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April 15, 2019

Via Email to James.Burke@waterboards.ca.gov

Mr. Matt St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
5550 Skylane Blvd. Suite A  
Santa Rosa, CA 95403

Re: **DRAFT ORDER NO. R1-2019-0021 - Waste Discharge Requirements For Nonpoint Source Discharges and Other Controllable Water Quality Factors Related to Timber Harvesting and Associated Activities Conducted by Humboldt Redwood Company, LLC in the Upper Elk River Watershed Humboldt County – Comments Filed on Behalf of Humboldt Redwood Company**

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

We file the following comments on behalf of Humboldt Redwood Company, LLC (Humboldt Redwood) on the above-referenced Draft Order for issuance of Waste Discharge Requirements (WDRs) covering Humboldt Redwood's timber management operations in the Upper Elk River Watershed. These comments supplement those of Humboldt Redwood Company also submitted today.

**I. The Draft WDRs Reflect Serious Flaws in the Elk River TMDL, Particularly as Improperly Modified by the State Water Board's Approval Resolution; the Regional Board Should Revisit and Correct the TMDL before Adopting new WDRs for Humboldt Redwood.**

**A. Humboldt Redwood's Concerns About the TMDL Were Never Adequately Addressed.**

During the Regional Board's development of the Upper Elk River TMDL, Humboldt Redwood raised a number of concerns about the adequacy of the scientific and legal

bases for the TMDL's zero load allocation and related elements of the TMDL. Those concerns were never adequately addressed, and they remain at the heart of the Elk River TMDL challenge. However, recognizing the validity of Humboldt Redwood's concerns, particularly regarding the feasibility of implementation, the Regional Board amended the TMDL toward the end of the TMDL process to clarify that the zero load allocation in the TMDL was "necessarily conceptual" rather than prescriptive.<sup>1</sup> Further, the Regional Board clarified that the zero load allocation is not a waste load allocation or effluent limitation, and the Regional Board has discretion on how to implement it.<sup>2</sup>

Similarly, the Regional Board included language acknowledging the limits of feasibility on implementation of the Table 2 hillslope indicators and numeric targets:

"The hillslope indicators and numeric targets in Table 2 are designed to inform Board actions and can be incorporated into orders, as appropriate and to the maximum extent feasible." North Coast Basin Plan – June 2018 Edition at 4-129

As reflected in the TMDL itself, the zero load allocation was not intended to be prescriptive; to the contrary, it was expressly intended to be conceptual. However, we are concerned that the additional requirements the Regional Board seeks to impose are arbitrary and capricious and constitute an abuse of discretion; these requirements are unnecessary to achieve the objectives of the TMDL and are infeasible.

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<sup>1</sup> The TMDL states:

"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 non-point source sediment (i.e., the control of all natural and anthropogenic sediment delivery from the tributary system)." North Coast Basin Plan – June 2018 Edition at 4-131.

<sup>2</sup> The TMDL also states:

"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 WDRs, waivers or other actions to reduce and eliminate waste discharges." North Coast Basin Plan – June 2018 Edition at 4-131, 135.

**B. The State Water Board Weakened Many of the Improvements Without Justification In Its TMDL Approval Resolution.**

Unfortunately, in its review and approval of the Upper Elk TMDL, the State Water Board stated in its Finding 9 a number of understandings that Humboldt Redwood views as inconsistent with the express language of the TMDL:

9. The State Water Board's understandings of the TMDL Action Plan's requirements and statements described above are (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.<sup>3</sup>

In an October 15, 2017 letter to this firm, the State Board clarified its understanding #3 as follows: "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~~ to the extent feasible and, if not feasibly eliminated, minimized, as soon as feasible but not later than 2031." [strikeout and underline are as shown in the original October 15, 2018 letter to reflect the clarification].

Although the Regional Board had just approved Humboldt Redwood's WDRs in 2016 as part of the TMDL process, the State Board Resolution also directed the North Coast Regional Board to review Humboldt Redwoods WDRs and revise them "as

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<sup>3</sup> State Water Resources Control Board Resolution No. 20017-0046 Approving an Amendment of the Water Quality Control Plan for the North Coast Region (Basin Plan) Incorporating the Action Plan for the Upper Elk River Sediment Total Maximum Daily Load (TMDL) In Chapter 4 (Implementation Plans) (August 1, 2017).

necessary to make them consistent with the State Water Board's understandings of how the TMDL Action Plan will be implemented as described in finding no. 9."

Humboldt Redwood and Green Diamond Resource Company timely challenged the legality and validity of the State Board's Resolution in California Superior Court. However, in a cooperative effort seeking issuance of WDRs that are achievable by the companies and consistent with the TMDL itself, the companies and the State Water Board agreed to a stay of the action pending the WDR issuance process.

Although Humboldt Redwood objects to the conditions that the State Board Order imposed on its approval of the TMDL, the State Board's findings nevertheless acknowledge the necessity that any additional requirements imposed in WDRs or other orders being "feasible and appropriate."

