

## MEMORANDUM

**To:** Tom Wheeler, Executive Director of the Environmental Protection Information Center

**From:** Michael Golz, Stanford Environmental Law Clinic Certified Law Student

**Date:** April 10, 2019

**Re:** Legal Analysis of Draft Order No. R1-2019-0021

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### Introduction

You asked us to review the draft waste discharge requirements (WDR) for Humboldt Redwood Company's Upper Elk River logging operations, Draft Order No. R1-2019-0021, and to provide you with a limited legal analysis. We understand that, in response to the State Board's directive to revise the WDR for the Humboldt Redwood Company (HRC), the Regional Board seeks to develop a new order that eliminates anthropogenic sediment loading of the Elk River to the maximum extent feasible. Our analysis below identifies two legal deficiencies: (1) the draft WDR does not comply with California's Nonpoint Source Policy (NPS Policy) – binding regulations adopted under the Porter-Cologne Water Quality Control Act – and recent judicial interpretation of the NPS Policy mandates; and (2) the Regional Board's proposed reliance on a mitigated negative declaration for the WDR does not satisfy the requirements of the California Environmental Quality Act (CEQA).

The Regional Board is charged by statute to regulate silvicultural discharges so that "the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state."<sup>1</sup> And the Regional Board "must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation."<sup>2</sup> To this end, California law requires that the Regional Board regulate discharges from timber harvesting activities with permitting conditions that implement the North Coast Basin Plan's water quality standards and protect beneficial uses.<sup>3</sup>

This requirement that the Regional Board implement the Basin Plan has two critical consequences. First, the Regional Board must achieve the recently adopted TMDL for Elk River sediment. As the Board well knows, the North Coast Basin Plan now includes a TMDL of zero anthropogenic sediment loading for the Elk River, as well as the accompanying TMDL Action Plan.<sup>4</sup> As the State Board noted, the TMDL Action Plan

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<sup>1</sup> Cal. Water Code §§ 13000, 13001.

<sup>2</sup> Cal. Water Code § 13000.

<sup>3</sup> Cal. Water Code § 13263(a).

<sup>4</sup> State Water Resources Control Board Resolution No. 2017-0046 (Aug.1, 2017), at 3.

requires that the Regional Board's "WDRs and any other orders [for the UER] 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>5</sup>

Second, because the Basin Plan must conform to state policy for water quality control,<sup>6</sup> any WDR issued by the Regional Board to implement the Basin Plan for UER logging operations must comply with those state policies. Of particular note – and the central subject of our comments – is the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program, commonly referred to as the NPS Policy. The NPS Policy enumerates several requirements for nonpoint source pollution WDRs which draft Order No. R1-2019-0021 fails to satisfy. Below, we describe the deficiencies with the draft order that result in noncompliance with the NPS Policy and suggest revisions to remedy the noncompliance.

### **I. The NPS Policy Sets Forth Regulatory Standards with which the Regional Board Must Comply.**

To ensure states are addressing pollution that is not subject to federal permitting requirements, Congress amended the Clean Water Act to require state programs that control nonpoint source pollution.<sup>7</sup> The State Board adopted the NPS Policy to comply with this obligation. The NPS Policy is designed to assist all responsible parties, such as regional water quality control boards, in understanding how California's nonpoint source pollution control requirements will be implemented and enforced.<sup>8</sup> But far from merely providing guidance for regional boards, the NPS Policy prescribes regulatory requirements – including "the mandatory five key elements" – applicable to each regional board's implementation of nonpoint source pollution control.<sup>9</sup>

The Regional Board must comply with the NPS Policy when crafting WDRs to implement nonpoint source pollution control. Where a regional board's nonpoint source control orders fail to comply with the NPS Policy, courts will declare the orders illegal and require the board to rewrite them.<sup>10</sup> During recent litigation in Monterey Coastkeeper v. State Water Resources Control Board, an appellate court evaluated the Central Coast Regional Board's efforts to control nonpoint source pollution from agricultural operations. The court emphasized that the NPS Policy sets forth legally operative requirements for regional board orders. In particular, the NPS Policy "mandates that an NPS program have a high likelihood of attaining water quality standards."<sup>11</sup> That is, WDRs designed to

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<sup>5</sup> Id. at 2.

