

1 ORDER NO. R1- 2006-0039. See Resolution No. R1-2006-0038 (“Pacific Lumber
2 WDR”) **Exhibit A hereto**. Petitioners incorporate the Exhibit A served and filed
3 with their original Petition by reference as if fully set forth here. This Petition is the
4 first amendment to the Petition that was filed on June 7, 2006.

5
6 Consistent with § VI(J) of Order No. R1-2006-0039, petitioners *do not*
7 petition to vacate Elk Findings #33, #34, #35 or any Findings or effective aspects of
8 the WWDR’s to the extent that they are relevant to Freshwater Creek.

9 Also, in accord with what discharger PALCO has done with its two Petitions
10 currently before the State Board, one challenging the WWDR’s and the other
11 challenging the May 15, 2006 letter from the Regional Board’s Executive Officer,
12 petitioners request that this Amended Petition be held in abeyance until further
13 notice pursuant to 23 CCR 2050.5. Petitioner are not requesting a stay at this time,
14 but do reserve their rights to seek such a stay in the future in the event that they
15 elect to change the status of this Amended Petition to active. Petitioners also
16 reserve the right to seek a hearing on the merits of this Amended Petition.

17
18 **III. STATEMENT OF THE REASONS THE ACTION WAS**
19 **INAPROPRIATE OR IMPROPER**

- 20 1. The North Coast Regional Water Quality Control Board violated CEQA
21 when it adopted negative declarations for impacts in Elk River.
22
23 2. The Regional Board improperly defined nuisance when developing
24 Receiving Water Limitations for Nuisance Flooding in Elk River.
25
26 3. The WWDR’s do not fulfill the Boards charge to “prevent nuisance” as
27 required by the California Water Code.
28

1 IV. PROCEDURAL HISTORY

2 The actions and inactions of the Regional Board have a long and detailed
3 history as follows:

- 4 • On April 17, 2000, Jesse Noell, Ken Miller and Alan Cook petitioned
5 the North Coast Regional Water Board to take action against Pacific
6 Lumber for its improper logging practices in the Elk River and
7 Freshwater drainages. The Regional Board refused to hold hearings or
8 take action on that petition.
- 9 • On March 1, 2001, another petition was filed which was marked
10 “received March 17, 2001.”
- 11 • On April 18 and 19, 2002, the Regional Board held a “Public Hearing
12 for Consideration of Potential Requests for Report(s) of Waste
13 Discharge for Timber Harvest Activities on and about Freshwater
14 Creek, Bear Creek, Stitz Creek, and Jordan Creek.” This hearing was
15 held in response to the State Water Quality Control Board (“State
16 Board”) Order of January 23rd, 2002, remanding petitioners’ request for
17 imposition of waste discharge requirement, for further action. At the
18 April 18-19 hearing, the Regional Board refused to take any action on
19 petitioners’ request that the Staff demand that waste discharge reports
20 be submitted and that waste discharge requirements then be imposed.
- 21 • On September 2, 2005, proposed WWDRs and attendant documents
22 previously circulated by the issuance team were made available to
23 interested parties. On March 8, 2006, new materials generated by the
24 issuance team for distribution were made available.
- 25 • On April 24th and 25th, 2006, the Regional Board held hearings, and on
26 May 8th, 2006 at or about 5:30 pm the Regional Board signed and made
27 “final” this action of the Regional Board [Watershed-Wide Waste
28

1 Discharge Requirements for Elk River– ORDER NO. R1- 2006-0039
2 See Resolution No. R1-2006-0038 hereinafter called (“Pacific Lumber
3 WDR”)or (“Order”)].

- 4 • On May 12, 2006 the Resolution 0038 and Elk 0039 WWDRs were
5 conformed to the adopted motion. It is unclear just how extensive the
6 changes were.
- 7 • On May 31, 2006, the excel files holding the Elk River Peak Flow
8 Models upon which the motion and Order relied, were finally provided
9 to Petitioner by e-mail. These excel files were part of the factual basis
10 for the Order at the time it went into effect on May 8th, 2006 at or about
11 5:30 pm.

12
13 V. STATEMENT OF HOW THE PETITIONERS ARE AGGRIEVED

14 The subject WWDRs are designed to provide discharger, Pacific Lumber
15 Company (“PL or PALCO”), with the privilege to discharge super-induced¹
16 floodwaters into the North and South Forks of Elk River, in Humboldt County.
17 Besides discharging floodwaters, the WWDRs permit PL to discharge large
18 amounts of harvest-related landslide-delivered sediments to the North and South
19 Forks of Elk River. These super-induced floodwaters and sediments flow
20 downstream to the nuisance-impaired low- gradient river reaches now buried in
21 sediments as a result of past operations on PL’s lands. These are the areas occupied
22 by Petitioners and their neighbors.

23 Petitioners Elk River Residents Association is a group of residents who are
24 aggrieved by increased nuisance flooding and/or impairment of water supply related
25 to impacts from discharges into the Elk River watershed.

26
27
28 ¹ Super-induced is used herein to distinguish those floodwaters that are derived from anthropogenic induced changes
to the watershed, i.e. man-made.

1 Petitioners Stephanie Bennett and Jesse Noell reside in a 102-year old
2 farmhouse located on the banks of the South Fork of Elk River near the confluence
3 with the North Fork of Elk River, with Stephanie’s elderly parent, Alice Bennett.