**C. The Regional Board Should Revisit the TMDL and Address These Flaws Before Imposing New WDRs.**

Humboldt Redwood urges the Regional Board to review the TMDL before imposing the WDRs as proposed. The Regional Board should correct the invalid assumption that there is a cause and effect relationship between the current operations by Humboldt Redwood and the downstream impaired conditions. As Humboldt Redwood's letter states, the absence of improvement in the impaired condition downstream despite 20 years of modern forestry practices and aggressive sediment removal activities, should cause the Regional Board to revisit the primary assumptions and the increasingly burdensome additional measures the draft WDRs seek to impose under the TMDL and the State Board's August 2018 approval resolution.

**II. If the Regional Board Proceeds to Impose New WDRs, it Must Reflect the Limits of its Authority in the New WDRs, Including Limitations on Feasibility. In Addition, the Regional Board Should Correct the Flaws Humboldt Redwood Identified in the 2016 WDRs.**

The Regional Board adopted WDRs for Humboldt Redwood in November 2016 just after it adopted the Upper Elk River TMDL. Humboldt Redwood raised a number of objections to the WDRs but, nevertheless, determined to implement its requirements. Pursuant to the State Board's August 2017 Order approving the Elk River TMDL, the Regional Board notified Humboldt Redwood that it would reopen and update the 2016 WDRs to address the State Board's stated understandings—which changed the substantive requirements of the TMDL. The Regional Board requested that Humboldt Redwood evaluate additional measures that could be added to Humboldt

Redwood's WDRs over and above the requirements that Humboldt Redwood had proposed in its original Report of Waste Discharge and those additional objectionable measures the Regional Board had imposed in the 2017 WDRs. In response, Humboldt Redwood proposed additional measures in its February 1, 2019 submission, including additional wet weather restrictions and additional canopy retention requirements within existing Class II Riparian Management Zone (RMZ) buffer widths. However, with these measures Humboldt Redwood has reached the limits of feasibility. Nevertheless, the Regional Board has proposed to impose even more infeasible and inappropriate measures, including.

- Expanded RMZs, referenced in the WDRs as "TMDL RMZs", which would extend RMZ restrictions to 14,036 acres--64% of Humboldt Redwood's Elk River timberlands.
- An additional five-year moratorium on any further harvesting on 3300 acres of Humboldt Redwood timberland in five subwatersheds that the Regional Board deems high risk; this addition adds to a 3-year moratorium for all acres within those watersheds under the 2016 WDRs except what were harvested under a single Timber Harvesting Plan--despite no findings of sediment discharge from the Timber Harvesting Plan that was completed in 2018. This extends the harvest moratorium to eight years for much of Humboldt Redwood's acreage in these subwatersheds.
- An unreasonable 8-year Timber Harvesting Plan enrollment process requirement (extending the five-year requirement that was in the 2016 WDRs for an additional three years)

Further, the Regional Board proposes to continue with the required feasibility study addressing in channel sediment removal, which is intended to lead to the imposition of remediation requirements for pre-existing instream sediment that is already in the watershed system as a result of natural processes and, perhaps, the legacy activities by prior landowners. As discussed below, those measures exceed the Regional Board's authority, are inconsistent with the TMDL and are not feasible.

Finally, although it has endeavored to implement the overburdensome 2016 WDRs, Humboldt Redwood must continue its legal objections to those requirements in excess of Humboldt Redwood's original ROWD and its February 1, 2019 submittal, as reflected in the Regional Board's record. Those concerns are reflected in our comments filed on behalf of Humboldt Redwood and Green Diamond on January 18, 2016; these comments are enclosed. Those comments and other pertinent Humboldt Redwood submissions regarding the 2016 WDRs are incorporated herein by reference.

**A. The Additional Measures the Regional Board Proposes Are Inconsistent with Regional Board Authority and the TMDL's Acknowledged Limitations**

1. The additional restrictions are not necessary and, therefore, would not be proper to impose on Humboldt Redwood.

Humboldt Redwood's February 1 matrix demonstrates again that the requirements of the 2016 WDRs already implement all the Table 2 hillslope indicators and numeric targets in the TMDL. In addition, the Regional Board has not provided sufficient justification for imposing these additional requirements. Therefore, additional restrictions are not necessary to implement the TMDL and, in fact, would be arbitrary and capricious.