<sup>6</sup> Cal. Water Code § 13240.

<sup>7</sup> 33 U.S.C. § 1329.

<sup>8</sup> Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (hereinafter, "NPS Policy") (May 20, 2004), at 2.

<sup>9</sup> Id.

<sup>10</sup> Monterey Coastkeeper v. State Water Resources Control Bd., 280 Cal. App. 5th 342 (2018)

<sup>11</sup> Monterey Coastkeeper, 280 Cal. App. 5th at 367.

control nonpoint sources of pollution must be highly likely to attain the water quality objectives laid out in the Basin Plan.

It is up to the Regional Board to “determine that there is a high likelihood the implementation program will attain the [regional board’s] stated water quality objectives.”<sup>12</sup> In determining whether its order contributes to a high likelihood of success, the Regional Board is guided by the appellate court decision in Monterey Coastkeeper. That case enunciated a fundamental nexus between the high likelihood standard and the five mandatory key elements: where a nonpoint source control program fails to satisfy a key element of the NPS Policy, the program cannot be highly likely to attain water quality objectives and is thus illegal.<sup>13</sup> The regional board order before the court in that case failed to include operative time tables with quantifiable milestones for improvement in agricultural discharges, as required by Key Element 3.<sup>14</sup> The court thus declared the order illegal.<sup>15</sup>

## **II. Draft Order No. R1-2019-0021 Fails to Comply with Several Key Elements of the NPS Policy.**

Upon reviewing the revised WDR for the Humboldt Redwood Company, we identified numerous legal deficiencies with respect to the NPS Policy. In this memorandum, we address the draft order’s noncompliance with Key Elements 2, 3, 4, and 5 of the Policy. The key elements were carefully drafted to ensure nonpoint source pollution WDRs would ultimately achieve water quality objectives. The draft order’s noncompliance with the key elements is thus not only deeply troubling, but also illegal.

### **A. The Draft Order Relies on Management Practices the Effectiveness of which the Regional Board Has Not Adequately Analyzed, in Violation of Key Element 2.**

The NPS Policy sets rigorous standards for the management practices used to implement nonpoint source pollution control programs. While “[m]ost NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution,”<sup>16</sup> the Regional Board “must be convinced there is a high likelihood the [management practices] will be successful.”<sup>17</sup> Thus, in order to comply with its obligations under the high likelihood standard, the Regional Board must evaluate the “effectiveness of the [management practices] implemented.”<sup>18</sup> For example, “MPs must be tailored to a specific site and circumstances,

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<sup>12</sup> NPS Policy at 11.

<sup>13</sup> Monterey Coastkeeper, 280 Cal. App. 5th at 369-70.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> NPS Policy at 7.

<sup>17</sup> Id. at 12.

<sup>18</sup> NPS Policy at 12.

and justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances.”<sup>19</sup>

We have two primary concerns with the draft order. First, the Regional Board has not undertaken the necessary analysis to determine if the revised specifications for canopy coverage and wet weather practices are adequate. For example, consider the canopy coverage revisions. Tetra Tech’s Upper Elk River: Technical Analysis of Sediment remains the primary source of technical information regarding sedimentation in the UER. While the report acknowledges the importance of canopy interception in reducing accelerated soil erosion,<sup>20</sup> nowhere does the report develop theory or modeling to support the numbers suggested by Regional Board staff. Moreover, during staff’s April 3, 2019 teleconference with interested stakeholders, it became apparent that the Regional Board does not even possess adequate data to determine the appropriate canopy coverage rates associated with low sediment impairment levels.