4 The original homestead and riparian rights predate the farmhouse, and date
5 back to 1856 according to the local memory of Paul Mazzucchi, who moved here in
6 1915. Petitioners’ only domestic and agricultural water supply is the now sediment-
7 impaired South Fork of Elk River.
8

9 Petitioners Stephanie Bennett and Jesse Noell are in the same position as
10 many others on the Elk River who were not provided alternative domestic and
11 agricultural water supply as a result of any Water Board Order (see CAO 98-100).
12

13 Petitioners and their families are aggrieved because they are and will continue
14 to be trapped by inevitably recurring flooding--which occurred as many as 10 times
15 last winter. Flood waters, at times, are affected by backwater effects in the vicinity
16 of the confluence of the two forks of the Elk River. Petitioners Bennett and Noell’s
17 home is sited above the 500-year FEMA flood line that was mapped pursuant to
18 state and federal requirements and county planning, FEMA designation “C.” Their
19 barn is sited near the 100-year flood plain FEMA map designation “A.”

20 On December 28th, 2005, Petitioners’ barn was invaded by flood waters
21 following 2.02 inches of rain that fell during the previous 24 hours. This amount of
22 rain, or greater, has fallen approximately 50 times during the past 52 years
23 according to the records maintained by the Eureka Weather Station.
24

25 Petitioner Kristi Wrigley lives at 2550 Wrigley Road where she farms an
26 apple orchard which, little more than a decade ago, consisted of about a 1,000
27 commercially productive trees. This farm has been in her family since 1903. Last
28 winter on December 28th, 2005, floodwater exceeded the record-setting 1964 storm

1 peak stage, and came within 8 inches of the 2002 peak stage. Kristi also owns
2 another family home that has been in her family since 1950, often referred to by
3 locals as the “Red House,” located at the confluence of the North and South Forks
4 of the Elk River. That house flooded 5 inches on December 28th, 2005, following
5 little more than two inches of rain during the previous 24-hour period. The logging
6 impacts in both the South Fork and the North Fork of Elk River contributed to this
7 flooding event.

8
9 For decades, the Regional Board has delayed taking action to control
10 sediment discharge, failed to enforce cleanup and abatement actions, failed to
11 prohibit discharge of waste in amounts deleterious, failed to issue cease and desist
12 orders, and now, after *decades of failing* to protect water quality, the Regional
13 Board grants waste discharge permits that exacerbate, prolong, and increase the
14 continuing nuisance in Elk River. Petitioners’ property is now permanently
15 subjected to inevitably recurring physical invasion by super-induced flood waters
16 and Petitioners’ riparian rights to domestic water and agricultural supply are
17 severely impaired.

18 VI. ELK RIVER WATERSHED BACKGROUND

19
20 The Elk River is one of six or seven remaining viable populations of wild
21 Coho salmon in California during decadal downturns in oceanic conditions. South
22 Fork Elk River is one of perhaps three viable populations whose breeding and
23 rearing habitat is substantially (50% or more) protected from logging by state or
24 federal forest reserves. Coho salmon are endangered. Since 1996, spawning gravels
25 in the low gradient reaches of the South Fork of Elk River have been progressively
26 buried with fine sediments. Given the paucity of viable wild populations of Coho,
27 this Elk River population of Coho is essential to the recovery of California’s
28

1 commercial and sport fishery identified by the North Coast Basin Plan as a
2 beneficial use of water². Elk River is identified in the State’s Coho Recovery Plan.

3
4 Flooding in Elk River results from the combined effects of sedimentation and
5 increased peak flow runoff. According to Rose Patenaude, Water Quality Engineer,
6 the Elk River has lost 60% of its floodwater conveyance capacity due to
7 sedimentation between 1965 and 2004.³ Last year, an additional 1/2 foot of fine
8 sediment was deposited over the old spawning gravels and rearing pools in the
9 channel adjacent to the farmhouse.⁴ Since October 2000, two feet of fine sediments
10 have been deposited in the channel adjacent to petitioners Bennett and Noell’s
11 farmhouse.⁵

12 According to the technical report (Empirical Peak Flow Reduction Model for
13 the Watershed-Wide Waste Discharge Requirements), the WWDR permit: “Allows
14 additional incremental discharges of peak flow due to canopy removal until
15 Channel Capacity is restored or infrastructure is improved.”⁶ The technical report
16 finds that “since natural recovery” [relied on to restore channel capacity] “would
17 take a very long time (in the order of many decades to centuries), some type of
18 assisted recovery is appropriate⁷; However, “Staff further determined that no
19 funding, public or private, was available for study preparation or implementation,
20 nor was any entity prepared to accept lead responsibility.” The Regional Board
21

22
23 ² See Appendix F to NCRWQCB’s Sensitive Watershed Nomination for Elk River

24 ³ Patenaude, J.R. 2004. Preliminary Assessment of Flooding in Lower Elk River. August 2004. North Coast Regional
25 Water Board Staff Technical Report.

26 ⁴ Testimony and comments of Jesse Noell, photos by Clark Fenton.

27 ⁵ Testimony and comments of Jesse Noell, photos by Clark Fenton.