2. The additional requirements violate the Water Code's and Basin Plan's controllability and feasibility prerequisites.

The Regional Board has failed to demonstrate with substantial evidence that the additional measures it seeks to impose are necessary to protect water quality and meet the feasibility standard. As described above, the Porter-Cologne Act and the Basin Plan impose feasibility limitations upon the Regional Board. For all the reasons set forth herein, the measures added to the WDRs are infeasible, and the proposed findings and the imposition of measures to mitigate or avoid such impacts are not supported by substantial evidence. In fact, much of the sediment that the objectionable measures target is not controllable, i.e., "may be *reasonably* controlled", as required by the Basin Plan.<sup>4</sup>

As reflected in the Basin Plan, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors."<sup>5</sup> There is no evidence that the Regional Board has adequately considered the required factors, including the economic effects of the proposed restrictions. Just the combination of the new "TMDL RMZs" and the now eight-year harvest moratorium on any further timber operations in the five designated "high risk" watersheds alone would cripple

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<sup>4</sup> "Controllable water quality factors shall conform to the water quality objectives contained herein. When other factors result in the degradation of water quality beyond the levels or limits established herein as water quality objectives, then controllable factors shall not cause further degradation of water quality. 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 and that may be reasonably controlled." North Coast Basin Plan – June 2018 Edition at 3-2

<sup>5</sup> See, e.g., North Coast Basin Plan – June 2018 Edition at 4-53

Humboldt Redwood's Elk River Watershed operations. Humboldt Redwood's ownership in this watershed is made up of Timberland Production Zoned lands. Nevertheless, these requirements would effectively remove from timber production 14,036 acres (64 percent of Humboldt Redwood's Elk River ownership) by placing them in the TMDL RMZs indefinitely. The harvest moratorium extension for five subwatersheds designated as "high risk" would keep an additional 3,343 acres for an additional five-year period. Further, the requirements associated with the pilot study to identify measures to remove sediment—both anthropogenic and nonanthropogenic (that was likely discharged previously by prior landowners under entirely different land use and forest management practices)—is fundamentally unfair and inconsistent with the Regional Board's authority to regulate Humboldt Redwood's own discharges. The Regional Board has not provided the necessary justification for such burdensome requirements.

Ironically, while there is significant evidence presented in Humboldt Redwood's submissions that the objectionable measures in the draft WDRs propose are infeasible for Humboldt Redwood to implement, there is little or no evidence that these extraordinarily burdensome measures would actually contribute to the TMDL objective of easing the downstream impaired condition or the identified nuisance conditions, let alone fixing them. This is the essence of infeasibility—incapable of being accomplished in a successful manner, within a reasonable period of time (by 2031), taking into account economic, environmental, legal, social and technological factors. Further, the measures violate the Basin Plan's "controllable" standard in that they are not targeted at reasonably controllable discharges of Humboldt Redwood.

**B. The Objectionable Provisions of the WDRs violate Constitutional Limitations on Agency Regulatory Actions.**

Many of the requirements of the proposed WDRs that Humboldt Redwood has objected to would violate the principles set out in the U.S. Supreme Court's *Nollan* and *Dolan* decisions. These decisions require rough proportionality and an essential nexus between the demands and regulatory burdens the Regional Board is proposing to place on Humboldt Redwood in the WDRs and the impacts of the timber harvesting operations covered by Humboldt Redwood's ROWD and supplemental submission. There is no such proportionality or sufficient nexus here.

As explained in the *Nollan* and *Dolan* decisions, the Fifth Amendment takings clause prohibits the imposition of conditions that lack an essential nexus or rough proportionality to the permitted activity. The Constitution requires an essential nexus between the particular case and a legitimate regulatory interest. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Even when a nexus exists, the imposed

condition must be roughly proportional to the effects of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

California courts have applied the principles from *Nollan* and *Dolan* to mitigation and regulatory requirements. *Environmental Protection Information Center v. Department of Forestry and Fire Protection*, 44 Cal. 4th 459 (2008) (“*EPIC*”) (finding that a landowner may only be required to implement mitigation measures roughly proportional to a landowner’s impact). The California Supreme Court found that mitigation measures which “[did] not differentiate between those events partially caused or exacerbated by timber harvesting and those that are not” went beyond the regulator’s authority. *Id.* at 511. As the Court concluded, a landowner should bear no more “than the costs incurred from the impact of its activity.” *Id.* The conditions imposed in the draft WDRs lack both an essential nexus and proportionality.

Essential Nexus. To be valid, the conditions in the WDRs must have an essential nexus to a legitimate government interest. The Regional Board is charged with the protection of waters within its jurisdiction. However, the Regional Board has not established the essential nexus between the downstream impaired conditions that it seeks to correct and the upstream timber operations of Humboldt Redwood. Indeed, the record shows that discharges from Humboldt Redwood’s operations have contributed significantly to reduced discharges from its timberlands, including from legacy sources. Further, many of the measures the draft WDRs seek to impose, including removal of pre-existing sediment (discharged previously by others) in Elk River Watershed streams. There is no practical way to distinguish between naturally occurring and anthropogenic sediment (let alone Humboldt Redwood-caused sediment) to satisfy the Supreme Court’s direction quoted above. The Regional Board has not established a sufficient cause and effect connection between Humboldt Redwood’s current operations and the downstream impaired condition, which has existed for many years even before Humboldt Redwood’s acquisition and, therefore, the essential nexus, between the requirements and restrictions it seeks to impose on Humboldt Redwood in the Upper Elk and the conditions it seeks to improve downstream.

