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VIA U.S. MAIL

Jeanine Townsend, Clerk of the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter/Revised Sections of the SED

Dear Members of the Board:

This firm represents several land owners who will, or may be, affected by the Water Board's efforts to adopt a regulation for maintaining instream flows in Northern California Coastal streams. These comments are precipitated by the "Notice of Filing" (hereinafter "**Notice**") promulgated by Jeanine Townsend dated February 22, 2013.

We and our experts, upon whom we rely for substantive comments, have not completed our substantive review of the substitute policies referred to in your Notice. These comments pertain to legal and collateral issues that can be considered apart from the detailed substance of your new policy:

1. As reflected in the first paragraph, project description, of your Notice, your policy is not limited to water subject to the Board's regulatory jurisdiction – i.e. water not subject to riparian water rights or pre-1914 water rights. Your letter says:

> "The Policy will apply to applications to appropriate water, registrations, and water rights petitions. The Policy will establish principles and guidelines for maintaining instream flows for the protection of fishery resources. It will prescribe protective measures regarding the season of diversion, minimum bypass flows, and maximum cumulative diversion. ..."

Article X, Section 2 of the California Constitution provides, in part:

> "Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self executing ..."

The California Supreme Court has held that this provision prohibits the legislature from adopting any law limiting a riparian's right to water being exercised or foreseeably usable in the future, in order to increase the amount of unappropriated water subject to the Board's jurisdiction under the 1914 Water Commission Act. Tulare Dist. v. Lindsay-Strathmore Dist. (1935) 3 Cal. 489, 525, 531. In our opinion, the same rule applies to any valid pre-1914 appropriative right. While the 1928 Constitutional Amendment extended the "reasonable use" doctrine to riparian rights, as well as to pre-1914 and post-1914 appropriative right holders, the quoted constitutional language prohibits the Legislature or the Board from further restricting such rights. What is a "reasonable use" within the meaning of Article X, Section 2 of the California Constitution is a "judicial" question, not a question subject to manipulation by the Legislature or the Board to elevate protection of fisheries resources over other beneficial uses.

The Board's instream policies will obviously affect riparian holders and the holders of pre-1914 rights because the regulations apply to "registrations"; and, at least as presently advised, it is clear that the Water Code requires, and we presently think legally so, riparians and pre-1914 water rights holders to register their uses.

The Board has, in other regulations, such as the attempt to adopt Regulation 862 in the last few years, ignored these constitutional limitations, causing great expense and uncertainty to water rights holders, only to have its regulations invalidated by the courts. (See Rudolph Light and Linda Light v. The California State Water Resources Control Board Mendocino County Superior Court Case No. SCUK CVG 1159127). These mistakes should not be repeated; and the Board should exempt from the current regulations riparian water rights holders and pre-1914 water rights holders.

2. The Notice also says on page 2 in the second paragraph on that page:

> "The revisions [in the new document] also clarify the impact analysis to reflect the fact that the potential switch from surface water diversions to groundwater pumping due to the Policy is unlikely to cause a significant reduction in surface water flows, and update section 7 to incorporate responses to comments developed for the 2008 SED. ..."

The phrase "groundwater pumping" is not defined. In the aforementioned Regulation 862, adopted September 20, 2011, and recently invalidated by the Mendocino County Superior Court, the Regulation specifically presumed that groundwater pumping would have an almost immediate and direct affect on stream flow. Ground water diverters were allowed to avoid the impacts of Regulation 862 only if they could prove that there was no "hydrologic connection" between the groundwater they were diverting and any part of the Russian River system. This direct disparity, and the Board's analysis and conclusion, must be explained for the citizens to have any basis for comprehending the Board's regulatory actions. A major purpose of CEQA is to assure that persons exercising rule making authority understand the environmental impacts of what they do and clearly explain their thought process to a concerned public.

While it has long been the law that the Board has jurisdiction over underflow to the same extent that it does over surface flow in the stream, (North Gualala Water District v. State Water Resources Control Board (2006) 139 Cal.App.,4th 1577), it has also been equally clear that the Board has no jurisdiction over "ground water". Any legislative effort to

grant the Board regulatory authority over ground water would have to meet Federal and State constitutional limitations pertaining to due process and just compensation (United States v. State Resources Control Board (1986) 182 Cal.App.3d 82, 100).

The trial court in Living Rivers Council v. State Water Resources Control Board (Superior Court Alameda County, 2012 #RG 10-5435923) held that the Board's previous CEQA analysis for its Policy was inadequate because it did not consider what environmental impacts might result from a switch from surface water diversions to ground water pumping. There is no indication in the court's opinion that it was limiting its requirement to explain the Policy's impacts to the pumping of "ground water" as opposed to pumping "underflow". The Board's current effort certainly makes no scientifically adequate effort to distinguish between pumping from underflow and groundwater to meet the obligation imposed by the Alameda Superior Court. Certainly the court can't blow off this requirement by the simple, unsupported conclusion without any significant analysis, and 180 degrees different from the presumption underlying Regulation 862, that there will be no impact.

After our substantive analysis is completed, it is likely we will submit further comments, but we hope that these comments will receive careful consideration and a substantive response that avoids the necessity of further costly and time consuming litigation.

Sincerely,

Jared G. Carter