28 ⁶ Empirical Peak Flow Reduction Model for the Watershed-wide Waste Discharge Requirements, page 2.

⁷ Empirical Peak Flow Reduction Model for the Watershed-wide Waste Discharge Requirements, page 1.

1 refused to accept lead responsibility.⁸ At this rate of recovery, Petitioners will likely
2 be dead before recovery occurs.

3
4 Over the past 12 years, the discharger was cited for violating state law scores
5 of times whereby dozens of landslides discharged hundred of thousands of cubic
6 yards of sediment into Elk River. In response to a Petition for Dredging signed by
7 64 Elk River residents and dated October 2, 2003, (**EXHIBIT B hereto**) Petitioners
8 incorporate the Exhibit B to their original Petition filed and served on June 7, 2006
9 by reference as if fully set forth here. The Regional Board in its December 3rd, 2003
10 Adopted Motions directed the Executive Officer “*to prepare a proposal for*
11 *pursuing short-term remedial options, **exclusive of dredging.**”⁹ The Regional Board*
12 chose not to take administrative civil liabilities action to clean up the sediment and
13 debris from the river, nor did the Regional Board “ratchet up” the enforcement
14 actions as required by the State Water Board’s Enforcement Policy.¹⁰

15
16 Although the Regional Board identifies the cause of nuisance flooding to be
17 channel filling—the Regional Board did not issue a Cleanup and Abatement Order
18 to remove the sediments that fill the channel. The WDR does not require the
19 discharger to cleanup the identified cause of nuisance flooding and no CAO that
20 would require cleanup of the channel filling sediments is coupled with the WWDR.
21 The WWDR simply provides the discharger with a permit to conduct more harmful
22 activities---ground disturbance, road construction and reconstruction, vegetation
23 removal-- that all the evidence shows will result in more sediment discharge and
24

25 ⁸ Empirical Peak Flow Reduction Model for the Watershed-wide Waste Discharge Requirements, page 2.

26
27 ⁹ MOTION 3.

28 ¹⁰ relevant pages were placed into record at an earlier comment and will be located when the record is available.

1 additional peak flow runoff, prolonging the continued harm to plaintiffs' health and
2 safety as well as continued property damage.

3 VII. ACTION THAT THE PETITIONERS WANT THE STATE BOARD
4 TO TAKE

5
6 Petitioners request the State Board to:

7 A. Vacate the approval of the Elk River WWDRs;

8 B. Issue a Cease and Desist Order, effective for three years or until the
9 discharger has removed an equivalent amount of sediment from the nuisance stream
10 reaches to recover the conveyance capacity of the stream as it was in 1987.

11 VIII. MEMORANDUM OF POINTS AND AUTHORITIES

12 A. THE WWDRs ARE INVALID BECAUSE THEY VIOLATE KEY
13 ANTI-DEGRADATION PROVISIONS IN STATE AND
14 FEDERAL WATER LAW

15 The record shows that the Regional Board failed to comply with Resolution
16 No. 68-16 when it approved the WWDRs, which: 1) permit the delivery of harvest
17 related landslide sediment to be increased¹¹ to the rate of 125% of landslide
18 sediment delivery associated with 15-year-old-and-older-harvest-units,¹² and 2)
19 permits the discharge of peak flow runoff in amounts that are deleterious and cause
20

21
22 _____
23 ¹¹ North Coast Basin Plan prohibits increases in turbidity beyond 20% above naturally occurring background levels.
24 More than 90% of sediment passing Salmon Forever's station on the South Fork of Elk River is believed to be
25 sediment that is suspended in the water column, according to Jesse Noell.

26 ¹² Manka, 2005, pg. 54, found that suspended sediment loads in streams flowing from a mix of recently harvested and
27 greater than 15-year-old harvest areas are 10 to 20 times higher than the naturally occurring background rates in Little
28 South Fork Elk River. *See also*, Elk River Resolution No. R1-2006-0038, paragraph 25, page 11 and watershed map
found at Attachment 1, Monitoring and Reporting Program No. R1-2006-0039.

1 nuisance. In essence, the Regional Board decided to weaken the existing Basin Plan
2 standard rather than protect the Beneficial Use and prevent the continuing nuisance.

3 First, the Regional Board impermissibly redefined the concept of nuisance¹³
4 so that most of the conditions petitioners have complained of are no longer at issue
5 and will not be specifically addressed as a result of the WWDR's implementation.

6 Water Code § 13050 provides as follows:

7 (m) "Nuisance" means anything which meets all of the following requirements:

8 (1) Is injurious to health, or is indecent or offensive to the senses, or an
9 obstruction to the free use of property, so as to interfere with the comfortable
10 enjoyment of life or property.

11 (2) Affects at the same time an entire community or neighborhood, or any
12 considerable number of persons, although the extent of the annoyance or damage
13 inflicted upon individuals may be unequal.

14 (3) Occurs during, or as a result of, the treatment or disposal of wastes.

