

Humboldt Watershed Council

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March 20, 2005

APPEAL TO THE STATE WATER RESOURCES CONTROL BOARD

Humboldt Watershed Council,

Petitioners,

In the Matter Re: Appeal for Immediate Emergency Stay of Action by California Regional Water Quality Control Board – North Coast Region, on March 16, 2005, regarding permitting of General Waste Discharge Requirements for Pacific Lumber Company timber operations in Freshwater and Elk River watersheds, Humboldt County.

PETITION FOR REVIEW AND IMMEDIATE EMERGENCY STAY OF ACTION BY THE REGIONAL WATER BOARD

Summary

The Humboldt Watershed Council and the Environmental Protection Information Center (“Petitioners”) hereby petition the State Water Resources Control Board (“State Board”) pursuant to § 13321 of the California Water Code and § 2053 of Title 23 of the California Code of Regulations (“CCR”) to rescind the North Coast Regional Water Quality Control Board’s (“Regional Board’s”) direction to staff to enroll Timber Harvest Plans by the Pacific Lumber Company (PL) in the Freshwater and Elk River watersheds of Humboldt County into the General Waste Discharge Requirements (GWDR), and to impose an immediate emergency stay of the Board’s action until this petition may be heard on its merits.

The Board’s action will cause direct harm to the health, safety, and property of the residents of these watersheds, whose interests the Petitioners represent. Furthermore, the Board’s action is arbitrary and stands in direct contradiction to the administrative record for these watersheds, and the terms of the General Waste Discharge Requirements (GWDR), specifically sections III.C.1, V.A.4 and V.A.5, which proscribe its use in watersheds where cumulative impacts are present due to past land use activities.

The Humboldt Watershed Council filed a previous petition (SWRCB/OCC FILE A-1683) the first time the RWB used the GWDR in these impaired watersheds. That petition has yet to be heard on its merits. Since then, the GWDR has been improperly used on three different occasions, to permit a total of twelve Timber Harvest Plans in these impaired watersheds. Given the extreme regularity with which the GWDR is being used in these watersheds, Petitioners request that the State Board provide summary judgment on the merits of the petition, and that such judgment be applied to all enrollments in these watersheds under the GWDR.

(1) **Name, address, telephone number and email address of the petitioner:**

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(2) The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition:

The Regional Board passed a motion¹ by John Corbett at a public hearing in Santa Rosa on March 16th, 2005, directing staff to enroll timber harvest plans for the Pacific Lumber Company in Elk River and Freshwater up to 75% of the acreage amount allowed by CDF. The motion also required that the Pacific Lumber Company voluntarily ask CDF to amend the THPs to state that PL will provide:

- drinking water for effected Elk River residents for one year,
- \$50,000 to fund a feasibility study to identify improvements to flood prone stream segments
- \$50,000 to fund a feasibility study to identify potential improvements to infrastructure to reduce flooding impacts
- \$50,000 to fund implementation of on the ground projects to reduce flooding
- Additional sediment offset mitigation at the rates of 8 to 1 in Freshwater and over 50 to 1 in Elk River.

The final text of the motion has not yet been made available by the Regional Water Board, but will be provided as soon as it becomes available. Petitioners will provide a video tape of the Board's discussion and motion by mail, and ask that it be admitted to the record as well.

(3) The date on which the regional board acted or refused to act or on which the regional board was requested to act:

The Regional Board passed this motion at a public hearing on March 16, 2005 in Santa Rosa, California.

(4) A full and complete statement of the reasons the action or failure to act was inappropriate or improper.

¹ See Excerpt from November 29, 2004 RWB Meeting, PALCO motions made by the Board

The Regional Board provided direction to staff which was arbitrary, contrary to the administrative record for these watersheds, and in direct conflict with the terms of the General Waste Discharge Requirements (GWDR), specifically sections III.C.1, V.A.4 and V.A.5, which proscribe its use in watersheds where cumulative impacts are present due to past land use activities.