Proportionality. Even if the Regional Board had established the required nexus, the imposed conditions also must be roughly proportional to the activities to be permitted. As the California Supreme Court has explained, the conditions must differentiate between the effects of the proposed project and those that are not—a permittee cannot be required to do more than mitigate the effects of its proposed activity.

As explained above, the conditions imposed by the WDRs are not supported by substantial evidence and are not adequately linked to Humboldt Redwood’s proposed



activities. Humboldt Redwood has submitted a ROWD and supplemental submission with significant evidence that they fully address and mitigate the effects of Humboldt Redwood's planned harvest activities. The Regional Board has gone beyond the parameters of the ROWD and supplemental 2019 submission without providing substantial evidence that they fail to mitigate the effects of Humboldt Redwood's planned operations in the watershed. Thus, the conditions in the WDRs do not satisfy *Dolan*'s rough proportionality standard because they exceed the level of mitigation allowable under the law by requiring Humboldt Redwood to mitigate beyond the effects of Humboldt Redwood's own proposed activities.

The proposed WDRs seek to require Humboldt Redwood to remediate environmental impacts disconnected by both time and distance. The WDRs place a moratorium on activities in specific watersheds subject to Humboldt Redwood accepting responsibility for remediating environmental effects not caused by Humboldt Redwood's operations and, in fact, caused and contributed to by many other factors. The Regional Board expects Humboldt Redwood to fix a problem that was decades in the making in the Lower Elk, far removed from Humboldt Redwood's land and its harvesting practices and activities. This condition is completely lacking in proportionality in light of the controls already to be implemented in the ROWD and Humboldt Redwood's February 2019 Supplemental submission.

The other objectionable conditions included in the draft WDRs also exceed the Regional Board's authority and violate the essential nexus and rough proportionality standards. All are unnecessary and out of proportion with Humboldt Redwood's proposed activities. As Humboldt Redwood has demonstrated, the measures proposed in the ROWD, as supplemented by Humboldt Redwood's February 2019 submission, fully address the water quality effects of its proposed harvest activities. The restrictions and management measures that Humboldt Redwood objects to in its detailed comments exceed the Regional Board's legal authority and violate the constitutional restrictions described above.

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**III. Conclusion.**

We ask the Regional Board to revisit and revise the TMDL before it issues WDRs to Humboldt Redwood. If the Regional Board determines to proceed, we ask that the Regional Board revise the WDRs to be consistent with the limits of the Regional Board's authority and feasibility, as reflected in Humboldt Redwood's proposal.

Thank you for considering our comments.

Sincerely,



Wayne M. Whitlock

Enclosure

cc: Mr. Dennis Thibeault  
Mr. Mike Miles

## ENCLOSURE

Humboldt Redwood Company and Green Diamond  
Resource Company Comments dated January 18, 2016

On

Proposed Order No. R1-2016-0004 Waste Discharge  
Requirements for Nonpoint Source Discharges and Other  
Controllable Water Quality Factors Related to Timber  
Harvesting and Associated Activities Conducted by  
Humboldt Redwood Company, LLC In the Upper Elk  
River Watershed, Humboldt County



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January 18, 2016

Via Electronic Mail

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

Re: Proposed Order No. R1-2016-0004 Waste Discharge Requirements  
For Nonpoint Source Discharges and Other Controllable Water Quality  
Factors Related to Timber Harvesting and Associated Activities  
Conducted by Humboldt Redwood Company, LLC In the Upper Elk  
River Watershed, Humboldt County

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

We represent Humboldt Redwood Company ("Humboldt Redwood") and Green Diamond Resource Company ("Green Diamond") in connection with the Upper Elk River Total Maximum Daily Load ("TMDL") and Waste Discharge Requirement ("WDRs") processes. We file these comments on behalf of Humboldt Redwood and Green Diamond to supplement the extensive comments submitted by Humboldt Redwood on this proposal. We incorporate by reference previous comments of Humboldt Redwood, Green Diamond and their experts on Upper Elk TMDL matters that are pertinent to these WDRs.

We note that the proposed WDRs for Humboldt Redwood rely extensively on the proposed sediment TMDL and Program of Implementation for the Upper Elk River ("TMDL Action Plan") and the *Upper Elk River: Technical Analysis for Sediment*

(“Technical Report”) prepared by Tetra Tech, Inc. However, the Regional Board will have not completed the public review process, made appropriate adjustments in the proposal and taken action on the TMDL and Action Plan before the hearing on the proposed WDRs.<sup>1</sup> We acknowledge that the Regional Board is accepting comments on the Tetra Tech report as part of the WDRs process. However, the Tetra Tech Technical report is one of the primary bases for the TMDL and will be the subject of comments filed on the TMDL and TMDL Action Plan.