15 Although Finding No. 39 does recognize that limited ingress and ingress to
16 property is one type of nuisance that is occurring, the finding also lists damage to
17 waterlines, fences being knocked down, loss of agricultural production, threats to
18 septic systems, loss of domestic water supplies from silting in of pools, the wear
19 and failure of pumps, damage to flooring, walls, and furniture, depressed property
20 values, and emotional distress of property owners. All these are recognized as
21 nuisances. But Finding No. 49 focuses only on the vehicle traffic impacts on Elk
22 River Road, and uses that to determine the receiving water limitation that is
23 necessary to eliminate nuisance. That narrow definition was arbitrarily determined,
24 and the findings contain no facts that justify ignoring the many other types of
25
26
27

28 ¹³ Elk River Resolution No. R1-2006-0038, paragraph 45, page 17.

1 nuisance that occur when flooding is less severe than that which causes Elk River
2 road to be reduced to one lane traffic.

3 On judicial review under C.C.P. § 1094.5 (b), the court will look at, among
4 other things, whether there was any prejudicial abuse of discretion by the agency.
5 Abuse of discretion is established if the decision is not supported by the findings.

6 The Regional Board decision is erroneous because it is not supported by the
7 findings.

8 Second, the Resolution findings established a “when achieved”¹⁴ standard for
9 peak flow increase that continues the nuisance for 20 years at Dead Woman’s
10 Corner, a location on Elk River downstream of the North Fork Bridge. On the South
11 Fork of Elk River, residents and their property will be subjected to endless nuisance
12 as there will be *no peak flow limitation*. At petitioners Bennett and Noell’s
13 farmhouse, the combined effects of peak flow increase and sedimentation has
14 converted the 100-year FEMA mapped flood stage into essentially an annual event.

15 This not only violates Water Code § 13263 (a)) and the Basin Plan, section 4,
16 page 4-32.00.), but it impairs petitioner’s vested riparian water rights, destroys
17 petitioner’s water supply, and forces petitioner to submit to the invasion of
18 petitioners land by super-induced flood waters and deposits of waste; all without
19 just compensation.
20

21 There is no Board finding that justifies the infliction of nuisance, damage to
22 property, threat to the health and safety, and the destruction and impairment of the
23 Beneficial Use as consistent with the maximum benefit to the people of the state.
24 This is simply a Board acting under the color of law forcing petitioners and dozens
25 of other people to bear a disproportionate burden such that the discharger may
26 benefit by having a permit to discharge waste into the public trust waters of the
27

28

¹⁴ Elk River Resolution No. R1-2006-0038, paragraph 44, page 17.

1 State. Once discharged, the wastes will impair petitioners' water supply and flood
2 onto petitioners' lands, damaging them.

3 Resolution 68-16 requires specific steps to protect high quality waters,
4 including mandating the use of WDRs setting forth specified technology-based
5 effluent limitations:

6 Whenever the existing quality of water is better than the quality
7 established in policies as of the date on which such policies become
8 effective, such existing high quality will be maintained until it has been
9 demonstrated to the State that any change will be consistent with
10 maximum benefit to the people of the State, will not unreasonably
11 affect present and anticipated beneficial use of such water and will not
12 result in water quality less than that prescribed in the policies.

13 Any activity which produces or may produce a waste or increase
14 volume or concentration of waste and which discharges or proposes to
15 discharge to existing high quality waters will be required to meet waste
16 discharge requirements which will result in best practicable treatment
17 and control of the discharge necessary to assure that (a) a pollution or
18 nuisance will not occur and (b) the highest water quality consistent
19 with maximum benefit to the people of the State will be maintained.

20 The Boards are also bound by federal anti-degradation regulations
21 promulgated under the federal Clean Water Act (CWA). The CWA permits
22 degradation only where "the State finds, after full satisfaction of the
23 intergovernmental coordination and public participation provisions of the State's
24 continuing planning process, that allowing lower water quality is necessary to
25 accommodate important economic or social development in the area in which the
26 waters are located." 40 C.F.R. 131.12(a)(2). Even where States can make the
27 necessary findings, they must continue to "assure water quality adequate to protect
28 existing uses" and achieve "reasonable best management practices for nonpoint
source control."

1 Maintenance of existing high quality waters means maintenance of
2 background levels, unaffected by other discharges. To the extent that high
3 quality waters are not maintained, Petitioners rights are taken and damaged.¹⁵

4
5 **B. A NEGATIVE DECLARATION WAS IMPROPER BECAUSE**
6 **SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT**
7 **THE PROJECT MAY HAVE A SIGNIFICANT IMPACT ON THE**
8 **ENVIRONMENT**

9 The Regional Board's Finding No. 117 states that the WWDR's could be
10 exempt from CEQA under 14 CCR §§ 15307 and 15308. 14 CCR § 15307
11 provides:

12 Class 7 consists of actions taken by regulatory agencies as authorized
13 by state law or local ordinance to assure the maintenance, restoration,
14 or enhancement of a natural resource where the regulatory process
15 involves procedures for protection of the environment. Examples
16 include but are not limited to wildlife preservation activities of the
17 State Department of Fish and Game. Construction activities are not
18 included in this exemption.

19 In Wildlife Alive v Chickering (1976) 18 Cal.3d 190, 205-206 the California
20 Supreme Court explained that there is no power to create CEQA exemptions for
21 activities that may have a significant effect on the environment, whether those
22 effects would be favorable or unfavorable. For that reason, it rejected the argument
23 that the setting of hunting seasons by the California Fish and Game Commission
24 was categorically exempt under § 15307. It could be argued that adoption of the
25 WWDR's at issue here will have a favorable effect on the environment, but under
26 Wildlife Alive, that does not entitle the WWDR's to a categorical exemption.

