or creative story-telling that diminish the truth and significance of the existing circumstances in the Upper Elk River Watershed that constitute the current baseline for evaluation of the potential for a significant environmental impact to occur as a result of implementing the Proposed Action or

for the purposes of choosing an appropriate CEQA compliant analysis and discretionary permitting framework.

**Comments Regarding the Draft Revised Proposed Order No. R1-2019-0021 as Pertains to State and Federal Water Quality Requirements**

The purpose of adoption of the Draft Revised Proposed Order for HRC as described on page 1 of the March 13, 2019 Notice is to:

“[P]rovide a water quality regulatory structure to prevent and address discharges of waste and other controllable water quality factors associated with timber harvest activities in the watershed and update existing Order No. R1-2016-0004 to ensure the waste discharge requirements (WDRs) will incorporate specific provisions that implement all of the hillslope indicators and numeric targets contained in the Action Plan for the Upper Elk River Sediment TMDL (TMDL Action Plan) and ensure that all anthropogenic discharges of sediment are eliminated to the extent feasible and, if not feasibly eliminated, minimized, as soon as feasible, but no later than 2031. At the hearing, the Regional Water Board will consider whether to affirm, reject, or modify the draft Order and Mitigated Negative Declaration, or take other action.”

The Proposed Draft Revised Order is also a part of the Program of Implementation for the Action Plan for the Upper Elk River Sediment TMDL. Statements contained in the Action Plan confirm this:

“All the sediment delivered to the stream channels in the Upper Elk River Watershed is attributed to management-related nonpoint source pollution and natural background. Due to the lack of sediment loading capacity in the impacted reaches, the load allocation is defined as zero. This approach incorporates a conservative, implicit MOS3 and includes seasonal variation of sediment production through estimating sediment loads on an annual time step. The zero load allocation is necessarily conceptual since, using current technology and techniques, no amount of land use restriction can physically result in zero loading of sediment (i.e., the control of all natural and anthropogenic sediment delivery from the upper watershed).

This loading capacity will guide the program of implementation and will be maintained until the sediment loading capacity of the impacted reaches has been expanded. The zero load allocation does not constitute an effluent limitation or a waste load allocation, and the Board has discretion on how to implement it in waste discharge requirements (WDRs), waivers of WDRs (waivers) or other actions to minimize and eliminate waste discharges. Once the loading capacity has been expanded, the Regional Water Board can reevaluate the load allocation and establish a second phase of the TMDL, as appropriate.” (Action Plan for the Upper Elk River Sediment TMDL, p. 6-7)

The Proposed Draft Revised Order No. R1-2019-0021 must be viewed in context of all other constituent parts of the Program of Implementation, as well as with State Water Board understandings, clarifications and directives to the Regional Board pertaining to the Upper Elk

River TMDL Action Plan and Program of Implementation. It must also be viewed in context of applicable federal and state water quality control laws, regulations, policies, and requirements.

The Draft Revised Proposed Order contains the following overview of the genesis and purpose of the Order:

“The purpose of this Order is to update the 2016 Order so that specific requirements ensure that: 1) HRC manages its timberlands in the Elk River watershed in such a manner that will lead to compliance with hillslope indicators and numeric targets from Table 2 of the TMDL Action Plan; 2) all anthropogenic discharges of sediment are eliminated to the extent feasible, and if not feasibly eliminated, minimized, as soon as feasible to implement the TMDL zero load allocation; and 3) HRC implement the TMDL Action Plan by complying with the specific and general requirements and prohibitions as prescribed in this Order, which apply throughout its timberlands in the Elk River watershed, not solely in areas with active timber operations.” (Draft Order No. R1-2019-0021, at Paragraph 1., p. 1)

This paragraph speaks to, “leading to compliance,” with the TMDL Action Plan and specific numeric targets, and the anthropogenic zero sediment load allocation, but contains no time schedule, no benchmarks to be attained on a time-certain schedule, and no triggers for enforcement or re-assessment in the event that compliance is not attained, or any way to ensure or demonstrate to the public that compliance is attained. Merely including more self-monitoring and reporting by HRC to demonstrate trends does not satisfy state and federal clean water laws, regulations and policies pertaining to the control of nonpoint source pollution as explained below.

Once a technical TMDL is established by EPA or in developed by a Regional Board for EPA approval, states are charged with ensuring the necessary implementation actions are taken so that the pollutants of concern do not exceed the TMDL and associated load and wasteload allocations. (*See* 33 U.S.C. § 1313(e); 40 C.F.R. § 130.6(c)(6)) TMDL implementation is accomplished by the states through a variety of mechanisms, including limits on NPDES permits, waivers, enforcement orders, Memoranda of Understanding with other state, federal, or local agencies, best management practices for non-point source pollution, or monitoring actions. (*See* 40 C.F.R. 130.7)

A Program of Implementation for achieving water quality objectives as described in the California Porter-Cologne Water Quality Control Act must include a “description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private,” a “time schedule for the actions to be taken,” and a “description of surveillance to be undertaken to determine compliance with objectives.” (*See*: California Water Code 13242) Since TMDLs interpret or refine existing water quality objectives, they are required to include a Program of Implementation.

As previously explained, Draft Proposed Revised Order No. R1-2019-0021 is one of multiple constituent parts of the overall Program of Implementation adopted into the North Coast

Basin Plan by the Regional Board in adopting the Action Plan for the Upper Elk River Sediment TMDL and accompanying Basin Plan Amendment.