As we indicated during the workshop and informational discussions for the TMDL and WDRs, Humboldt Redwood and Green Diamond (the “Companies”) have continuing significant concerns—legal, policy and technical—with the Regional Board proposals and the Tetra Tech Report. Among other things, we challenge the assertion that the Tetra Tech report reflects the best available science, as it fails to take into account critical scientific information submitted by the Companies and scientific experts. Furthermore, the Tetra Tech Report is far more than a technical report submitted in support of the technical conclusions of the TMDL. Rather, it includes extensive recommendations for regulatory actions that the Regional Board will take to implement the TMDL. In addition, it assumes the validity of the regulatory recommendations in the Peer Review Staff Report and other documents Tetra Tech reviewed and synthesized for purposes of preparing its report. This as yet unreviewed, unapproved Report is the basis for an unreviewed and unapproved TMDL, which in turn is the basis for the proposed WDRs and the draconian regulatory burden they would impose on Humboldt Redwood. Until the Regional Board fully considers the adequacy of the Tetra Tech report, it would be improper in the WDRs proceeding to assume the propriety of imposing the extensive regulatory requirements reflected in Tetra Tech’s recommendations and the TMDL Action Plan.

The Companies will address these issues in separate comments on the proposed TMDL and TMDL Action Plan, and those comments also will further address the Tetra Tech report. In the meantime, we question the propriety of the extensive reliance in the WDRs process on the TMDL proposal, and underlying analyses. That

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<sup>1</sup> We note a discrepancy on the Regional Board’s website that makes it unclear when the Regional Board actually intends to hold a hearing on the WDRs. As of the date of our comments, the Public Notice and the “Items for the March 10, 2016 Board Meeting” on the Tentative Orders section of the website list the hearing date for the WDRs as March 10. However, Mr. St. John has advised Humboldt Redwood that the March Regional Board meeting has been cancelled and that the hearing on the proposed WDRs will be held on April 7, which is also the date scheduled for the TMDL hearing..

extensive reliance on conclusions from the TMDL—that have yet to be heard, adequately adjusted based on full and adequate consideration of the Companies’ and the public’s comment, and then properly adopted—raises significant concerns. It implies that the Regional Board had already reached its conclusions regarding the TMDL before the WDRs were proposed, that the Regional Board is not open to adjusting its proposals based on consideration of scientific information and comment that differ with the assertions reflected in the proposals. We trust that the Regional Board will ensure that it remains open to making those changes in the proposals and underlying scientific and regulatory conclusions that are necessary to cure significant fatal flaws in the proposed WDRs.

Humboldt Redwood submitted a comprehensive Report of Waste Discharge (“ROWD”) that is based on extensive hillslope and instream monitoring and analysis of current practices, consultation with experts and significant interaction with the Regional Board. Humboldt Redwood’s proposal demonstrates that Humboldt Redwood’s operations in the Upper Elk Watershed are not causing or contributing to the ongoing problems the staff has identified in the Lower Elk Watershed. Indeed, Humboldt Redwood has demonstrated that the combination of its program of addressing legacy sediment sources and its unique timber harvesting methods reflected in its ROWD will result in a net reduction of sediment from its Timber Harvesting Plans and its operations overall in the Upper Elk Watershed and each of the subwatersheds in which Humboldt Redwood operates. The Companies also have submitted extensive information demonstrating that their current operations are not contributing substantively to the problems in the impacted reach of the Lower Elk. Further, the Companies have demonstrated that the adverse conditions in the Lower Elk and their failure to improve are due to many other causes.

The problem of excessive sediment in the Elk River Watershed is far more complicated than portrayed in the proposed TMDL and WDRs. For example, sea level measured at the North Spit of Humboldt Bay since 1977 has the highest rate of projected rise along the California coastline at 18.6 inches per century (4.73mm/yr) (Russell 2012). This is largely because the land surrounding Humboldt Bay is subsiding. This combination of factors affects river hydraulics and related sediment transport capability. Sea level in this area is estimated to continue to rise 6 inches by 2030, 12 inches by 2050 and 36 inches by 2100 (Laird 2013).

Even for human-caused historic sediment contribution, a variety of historic practices and actions other than timber operations have contributed to the deficient sediment transport and assimilation capacity of the Lower Elk River. Those additional causes include:

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

These factors have had a dramatic adverse effect on sediment transport, deposition and accretion in the Elk River floodplain. They have caused extensive sand deposition and channel alteration in the storage portion of the watershed and at the mouth of Elk River. We continue to object to the Regional Board's inexplicable failure to acknowledge and take action to address those influences while maintaining its singular focus on current timber harvest operations and remediation by Humboldt Redwood and Green Diamond. The arbitrary and capricious nature of this failure is manifest in the Regional Board's proposed prohibition of harvesting in five subwatersheds deemed "high risk" by the Regional Board unless and until Humboldt Redwood proposes projects to remediate the Lower Reach. The acreage covered by this prohibition amounts to one fifth of Humboldt Redwood's ownership in the Elk River Watershed.