27
28 14 CCR § 15308 provides as follows:

¹⁵ see testimony and comments of ERRRA, Jesse Noell and Kristi Wrigley.

1 Class 8 consists of actions taken by regulatory agencies, as authorized
2 by state or local ordinance, to assure the maintenance, restoration,
3 enhancement, or protection of the environment where the regulatory
4 process involves procedures for protection of the environment.
5 Construction activities and relaxation of standards allowing
6 environmental degradation are not included in this exemption.

6 Under the reasoning of Wildlife Alive, reliance on Class 8 as an exemption is
7 foreclosed as well. See also Bankers Hill, Hillcrest, Park West Community
8 Preservation Group v Mi Arbolito LLC (2006) 139 Cal.App.4th 249, 267 fn 15 (no
9 statutory policy exists for in favor of applying categorical exemptions where a fair
10 argument can be made that a project will create a significant effect on the
11 environment). It is apparent that the WWDR's at issue here may have a significant
12 effect on the environment. Plus, because the "grandfather clause" was modified as
13 well to eliminate subtracting from the discharger's permitted sediment ceiling the
14 amounts by which they had exceeded their quota under the GWDR's, the WWDR's
15 arguably result in a relaxation of standards allowing environmental degradation.
16 Therefore, Finding 117's contention that the WWDR's could be found to be exempt
17 from CEQA is improper.

19 Although it contended that the WWDR's could be found to be exempt from
20 CEQA, the Regional Board nevertheless acted as the lead agency for CEQA
21 compliance, and purported to conduct an Initial Study and issued a Negative
22 Declaration for the project.

23 Guidance to the Regional Board on determining whether the project would
24 have significant environmental effects is provided by 14 CCR § 15064. Subsection
25 (f)(1) provides: "Said another way, if a lead agency is presented with a fair
26 argument that a project may have a significant effect on the environment, the lead
27 agency shall prepare an EIR even though it may also be presented with other
28

1 substantial evidence that the project will not have a significant effect ([No Oil, Inc.](#)
2 [v. City of Los Angeles \(1974\) 13 Cal. 3d 68.](#))”

3 The Regional Board or staff obviously misapprehended the guidelines
4 because Finding No. 123 states in part that “[t]here is no evidence in the record to
5 support a fair argument that these watershed-wide WDR’s will result in significant
6 *adverse* environmental effects (emphasis supplied).” The Negative Declaration
7 itself reflects this misunderstanding of the proper standard of review. It states under
8 the Environmental Finding heading that: “This project will not have a significant
9 adverse affect on the environment.” As discussed above, to trigger the need for an
10 EIR, as opposed to a Negative Declaration, it need only be shown that substantial
11 evidence supports a fair argument that the project will have a “significant effect on
12 the environment.” Whether that effect would be adverse or not is irrelevant. An
13 EIR would be much more appropriate for this project. For one thing, it would
14 prevent the Regional Board from substantively modifying the WWDR’s after the
15 public comment period is over, as it did in this instance.

16
17 In granting PALCO’s Petition for Writ of Mandate in CV050516, Judge
18 Letton recently noted in the Order filed April 27, 2006, that “CEQA compliance for
19 the adoption of the GWDR’s is controlled by the potential environmental impacts of
20 the act of adopting the GWDR’s.” So it must be with the WWDR’s. However, for
21 CEQA purposes, the passage of the WWDR’s should not have been considered in a
22 vacuum.

23
24 A project's environmental effects may be sufficiently significant to
25 require the preparation of an EIR if they are "cumulatively
26 considerable," meaning that "the incremental effects of [the]
27 individual project are considerable when viewed in connection with
28 effects of past projects, the effects of other current projects, and the
effects of probable future projects." (Guidelines, § 15065, subd. (c).)
This requires the lead agency to "consider[] the effects of other

1 projects, but only as a context for considering whether the incremental
2 effects of the project at issue are considerable. In other words, the
3 agency determines whether the incremental impacts of the project are
4 'cumulatively considerable' by evaluating them against the backdrop of
5 the environmental effects of other projects." [citation].

6 Gentry v City of Murietta (1995) 36 Cal.App.4th 1359, 1381.

7 Obviously, past logging activities in Elk River were “projects” that were
8 subject to CEQA. The same goes for concurrent and future logging operations.
9 Because the WWDR’s act as gatekeepers of two factors that have a direct affect on
10 the physical environment, ie: the peak flows of Elk River and the amount of
11 sediment its waters will carry, the cumulative effects of the WWDR’s and the past,
12 present, and future logging activities of the discharger should have been considered,
13 and it is obvious that taken together, they may have a significant effect on the
14 environment.

15
16 14 CCR § 15065 provides in relevant part:

17 (a) A lead agency shall find that a project may have a significant effect
18 on the environment and thereby require an EIR to be prepared for the
19 project where there is substantial evidence, in light of the whole record,
20 that any of the following conditions may occur:

21 (1) The project has the potential to substantially degrade the quality of
22 the environment; substantially reduce the habitat of a fish or wildlife
23 species; cause a fish or wildlife population to drop below self-
24 sustaining levels; threaten to eliminate a plant or animal community;
25 ...substantially reduce the number or restrict the range of an
26 endangered, rare or threatened species;

27 There is substantial evidence in the record that a fair argument can be made
28 that the WWDR’s, considered cumulatively with the other past and future logging
projects, will significantly affect the environment by allowing the sediment levels in
the Elk River to get so high as to substantially reduce the spawning habitat of Coho

1 salmon, causing its population to fall below sustaining levels, thereby eliminating
2 that community from the Elk River. Crucially the savings clause of subsection
3 (b)(2) does not come into play where the species could be eliminated from the Elk
4 River.