The Board's decision was arbitrary by any measure. Board Member John Corbett proposed that the Board direct staff to enroll additional THPs up to 75% of the CDF allowance. At no time was the Board presented with any evidence to support a recovery curve based on this 75% rate, nor was there any discussion among the Board as to the effects of such a rate. In fact, the only basis given by Mr. Corbett for choosing the 75% figure was "...it's minus 25%."

After Mr. Corbett presented the 75% figure, Board Member Lyle Marshall cautioned his fellow Board Members that *"I can't vote to pick an arbitrary percentage out of the air"*.

At the hearing, PL offered a list of these proposed mitigations which they would do if they received 100% of their CDF allowance, but these proposals were not made available to the public in advance of the meeting or even, in fact, in advance of their being discussed by the Board. Most members of the public never saw this list of proposals until after the hearing.

Prior to this hearing, on March 8th, 2005, the Humboldt Watershed Council sent a letter to the RWB requesting that the 4 new members of the Regional Water Board recuse themselves from voting on this issue until they have had the benefit of a full-day workshop to familiarize themselves with the lengthy history and administrative record for this issue. On March 10th, the Humboldt Watershed Council did notify Staff Counsel for the RWB that a precedent for such recusal by new members had been established at the January 26th, 2001 RWB meeting.

New Board Members Leonardi, Somerstrom, and Marshall all acknowledged that they were uncomfortable or unfamiliar with the lengthy administrative record for these watersheds, and that they had not had adequate time to review information and/or the proposals brought forward by PL. Despite this, Board Members Leonardi and Somerstrom nonetheless voted along with the majority to overturn the staff's considered decision of February 25th.

The RWB's use of the GWDR (order R1-2004-0030) in watersheds where cumulative effects are present is self-proscribed under sections III.C.1, V.A.4 and V.A.5. Yet it is being justified by adding these additional mitigations which are not part of the GWDR at all. These mitigations are assumed to be a highly significant amendment to the GWDR, as they miraculously make cumulative impacts go away. Given this near-magical significance, their addition into the GWDR makes the final permit more properly recognized as an individual WDR. Individual WDRs would require public notice, circulation, and review before adoption, but that this has not happened and, therefore, the CEQA process has been improperly circumvented.

The additional measures being applied to these THPs are being made requirements of CDF, therefore obligating CDF with enforcement of Basin Plan objectives. The RWB does not have any right to voluntarily give up its authority in this way, nor does CDF have either the ability or the desire to provide such enforcement. The Basin Plan requires recovery, rather than simple prevention of further harm. CDF does not have the ability to require recovery. Additionally, these mitigations were made voluntary amendments, meaning that there is no enforcement. PL is free to comply or not at their will. Under the Forest Practice Rules, any of these mitigations that PL should voluntarily choose to do will not be done for up to 5 years. Meanwhile, the impacts will have already occurred up front.

It is highly unlikely that Pacific Lumber will be able to fulfill these obligations that far into the future in any case, as the company has stated quite clearly that it will not be able to stay in business more than a couple of weeks at the level it has been allowed. The impacts of these newly permitted operations will happen in the immediate future, but any mitigation work will likely not happen for many years, if at all. Therefore, enrollment of these THPs must be considered to be unmitigatable, as there is no way to ensure that the mitigations will ever happen.

Additionally, the mitigations stated in the Board's motion are unenforceable in that they are entirely dependent upon the economic survival of the discharger, which is highly suspect at this time. The mitigations exist only as voluntary amendments into CDF's Timber Harvest Plans, making them unenforceable by Water Quality, and illegally obligating CDF to enforce Basin Plan objectives. Being voluntary amendments, CDF will not be able to enforce them in any event.

Pacific Lumber has failed to demonstrate that it can or will comply with the necessary mitigation encompassed by the Board's motion and the terms of the General WDRs.

On February 28, 2005, PL provided to wildlife agencies a notice of material change in its funding resources, identifying a financial crisis which it had anticipated for many months. PL declared in that letter that it "anticipates that it will not be able to fully fund all of the activities, research programs, and related commitments of its HCP during calendar year 2005." Thus, it cannot be assumed that PL will provide the mitigation required under the HCP or the Agreement Relating to Assembly Bill 1986.