**I. The Regional Board's Proposal to Prohibit Timber Harvesting Operations in Five Humboldt Redwood Watersheds Pending Remediation of Excess Instream Sediment Deposits in the Lower Reach of the Elk River Watershed Has No Adequate Basis in the Record and Would Exceed the Regional Board's Authority**

The proposed WDRs are based on the unfounded conclusion that, because the problem in the Lower Elk is not improving, the problem must be associated with Humboldt Redwood's current operations. Therefore, without acknowledging the actual causes and the current factors that are preventing the Lower Elk from improving, the WDRs impose extensive additional restrictions and management measures—even to the point of prohibiting timber harvesting operations altogether in five Humboldt Redwood subwatersheds—unless and until those conditions in the impacted reach improve sufficiently. Humboldt Redwood and Green Diamond have voluntarily supported stewardship efforts to improve impaired conditions in the Lower Elk; but have consistently objected to any imposition of regulatory obligations to remediate the impaired conditions as a condition upon its operations.

Nevertheless, the WDRs would impose a harvesting prohibition that holds Humboldt Redwood's operations hostage to as yet undefined remediation of the impacted reach for an undefined period of time—with the standard for obtaining regulatory relief from these extreme limitations undefined, to be determined in the future. The harvesting prohibition pending adequate improvement of the Lower Elk—which the proposal asserts is dependent on remediation—is a back-door means of requiring

Humboldt Redwood to undertake that remediation. As with other previous variations, this element of the proposed WDRs remains highly objectionable.

The proposed WDRs rely on the fact that the Lower Elk problem persists and, on that basis, assert that additional actions beyond those that Humboldt Redwood has proposed are necessary. The proposed WDRs imply that simply because there is an ongoing problem in the Lower Elk, the Regional Board has unlimited discretion to impose any requirements or restrictions on activities in the Upper Elk that are subject to the Regional Board's control. To the contrary, without establishing the necessary cause and effect relationship, the Regional Board has no such authority. Further, as reflected in our comments below, the Regional Board's authority is limited even where a cause and effect relationship is found.

Neither the proposed WDRs nor the Tetra Tech report establishes an actual cause and effect relationship between the activities for which Humboldt Redwood seeks approval and the ongoing challenges in the Lower Elk that would be necessary to justify the objectionable measures the Regional Board has proposed. Further, they do not provide the necessary substantial evidence that these additional measures would, if imposed, actually have the desired effect of improving conditions in the Lower Elk—the proposal acknowledges great uncertainty. These additional measures are highly objectionable and would impose an extensive, unnecessary regulatory burden on Humboldt Redwood. Humboldt Redwood requests that the Regional Board adjust the proposed WDRs to be consistent with Humboldt Redwood's ROWD and its comments. As currently, proposed, the WDRs are arbitrary and capricious, and adopting them as written would reflect an abuse of discretion and would exceed the Regional Board's authority. The additional measures that exceed those proposed in Humboldt Redwood's ROWD are unjustified, substantively and procedurally, by law, facts and science.

The Companies again emphasize that remediation of excess historical sediment in the Elk River floodplain to reduce flooding is clearly a worthy objective. Green Diamond and Humboldt Redwood are actively supporting voluntary stewardship efforts to identify remedial solutions for the Elk River floodplain. However, this end does not justify the regulatory means the Staff has chosen here—imposing the obligation on Humboldt Redwood to remediate the floodplain or continue to forfeit any right to carry out timber harvesting operations that the Company has demonstrated are fully protective of water quality and the environment. Further, the Regional Board's worthy objective to remediate the impaired condition does not justify the Regional Board's ignoring the role of other watershed conditions that are actually contributing currently to the impaired conditions.



**II. The Regional Board's Proposed WDRs Improperly Add Unnecessary, Unreasonable and Infeasible Measures and Restrictions to Humboldt Redwood's Robust Plan Reflected in its Report of Waste Discharge.**

In addition to the proposed WDRs' highly objectionable harvest prohibition and Lower Reach remediation requirements, Humboldt Redwood objects to the additional management restrictions the WDRs seek to impose beyond the harvest prohibition, including the:

- Imposition of an annual average 2% harvest rate limit for Humboldt Redwood's ownership in all sub-watersheds (10 year rolling average)
- Expansion of and changes to Humboldt Redwood's existing Riparian Management Zone protection measures
- Expanded wet weather-related prescriptions, amounting to a prohibition on timber operations permitted for over six months of the year (October 15 through May 1)
- Requirement to conduct a feasibility study for Control of *Instream* Sediment Sources<sup>2</sup>

These measures inexplicably contradict the successes of the past 10 years and the basis for many significant regulatory approvals, which all document major improvements in Elk River watershed conditions that, unlike those targeted by the Regional Board here, are potentially related to Humboldt Redwood's timber harvesting operations. There is no evidence that the Regional Board's additional measures are necessary or would provide the improvements the Regional Board asserts it is targeting. As proposed, the WDRs are unreasonable and infeasible. They would impose unnecessary regulatory burdens and threaten the economic viability of Humboldt Redwood's operations.