5
6 At the hearings of April 24 and 25, 2006, petitioners and Salmon Forever
7 submitted photographs and updated data for hydrologic years 2005 and 2006
8 showing: 1) an epidemic of new or reactivated landslides associated with timber
9 harvest in the South Fork of Elk River, and, 2) significant aggradation at nuisance
10 flood reaches.

11 The photographs taken February 2006 along a two mile stretch of South Fork
12 Elk River, depict five or more new or reactivated landslides associated with timber
13 harvests from 1997 and later. This epidemic demonstrates that the storms of 2005
14 were a substantial landslide triggering event. This is in sharp contrast to 2003,
15 where Appendix A to the Landslide Sediment Delivery Reduction Model shows
16 only four landslides in the entire South Fork watershed. Some of these were likely
17 reactivated by the winter storms of 2005. This shows that the WWDR's, considered
18 cumulatively with past and future logging activities have a substantial likelihood of
19 significantly effecting the environment.
20

21 There is also substantial evidence in the record to support a fair argument that
22 the environmental effects of the WWDR's will "cause substantial adverse effects on
23 human beings, either directly or indirectly," within the meaning of 14 CCR § 15065
24 (a)(4), and that the WWDR's have the potential to achieve short term environmental
25 goals to the disadvantage of long term environmental goals, with in the meaning of
26 subsection (a)(2).
27
28

1 The evidence in the record of significant affects upon humans is legion. The
2 Regional Board’s findings themselves acknowledge the impacts to residents of the
3 Elk River watershed.

4 As discussed in detail below in the context of CEQA procedure, the fact of
5 the modification of the “grandfather clause” at the last minute gives further support
6 to the contention that approval of a negative declaration for this project was
7 improper. That the practical effect of that modification was to almost double the
8 amount of sediment that would be allowed in the South Fork of the Elk River
9 cannot be said to be other than a significant effect upon the environment.

10 The Regional Board also inserted § IV(B)(3) into Order No. R1-2006-0039,
11 the WWDR’s, in executive session on May 8, 2006, after public comment was
12 closed. That language appears nowhere in the draft WWDR’s that were circulated
13 as part of the CEQA process. The language allows the discharger to become
14 eligible to exceed the harvest acreage associated with the receiving water limitation
15 in the WWDR’s if it shows that it has an enforceable monitoring program to prove
16 that no discharge has occurred. But what if the monitoring program shows that in
17 fact an unacceptable amount of discharge has occurred? By then, the trees can have
18 been cut, and once again, the discharger will have been given a way to get around
19 the harvest limitations that are the heart of the WWDR’s.

20 Because harvest in excess of the limits in the South Fork WWDR’s is
21 possible because of §IV(B)(3) of the Order, additional runoff into the river will
22 result, whether it is carrying sediment or not. This increase flow will combine with
23 the North Fork below the confluence, it will increase nuisance flooding downstream
24 from there. It will also increase flooding at petitioner Wrigley’s Red House, which
25 is located at the confluence. It will flood more because there is a slight “back up”
26 effect at the confluence generated by the higher flows coming down the South Fork.
27
28

1 Surely, this scenario qualifies as supporting a fair argument that the
2 WWDR's may have a significant effect on the environment.

3 C. THE REGIONAL BOARD CHANGED THE PROJECT WITHOUT
4 NOTICE TO INTERESTED PERSONS AND ISSUED WWDR'S IN
5 VIOLATION OF CEQA PROCEDURAL REQUIREMENTS

6 The draft WWDR's that was the "project" for which a negative declaration
7 was proposed, and that was adopted by resolution on May 8, 2006, contained
8 language to the effect that the acreage that was previously harvested under the
9 GWDR's would count against the allocation of harvest acreage specified by the
10 models in the WWDR's.

11 Directly after returning from executive session on May 8, 2006, the Regional
12 Board announced that it was modifying that clause to eliminate the offsetting effect
13 of the harvest that had exceeded the levels set under the GWDR's. It also added §
14 IV(B)(3) to Order No. R1-2006-0039, as discussed above. None of the interested
15 persons who participated in the hearings of April 24th and 25th, 2006, were aware
16 that this was even possible. The public had been assured at prior board meetings
17 that whatever harvest was conducted under the prior enrollments would be held
18 against the WWDR limitations.

19 At the March 2005 Regional Board meeting under Item 7, Regional Board
20 member John Corbett made a motion with a stipulation: "...the conditions must be
21 amended into the THP. All the clear-cut equivalent acreage enrolled under this
22 motion will count against whatever limits come out of the watershed-wide-WDRs
23 when they are considered for adoption." The rescission of the grandfather clause
24 improperly permitted approximately 230 acres of harvest to occur in the South Fork
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1 of Elk River in one year;¹⁶ thereby significantly increasing (doubling) the impacts
2 over the limitations established by the landslide model, and increasing peak flow.
3 This action destroyed the integrity of the Landslide Reduction Model by, as a
4 practical matter, allowing an “end run” around its basic premise that limited canopy
5 removal will suppress landslides and thus the amount of sediment in the river,
6 which will in turn affect peak flows.