No time schedule for actions to be taken to ensure attainment of the zero anthropogenic load allocation to the extent feasible as soon as possible but by no later than 2031 are currently found either in the Action Plan or the Proposed Revised Draft Order for HRC.

Key Element Number 3 of the State Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“NPS Policy” SWRCB, 2005) provides that if a Regional Board determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program, “shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.” (NPS Policy, SWRCB, 2005, at Section-C, Key Element 3, p. 12)

For additional comments specific to this topic, please also refer to the April 10, 2019 Legal Analysis of Draft Order No. R1-2019-0021 prepared by Michael Golz, Certified Law Student at the Stanford University Environmental Law Clinic. (**Attachment-A**)

The overview paragraph from Proposed Revised Draft Order No. R1-2019-0021 cited above clearly indicates the Regional Board’s intent to exercise its discretion to allow time for a phased and gradual attainment of the anthropogenic zero sediment load allocation. Additionally, statements previously cited from the Action Plan indicate the Regional Board’s intention that the Upper Elk River Sediment TMDL and Action Plan are a “phased approach” to creating and Implementation Plan to ensure control of nonpoint source sediment pollution and the eventual attainment of currently-impaired water quality objectives.

In light of this gradual and phased approach to anthropogenic sediment pollution reduction and the phased approach to the components of the Action Plan, the NPS Policy clearly requires the Regional Board to establish ‘specific time schedules and corresponding quantifiable milestones,’ and requires a means for monitoring for and demonstrating compliance and attainment of quantifiable mileposts as part of the Draft Revised Proposed Order and any other subsequent permitting to revise sediment pollution discharge controls for timber operations associated with activities of Green Diamond Resource Company in the Upper Elk River Watershed.

Proposed Revised Draft Order No. R1-2019-0021 is deficient given the absence of these fundamental elements to ensure that adequate water quality controls are implemented in a timely and effective manner.

The Regional Board is required to implement the NPS Policy in a manner that satisfies the ultimate goal of attaining water quality objectives and restoring beneficial uses of water. All actions must demonstrate that the measures to be taken have a high likelihood that the program will attain desired objectives, including the management practices to be used and the process to be use to ensure their proper implementation, to include a specific time schedule, and a corresponding quantifiable milestones designed to measure progress toward reaching specified requirements; sufficient feedback mechanism to determine if the program is meeting

stated purpose and must make clear in advance potential consequences of failure to achieve the program's stated purposes.

The Regional Board must take seriously its responsibilities under the NPS Policy, and must breathe far greater specificity, quantification and structure into all aspects of the Proposed Action in order to satisfy state law and the NPS Policy.

It is important to remember that pollution discharges to waters of the state are not protected by any preemptive or presumptive rights, either to discharge initially or to continue doing so if such discharges are not in the greater public interest. Specifically, California Water Code 13263(g) provides, “[n]o discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.”

California Water Code 13000 establishes the Legislative intent in enacting the Porter-Cologne Water Quality Control Act, and states:

“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.”

Additionally, the Legislature declared in enacting the Porter-Cologne Water Quality Control Act's State Policy for Water Quality Control that:

“[t]he principles, guidelines, and objectives [of water quality control plans] shall be consistent with the state goal of providing a decent home and suitable living environment for every Californian.” (See: California Water Code 13142(c))

The Regional Board has failed to create and implement a program to ensure that the goal of, “providing a decent home and sustainable living environment for every Californian,” in the Upper Elk River Watershed. This decades-long failure has resulted in allowing water quality objectives to become impaired, nuisance conditions threatening the lives, health, safety and property of citizens of California to occur and to continue and has instead favored the pollution dischargers in the watershed over the implementation of state and federal water quality control laws and protecting California citizens from unreasonable and feasibly controllable degradation of the quality and beneficial uses of waters of the state and the creation of nuisance.

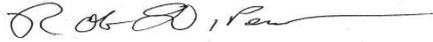
The March 13, 2019 Notice and its constituent parts, most specifically the Draft Revised Proposed Order will perpetuate and exacerbate this decades-long failure of the Regional Board to faithfully implement and enforce state and federal water quality control laws, regulations and policies, by continuing to allow and permit feasibly and reasonably controllable nonpoint source sediment waste discharges into Waters of the State in the Upper Elk River Watershed from continued ongoing and permitted timber harvesting.

Although the Regional Board has discretion in its Program of Implementation permitting, this discretion does not extend beyond the clearly written limits and requirements of the Porter-Cologne Water Quality Control Act, the NPS Policy, The North Coast Basin Plan, or those actions intended to satisfy state obligations under the federal Clean Water Act for listed impaired waterbodies and waterbody segments.

### **Conclusion**

The Proposed Action in all its constituent parts as circulated for public comment pursuant to the March 13, 2019 Notice is deficient and must be revisited and revised as explained herein prior to any action being taken by the Regional Board. Commenters appreciate the opportunity to review and provide comments pertaining to the Proposed Action and encourage the Regional Board to consider doing more and doing better to ensure compliance with all applicable legal and regulatory authorities.

Respectfully Submitted,



Rob DiPerna  
California Forest and Wildlife Advocate  
Environmental Protection Information Center (EPIC)



Jennifer Kalt  
Humboldt Baykeeper



Felice Pace  
Water Chair,  
North Group, Redwood Chapter Sierra Club

## Attachments

**Attachment-A:** Legal Analysis of Draft Order No. R1-2019-0021 prepared by Michael Golz, Certified Law Student at the Stanford University Environmental Law Clinic. April 10, 2019.