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<sup>2</sup> This requirement, applicable to sediment that has already found its way into the watercourse as a result of many different causes, including nature, has all the same flaws as those related to remediation of the Lower Elk River.

**III. As Proposed, the WDRs Lack Substantial Evidence and Would Violate the Prohibition in Water Code Section 13360 on Prescribing the Specific Method of Achieving Compliance**

Humboldt Redwood submitted a comprehensive ROWD proposal for its ownership in the Upper Elk River Watershed based on site-specific management objectives, and it addressed ownership and watershed-specific issues. These measures are supported by substantial evidence and are the product of many years of study, monitoring, experience and dialogue with Regional Board staff. Humboldt Redwood supports all those provisions of the proposed WDRs that reflect the findings and practices presented in the ROWD.

The Regional Board has erred in proposing additional conditions that are inconsistent with the ROWD and lack substantial evidence. These additional conditions lack the robust scientific support the ROWD provided and are based on scientifically indefensible conclusions. This approach fails to provide the necessary substantial evidence for doing so in relation to Humboldt Redwood's proposal. Further, this approach is a clear violation of the Water Code's prohibition on specifying the means of compliance.

Section 13360 provides that no waste discharge requirement may specify "the design, location, type of construction, or particular manner in which compliance may be had" with a requirement, order, or decree. The permittee is specifically allowed to comply with the WDRs in any lawful manner.

As one California Court of Appeal has described, "Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement." *Tahoe-Sierra Preservation Council v. State Water Resources Control Board* (1989) 2010 Cal. App. 3d 1421. Section 13360 "preserve[s] the freedom of persons subject to a discharge standard to elect between available strategies to comply with that standard." *Id.*

The Water Code authorizes the Regional Board to adopt requirements to meet water quality standards and protect beneficial uses, provided that those requirements are supported by substantial evidence. However, Water Code Section 13360 prohibits the Regional Board from dictating the means of complying with those requirements. This provision clearly would be violated by the addition of timber harvesting prescriptions and the outright prohibition of "harvesting activities" in the five subwatersheds.

Humboldt Redwood has crafted a proposal that results in a net reduction of sediment discharges over current conditions. That proposal reflects exactly the kind of ingenuity Section 13360 was designed to protect. The Regional Board's WDRs

reflect a substitution of its judgment as to the type and extent of forest management measures that Humboldt Redwood should apply. In so doing, the Regional Board has usurped the ingenuity Section 13360 was intended to preserve. We believe the additional measures proposed by the Regional Board, including the outright prohibition on harvesting activities and other attempts to directly regulate timber harvesting activities themselves, violate this provision and clearly exceed the Regional Board's authority under the Water Code.

**IV. As Proposed the WDRs Would Violate Constitutional Principles Outlined in the *Nollan* and *Dolan* Decisions. The Prohibitions, Restrictions and Management Measures Added to the Measures Included in Humboldt Redwood's ROWD Lack a Fundamental Nexus and Proportionality to Humboldt Redwood's Timber Harvesting Activities in the Elk River Watershed.**

The requirements of the proposed WDRs that Humboldt Redwood has objected to would violate the principles set out in the U.S. Supreme Court's *Nollan* and *Dolan* decisions. These decisions require rough proportionality and an essential nexus between the demands and regulatory burdens the Regional Board is proposing to place on Humboldt Redwood in the WDRs and the impacts of the timber harvesting operations covered by Humboldt Redwood's ROWD. There is no such proportionality or sufficient nexus here.

As explained in the *Nollan* and *Dolan* decisions, the Fifth Amendment takings clause prohibits the imposition of conditions that lack an essential nexus or rough proportionality to the permitted activity. The Constitution requires an essential nexus between the particular case and a legitimate regulatory interest. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Even when a nexus exists, the imposed condition must be roughly proportional to the effects of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

California courts have applied the principles from *Nollan* and *Dolan* to mitigation and regulatory requirements. *Environmental Protection Information Center v. Department of Forestry and Fire Protection*, 44 Cal. 4th 459 (2008) ("*EPIC*") (finding that a landowner may only be required to implement mitigation measures roughly proportional to a landowner's impact). The California Supreme Court found that mitigation measures which "[did] not differentiate between those events partially caused or exacerbated by timber harvesting and those that are not" went beyond the regulator's authority. *Id.* at 511. As the Court concluded, a landowner should bear no more "than the costs incurred from the impact of its activity." *Id.* The conditions imposed in the draft WDRs lack both an essential nexus and proportionality.

Essential Nexus. To be valid, the conditions in the WDRs must have an essential nexus to a legitimate government interest. The Regional Board is charged with the protection of waters within its jurisdiction. This includes both the upper and lower reaches of the Elk River. However, by the Regional Board's own admission, the conditions imposed by the draft WDRs are *not* related to government interest in the Upper Elk River where Humboldt Redwood's activities are proposed to occur. Rather, the Regional Board's stated interest is in the *Lower* Elk River. Further, the Regional Board does not provide a sufficient cause and effect connection and, therefore, the essential nexus, between the requirements and restrictions it seeks to impose on Humboldt Redwood in the Upper Elk and the conditions it seeks to improve in the Lower Elk.