7
8 The technical information in the record clearly establishes that water quality
9 impacts are directly proportional to area harvested.

10 This modification to the “grandfather clause” is important because it deprived
11 interested members of the public of the right to consider and comment upon the
12 proposed negative declaration, because the action modifying it was done after the
13 public comment period was over.

14 Courts interpret CEQA broadly in order to afford the fullest protection to the
15 environment consistent with the reasonable scope of the statutory language. Fall
16 River Wild Trout Foundation v County of Shasta (1999) 70 Cal.App.4th 482, 490.

17 Courts have repeatedly emphasized that the CEQA process serves an
18 important informational purpose.

19 The environmental review contemplated by CEQA serves an
20 informational purpose. This review does not impose conditions or
21 mandate how a project should be run. It simply explains the effects of
22 the project, reasonable alternatives, and possible mitigation measures
23 "so that the public can help guide decision makers about environmental
24 choices." ([Endangered Habitats League, Inc. v. State Water Resources](#)
[Control Bd. \(1997\) 63 Cal. App. 4th 227, 242 \[73 Cal. Rptr. 2d 388\].](#))

26 ¹⁶ In 2005, 231 acres were harvested in the South Fork of Elk River; the WDR landslide model limits harvest to 114
27 acres harvested each year after 2004. Petitioners believe this to be accurate, however Petitioners have not received the
28 hearing transcript as of June 6, 2006.

1 County of Amador v El Dorado County Water Agency (1999) 76
2 Cal.App.4th 931, 960; see also Kings County Farm Bureau v City of Hanford
3 (1990) 221 Cal.App.3d 692, 712 (failure to include relevant information in EIR
4 precludes informed public participation).

5 In Fall River, supra, 70 Cal.App.4th 482, 492-493, the court upheld the trial
6 court’s setting aside of the adoption of a mitigated negative declaration where the
7 county had failed to send a copy to the Department of Fish and Game as required by
8 law. The court reasoned that doing so deprived the county of, among other things,
9 informed public participation. The court discussed the case law that found failure to
10 comply with mandatory procedures to be presumptively prejudicial. That reasoning
11 applies here. The lead agency should have included in the project description at
12 least the possibility that the “grandfather clause” would be modified in the way that
13 it was, to give the public the opportunity to comment upon that scenario.
14

15 The approach followed by the Regional Board was tantamount to a “bait and
16 switch” technique that was clearly improper and inappropriate.

17 The only way this can be avoided in the future, is if the Regional Board does
18 a full EIR on the project. This would require that all the various scenarios that the
19 Regional Board is contemplating in the way of possible scenarios be aired in public
20 and commented upon. This would avoid the improper and inappropriate procedure
21 that occurred here.

22 **E. THE REGIONAL BOARD DID NOT DO WHAT WAS**
23 **NECESSARY TO GO BEYOND THE AVOIDANCE OF SIGNIFICANT**
24 **ENVIRONMENTAL IMPACTS AS REQUIRED BY THE WATER CODE**

25 It was the Regional Board’s responsibility to see that the discharger’s conduct
26 complies with the Basin Plan and the Porter-Cologne Water Quality Act. The
27 following aspects of the WWDR’s render the Regional Board’s action improper and
28 inappropriate:

- 1 a. WWDR's will remove Agricultural Lands from production;
- 2 b. WWDR's fail to prevent exposure of people and structures to
- 3 significant risk of loss, injury or death involving flooding;
- 4 c. WWDR's fail to prevent substantial adverse effects on the health
- 5 and safety of human beings;
- 6 d. WWDR's fail to prevent contribution of runoff water which would
- 7 exceed the capacity of roads, bridges and infrastructure;
- 8 e. WWDR's fail to prevent a reduction in the feeding, breeding and
- 9 rearing success of Elk River's endangered coho salmon;
- 10 f. WWDR's fail to prevent housing within a 100-year flood hazard
- 11 area as mapped on a federal Flood Hazard Boundary and Flood
- 12 Insurance Rate Map from being subjected to flooding on a annual or
- 13 decadal basis for 20 years or more;

14 Under the Water Code, the Regional Board is charged with, among other
15 things, *preventing* nuisance. Water Code §§ 13263(a) and 13241. The Regional
16 Board ignored any scenario that could actually accomplish this, and instead adopted
17 a strategy, that might, after 20 years, *eliminate* the nuisance conditions which will
18 undoubtedly persist to some substantial degree during this lengthy period. That is
19 not prevention.