Second, Regional Board staff has taken a narrow view of the management practice revisions necessary to comply with the State Board directive. The State Board resoundingly rejected the 2016 version of the WDR, not simply because the canopy coverage buffer was too small, but because the entire order as a whole failed in the Board’s eyes to ensure minimization of anthropogenic sediment loading. Whatever form of the order that the Regional Board adopts, it must provide supporting evidence or analysis showing that the control measures specified in the order can meet this rigid expectation by 2031. We stress that the directive provides the Regional Board with a prime opportunity to rectify the inadequacy of the WDR, even if that ultimately means recognizing that the fragile geomorphology of the UER cannot sustain the current level of harvest and road use.

### **B. The Draft Order Lacks Specific Time Tables with Quantifiable Milestones, in Violation of Key Element 3.**

Key Element 3 of the NPS Policy demands that a WDR in a nonpoint source control program “include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching [water quality objectives].”<sup>21</sup> As explained above, this key element was recently litigated in Monterey Coastkeeper. The appellate court determined that the order in question failed to prescribe effectual time tables or milestones, holding that “[w]ithout specific time schedules and quantifiable milestones, there is not a ‘high likelihood’ the program will succeed in achieving its objectives, as required by NPS Policy.”<sup>22</sup>

Furthermore, the quantifiable milestones required by Key Element 3 must be tethered to water quality objectives. As the court in Monterey Coastkeeper made clear,

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<sup>19</sup> Id.

<sup>20</sup> See Tetra Tech, Inc., Upper Elk River: Technical Analysis of Sediment (Oct. 21, 2015), at 11.

<sup>21</sup> NPS Policy at 13.

<sup>22</sup> Monterey Coastkeeper, 280 Cal. App. 5th at 369.

“the purpose [of the milestones] is to assure that the water quality objectives are eventually met.”<sup>23</sup> Consequently, the Regional Board may not simply require a discharger to implement control measures without regard for resultant water quality conditions. While regional boards have flexibility in using their administrative tools to fashion pollution control programs,<sup>24</sup> “[m]anagement practice ‘implementation never may be a substitute for meeting water quality requirements.’ ”<sup>25</sup>

The State Board directive was clear: “[t]he WDRs and any other orders must include interim milestones and earlier compliance requirements than 2031 where appropriate and to the maximum extent feasible.”<sup>26</sup> In order to comply with the NPS, the Regional Board must revise the draft order to contain specific time tables with quantifiable milestones tied to water quality objectives. Our review of the draft order reveals a WDR reliant on HRC’s implementation of sediment control management practices without regard to the actual outcomes of those practices. There are neither time tables nor quantifiable milestones specified in the draft order, let alone carefully crafted milestones that will move the UER toward the TMDL of zero anthropogenic sediment. At bare minimum, HRC must be accountable for interim milestones, such as interim river sediment concentrations, that lead to attainment of the TMDL by 2031.

#### **C. The Draft Order Provides for Inadequate Feedback Mechanisms, in Violation of Key Element 4.**

Consistent with the fundamental objective of reaching water quality objectives, WDRs for nonpoint source pollution must include “sufficient feedback mechanisms so that the [Regional Board], dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.”<sup>27</sup> Verification and feedback measures, such as inspection and “ambient water quality monitoring,” are essential to the success – and legality – of a nonpoint source pollution control program.<sup>28</sup> In order to ensure timely compliance water quality objectives, regional boards will typically have to “describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program’s objectives.”<sup>29</sup>

Given the Regional Board’s duty to achieve the sediment TMDL by 2031, the current feedback mechanisms in the draft order are inadequate. Although the order includes monitoring of the direct effects of the management practices, such as reduced

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<sup>23</sup> Id.

<sup>24</sup> NPS Policy at 10.

<sup>25</sup> Monterey Coastkeeper, 280 Cal. App. 5th at 369 (citing Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (May 20, 2004), at 12).

<sup>26</sup> State Water Resources Control Board Resolution No. 2017-0046, at 3.