Proportionality. Even if the Regional Board had established the required nexus, the imposed conditions must also be roughly proportional to the activities to be permitted. As the California Supreme Court has explained, the conditions must differentiate between the effects of the proposed project and those that are not—a permittee cannot be required to do more than mitigate the effects of its proposed activity.

As explained above, the conditions imposed by the WDRs are not supported by substantial evidence and are not adequately linked to Humboldt Redwood's proposed activities. Humboldt Redwood has submitted a ROWD with significant evidence that it fully mitigates the effects of the harvest activities and, in fact, results in a net reduction of sediment discharges in relation to existing conditions. The Regional Board has gone beyond the parameters of the ROWD without providing substantial evidence that the ROWD fails to fully mitigate the effects of the project. Thus, the conditions in the WDRs do not satisfy *Dolan's* rough proportionality standard because it exceeds the level of mitigation allowable under the law by requiring Humboldt Redwood to mitigate beyond the effects of Humboldt Redwood's own proposed activities.

The proposed WDRs seek to require Humboldt Redwood to remediate environmental impacts disconnected by both time and distance. The WDRs place a moratorium on activities in specific watersheds subject to Humboldt Redwood accepting responsibility for remediating environmental effects not caused by Humboldt Redwood's operations and, in fact, caused and contributed to by many other factors. The Regional Board expects Humboldt Redwood to fix a problem that was decades in the making in the Lower Elk, far removed from Humboldt Redwood's land and activities. This condition is completely lacking in proportionality in light of the zero net discharge effect of the measures proposed in the ROWD.

The other objectionable conditions included in the draft WDRs also exceed the Regional Board's authority and violate the essential nexus and rough proportionality

standards. The required expansion of RMZs, the two percent Clearcut Equivalent Acre limitation and the additional wet weather restrictions all are unnecessary and out of proportion with Humboldt Redwood's proposed activities. As Humboldt Redwood has demonstrated, the measures proposed in the ROWD fully address the water quality effects of its proposed harvest activities. The restrictions and management measures that Humboldt Redwood objects to in its detailed comments exceed the Regional Board's regulatory authority and violate the constitutional restrictions explained above.

**V. The Regional Board's Proposed Action Results in a Flawed Initial Study/Negative Declaration under the California Environmental Quality Act.**

The California Environmental Quality Act ("CEQA") provides for the evaluation of potentially significant environmental effects and the adoption of "feasible" measures that are found, on the basis of substantial evidence, to be necessary to avoid or reduce such an impact to less than minimal effects.

The Regional Board has failed to demonstrate with substantial evidence that the proposed project, meaning the activities covered by the ROWD, would result in a potentially significant environmental effects that require the specified measures to avoid or reduce such potential to a level of insignificance. Further, the Regional Board has failed to acknowledge the net reduction in sediment over existing conditions that result in cumulative benefits to the watershed rather than adverse cumulative effects.

For all the reasons set forth herein, the measures added to the WDRs and reflected in the draft Initial Study/Negative Declaration are clearly infeasible, and the proposed findings and the imposition of measures to mitigate or avoid such impacts are not supported by substantial evidence.

CEQA Guidelines § 15364 defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." There is no evidence that the Regional Board has considered the required factors, including the economic effects of the proposed restrictions, which would cripple Humboldt Redwood's Elk River Watershed operations.

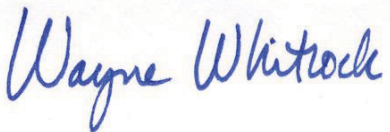
**VI. The Regional Board Should Eliminate the Unnecessary and Inefficient Enrollment Approval Process. THPs That Meet the WDRs Requirements, as Reflected In THP Approval Without Regional Board Objection, Should be Enrolled Without Further Regional Board Action.**

As Humboldt Redwood explained in its comments, the Regional Board has the ability to ensure that the WDRs are properly implemented through its review of every THP. It is unnecessary and improper for the Regional Board to require that, in addition to demonstrating compliance with the WDRs during the THP process, Humboldt Redwood must request and wait to begin operations for an affirmative enrollment in the WDRs. Unlike general waste discharge requirements, watershed-wide waste discharge requirements require Humboldt Redwood to continually monitor and implement sediment and prevention actions throughout the entire watershed including areas outside of the footprint of any individual THP. In exchange for shouldering this financial and operational burden, the company should be assured of consistent and automatic enrollment of individual THPs that demonstrate compliance with the WDRs as part of the standard THP approval process.

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In conclusion, we request that the Regional Board reconsider and revise its proposed WDRs consistent with these comments and those of Humboldt Redwood Company. Thank you for your consideration.

Sincerely,



Wayne M. Whitlock

cc: Humboldt Redwood Company Distribution  
Green Diamond Resource Company Distribution