20 Petitioners and Salmon Forever, a nonprofit water quality monitoring group,
21 submitted updated data for hydrologic years 2005 and 2006 showing: 1) an
22 epidemic of new or reactivated landslides associated with timber harvest in the
23 South Fork of Elk River, and, 2) significant aggradation at nuisance flood reaches.
24 Despite the discharger's court actions that led to a seven-month delay, neither the
25 discharger nor staff submitted updated evidence related to environmental settings
26 and nuisance conditions that rebut evidence submitted by Petitioners and Salmon
27 Forever. Finally, evidence submitted by Petitioners and Salmon Forever
28 demonstrates that the assimilation capacity for fine and course suspended sediments

1 of the nuisance stream reaches is presently over utilized. See Water Code 13263 (a)
2 and (b). Given the ongoing aggradation and bank accretion in combination with
3 nuisance flooding, under-utilization-receiving water limitation prescriptions are
4 necessary. The Findings do not provide a rationale that is supported by specific
5 factual findings regarding what the proposed level of utilization will be and how
6 that level will affect the full slate of beneficial uses and prevent nuisance.

7 **F. PETITIONERS WERE DENIED A FAIR HEARING BEFORE THE**
8 **REGIONAL BOARD**

9
10 Upon judicial review under C.C.P. 1094.5, a court will inquire into whether
11 there was a fair trial. Here, the Regional Board abused its discretion by allowing a
12 newly formed group to acquire “party status” even though it had missed the
13 deadline to file comments.

14 The granting of that status by the Regional Board was prejudicial to the
15 instant petitioners because it drastically cut down on the amount of time that they
16 had to present their case at the Regional Board’s hearings.

17 The “Owners Group” initial request for party status was denied by the
18 Regional Board. They then sought relief in Humboldt County Superior Court. The
19 court granted their motion to intervene in that action, which had been brought by
20 PALCO. That case was soon dismissed though. The court’s allowing them to
21 intervene was not a factor that the Regional Board should have considered in
22 reversing itself and granting the Owners Group party status in the administrative
23 proceedings. Doing so deprived the instant petitioners of a fair hearing before the
24 Regional Board.

25 **G. THE WWDR’S FOR ELK RIVER AMOUNT TO AN**
26 **IMPERMISSIBLE TAKING OF PRIVATE PROPERTY WITHOUT**
27 **COMPENSATION**
28

1 Art. 1 § 19 of the California Constitution requires compensation where
2 property is taken or damaged for a public purpose. The 5th Amendment to the
3 United States Constitution prohibits the taking of private property without just
4 compensation.

5 A taking commonly occurs where diversion of waters in the course of a
6 public improvement causes injury to land or water rights. Clement v State
7 Reclamation Board (1950) 35 Cal.2d 628, 641. The fact that the state issues a
8 permit that leads to a taking for public use may be actionable, although a traditional
9 “public improvement” is not being undertaken.

10 In Anderson v Fay Imp. Co. (1955) 134 Cal.App.2d 738, a landowner sued a
11 contractor who had performed work for a private subdivider that left the sidewalk in
12 front of his house raised five feet higher than it was, so he could no longer use his
13 garage. In absolving the contractor from all but a fraud cause of action, the court
14 noted:

15 “In case of damages in an inverse condemnation proceeding it is the public
16 that has devoted the property to the public use, and the public and not the private
17 contractor should pay for the damage. The damage to the right of access was, in
18 effect, a taking by the government for a public use. The fact that in the instant case
19 the contractor was performing work for a private subdivider has no legal
20 significance. As far as the regrading of the street is concerned the work was being
21 done on a public street under a government permit. The wrongful act entitling the
22 plaintiffs to compensation was that of the city and county.”

23 Here, the Regional Board is issuing a permit to continue to discharge waste
24 into a stream that is part of the public trust under the Water Code, and in which
25 petitioners’ have water rights. If the State Board does not correct the Regional
26 Board’s error, petitioners will have no choice but to seek recompense from the state
27 for the diminution in the value of their property.
28

1 IX. A COPY WAS SENT TO THE DISCHARGER AND REGIONAL
2 BOARD

3 A copy of this Amended Petition was mailed to the Regional Water Board
4 and to the Discharger. It was also served electronically to the persons listed on the
5 attached Proof of Service.

6 X. THE ISSUES HEREIN WERE RAISED PREVIOUSLY OR ARE
7 EXCUSED FROM THE REQUIREMENT

8 All but two issues raised herein were raised in a timely manner through
9 written and oral comments to the Regional Board on this issue over the past 10
10 years, and in a North Coast Regional Board evidentiary hearing held on April 24th,
11 and 25th, and May 8th, 2006.

12 The issues of whether the Regional Board's modification of the "grandfather
13 clause" and inserting § IV(B)(3) into the Order just prior to making the motion to
14 adopt the WWDR's violated CEQA could not have been raised earlier, because they
15 arose after the Regional Board adopted the WWDR's.
16

17 XI. CONCLUSION

18 For the above-stated reasons, petitioners respectfully request the following:

19 1. That the State Board issue a notice under 23 CCR § 2050.5 to the
20 discharger, the regional board, and other interested parties that they have 30 days to
21 respond to the petition;

22 2. That the State Board hold a hearing on the petition to receive oral
23 argument and/or additional evidence, and at the conclusion of the hearing:

24 B. Vacate the approval of the Elk River WDRs;

25 B. Issue a Cease and Desist Order, effective for three years or until the
26 discharger has removed an equivalent amount of sediment from the nuisance stream
27 reaches to recover the conveyance capacity of the stream as it was in 1987;

28 C. For such other and further relief as the State Board deems appropriate.

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Dated: June 23, 2006

Respectfully Submitted,

J. Bryce Kenny
Attorney for Petitioners

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