<sup>27</sup> NPS Policy at 13.

<sup>28</sup> Id. at 13-14.

<sup>29</sup> NPS Policy at 13.

landslides, very little attention is devoted to the Regional Board's ongoing efforts to track actual water quality conditions.

The Regional Board must revise the draft order to include more robust feedback mechanisms and adaptive measures to ensure timely compliance with the TMDL and water quality objectives. For example, Provision 64 of the Specific Requirements and Rationale section merely requires the Regional Board staff to, within five years, "assess whether water quality conditions in the impacted reach are improving."<sup>30</sup> As the order will be adopted no earlier than June 19, 2019, the Regional Board has less than twelve years to achieve the TMDL. The current proposal allows staff to revisit program effectiveness almost halfway to the deadline for TMDL attainment, leaving little time to adapt the WDR to address any deficiencies. The Regional Board should assess ambient water quality monitoring data annually to determine whether year-to-year variability in weather patterns and harvesting activities necessitates a more aggressive regulatory approach to restore beneficial uses.

#### **D. The Draft Order Fails to Adequately Specify the Consequences Triggered by Noncompliance with the Order, in Violation of Key Element 5.**

Even the most elaborate WDR will fail if there are no enforced consequences for noncompliance, whether with the provisions of the WDR itself or with broader water quality requirements. Accordingly, the NPS Policy requires the Regional Board to "make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes."<sup>31</sup> The Policy emphasizes the need for regulatory certainty, mandating that the Regional Board set "[c]lear expectations regarding potential [regional board] responses to inadequate or ineffective programs, including but not limited to adopting a revised program or the taking of an enforcement action."

Without a commitment to strengthening regulations in the face of lackluster progress toward the TMDL, the draft order violates Key Element 5. The order hints at potential consequences but fails to commit to a course of action that is highly likely to attain the TMDL by 2031. For example, the Executive Officer may decline to enroll timber harvest plans (THPs) if HRC harvests at a rate above 2% of equivalent clearcut acreage.<sup>32</sup> However, this provision overemphasizes the harvest rates instead of responding to progress (or lack thereof) in water quality conditions. In addition, as discussed above, the Board plans to revisit within five years whether the WDR's limited harvest conditions are adequate to improve water quality. But nowhere does the order address revisiting the entire WDR should it fail to move us toward our water quality objectives. To be legally

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<sup>30</sup> North Coast Regional Water Quality Control Board, 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 (proposed for June 19, 2019).

<sup>31</sup> NPS Policy at 14.

<sup>32</sup> Draft Order No. R1-2019-0021, at 37.

sufficient, the WDR must incorporate an approach more strongly correlated to actual water quality, such as an express willingness to substantially reign in logging operations – whether harvest, transportation, or road construction – in the face of persistent anthropogenic sediment loading.

### **III. The CEQA Process for Draft Order No. R1-2019-0021 Is Deficient.**

The NPS Policy lays out substantive water quality control requirements for the draft order with which the Regional Board has failed to comply. There are also deficiencies in the Board's process, particularly with respect to CEQA. First, given HRC's contribution to ongoing violation of water quality objectives, the Regional Board must prepare an EIR for adoption of a revised WDR. Second, the Board must consider the cumulative impacts of all logging operations in the UER, including Green Diamond's operations, when evaluating the environmental effects of HRC's practices.

#### **A. An EIR, not a Subsequent Mitigated Negative Declaration, Is the Proper Vehicle for the Proposed WDR.**

As noted in the 2019 Initial Study, issuance of a revised WDR for HRC's logging operations could have a significant effect on the environment.<sup>33</sup> Accordingly, the Regional Board may only prepare a proposed mitigated negative declaration (MND) if two conditions are met. First, the WDR must "avoid the effects or mitigate the effects to a point where clearly no significant effects would occur."<sup>34</sup> Second, there must not be substantial evidence before the agency that the revised WDR may have a significant effect on the environment.<sup>35</sup>

Neither of the conditions is met here because HRC's logging operations will contribute to already significant degradation of the Elk River. Where a project could contribute to ongoing exceedance of prescribed standards, the project's contribution – however marginal – must be considered in light of the preexisting exceedance.<sup>36</sup> For example, a court has held that where the emissions of a cogeneration facility would contribute incrementally to ambient air quality standard exceedance, proper cumulative impacts analysis must address the collective unlawful exceedance, not merely the facility's "relative effects."<sup>37</sup>

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<sup>33</sup> North Coast Regional Water Quality Control Board, Initial Study Supporting the Preparation of a Subsequent Mitigated Negative Declaration Waste Discharge Requirements for Timber Harvesting and Related Land Management Activities Conducted by Humboldt Redwood Company, LLC. In Upper Elk River, Humboldt County, California (proposed for June 19, 2019), at 32.

<sup>34</sup> Guidelines for Implementation of California Environmental Quality Act, 14 Cal. Code Reg. § 15070(b).

<sup>35</sup> Id.

<sup>36</sup> See Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 718 (1990).

<sup>37</sup> Id. at 721.

Unless HRC manages to prevent anthropogenic sediment loading from its property, the company's operations will contribute to ongoing violation of water quality standards and the TMDL. Although HRC's contribution may be smaller relative to historical loading, its operations are an integral part of collective UER sediment-producing activities. The draft order would thus authorize operations guaranteed to contribute to ongoing and significant environmental effects. Consequently, the Regional Board must produce an EIR.

**B. The Regional Board Is Engaging in Unlawful Piecemealing of CEQA Analysis for the Upper Elk River Watershed.**

A "project" for CEQA purposes is the "whole of an action" which poses the potential for physical damage to the environment.<sup>38</sup> In particular, the term "project" refers "to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies" and "does not mean each separate governmental approval."<sup>39</sup> Analysis of cumulative environmental impacts is crucial to the CEQA process,<sup>40</sup> motivating a prohibition on segmentation of related activities expected to cause environmental harm. As the California Supreme Court described more than 40 years ago, "the mandate of CEQA [is] that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences."<sup>41</sup>

The Regional Board's CEQA analysis unlawfully evaluates the impacts of Humboldt Redwood Company's logging operations in isolation. Namely, the 2015 Initial Study/MND and the 2019 proposed subsequent MND evaluate HRC's operations in the UER without reference to the effects of Green Diamond's concurrent operations. As the Regional Board admits, "[i]f adopted, the MND satisfies CEQA requirements for the regulatory portion of the TMDL Action Plan applicable to HRC."<sup>42</sup> Given that the Board's project here is to implement the TMDL Action Plan, Board may not consider the two companies' logging operations independently for the purposes of CEQA. Sediment impairment of the Elk River is integrally tied to the practices of both HRC and Green Diamond, so cumulative impact analysis of logging activities must address both companies.

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<sup>38</sup> 14 Cal. Code Reg. § 15378(a).

<sup>39</sup> *Id.* § 15378(c).

<sup>40</sup> *Id.* § 15126.2(a).

<sup>41</sup> *Bozung v. Local Agency Formation Comm.*, 13 Cal. 3d 263, 283-84 (1975).

<sup>42</sup> North Coast Regional Water Quality Control Board, Elk River TMDL, [https://www.waterboards.ca.gov/northcoast/water\\_issues/programs/tmdls/elk\\_river/](https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/elk_river/) (emphasis added).



In closing, we stress the urgency of improving water quality control in the Elk River watershed. As both private properties and protected fish species continue to suffer the fallout of logging practices, the Regional Board can no longer take a tepid approach to addressing dramatic sedimentation of the river. We hope this legal analysis will aid EPIC in correcting the Regional Board's abdication of its duty to properly regulate logging in the watershed.

Sincerely yours,

Environmental Law Clinic,  
Mills Legal Clinic at Stanford Law School