PL has anticipated this crisis because the consequence of its excessive rate of harvest over the course of the last 20 years is predictable, it that it leaves PL with dwindling supply of timber volume.

In addition to its formal notice that it will not be able to meet its commitments under the HCP, Pacific Lumber has publicly stated many times in the past month or more that it is on the verge of bankruptcy. PL has also stated that should it file bankruptcy, it will not comply with the terms and conditions of its Habitat Conservation Plan or other agreements entered into as part of the Headwaters Deal in 1999. This is further evidence that PL is not in a position to comply with conditions.

When asked at the hearing last Wednesday whether the allocated 75% harvest rate would remedy PL's financial crisis, spokesperson Jared Carter expressly refused to guarantee that if given the 75%, PL would not file bankruptcy. In fact, Mr. Carter indicated that the company could be forced to file within weeks if given 75%.

It is clear that Pacific Lumber has no ability to meet its commitments. Apparently, it is poised to harvest at the highest rate, and to then abandon its requirements under the law.

The terms of the motion are vague and ambiguous. PL is required to amend THPs to include specific conditions. The motion is not clear as to whether the conditions must be met in each THP, or whether the conditions may be met by the a combination of THPs. For example, it is unclear whether each THP in Freshwater must meet the 8 to 1 sediment offset requirement, or whether a combination of THPs need meet it, so that sediment produced from each THP need not be offset by an 8 to 1 ratio. This same vagueness applies to Elk River THPs, where the offset must be greater than 50 to 1. Nor is it clear whether Pacific Lumber may rely on existing mitigation from other THPs to satisfy these sediment offset requirements. Pacific Lumber submitted the first amendment on Friday, March 18, for a THP 01-325 in Freshwater. The amendment was for "an additional appurtenant road and four mitigation sites . . . [t]hese additional sites were approved in the Morton's Loop THO 1-01-325 HUM. " It appears that PL intends to rely upon existing mitigation from another THP to satisfy the Board's condition. In this way, no actual offset is given. The motion is also unclear as to when the conditions must be satisfied. According to the amendment submitted on Friday, PL will not meet the conditions to provide drinking water and fund the two feasibility studies until "prior to completion of the THPs." This means that PL can delay compliance for up to five years, as that is the period of time, with extension, that a plan submitter has to complete a THP.

The Regional Board has not addressed how these conditions will be enforced. It cannot delegate its duty under Porter Cologne to the Department of Forestry, yet it has not taken the necessary steps to ensure that its conditions will be met and will be enforced.

PL's proclaimed financial crisis, and its express unwillingness to guarantee that it will not seek refuge in bankruptcy and ignore its obligations, underscore the potential significant adverse environmental consequences from the Board's motion of March 16, 2005. Clearly, PL intends to log without guaranteeing that it will fulfill the conditions imposed by the Board, as well as other legal requirements. The Board has not adequately addressed this problem, as it should have. It did not provide adequate opportunity for public comment on what it approved, nor did it provide adequate evaluation of what it approved. While the Board is not required to prepare an EIR for waste discharge requirements, it does not have a full exemption from CEQA. In this case, given the circumstances, the Board had a duty to evaluate the significant environmental effect of its action.

The Board's action directly harms the health, safety, and property of the residents of these watersheds, whose interests the Petitioners represent. Comments made by various Board Members at the hearing demonstrated that the additional enrollments were done so as to avoid economic harm to the discharger. Watershed residents have consistently appealed to the Regional Water Board over many years for relief from the serious and life-threatening impacts of PL's violations, yet have received none. For the RWB to instead grant economic relief to PL is not only unjustified and unconscionable, but is discriminatory, and violates the State of California's definition of Environmental Justice.

The Regional Board's motion, and the Executive Officer's action, are inappropriate, self-proscribed, and in conflict with both past direction and the administrative record

The Freshwater and Elk River Watersheds have been the subject of a tremendous amount of study by the Regional Water Board over the last seven years. These watersheds, in conjunction with the Bear, Stitz, and Jordan Creek watersheds (known collectively as "the five watersheds"), have a number of factors in common, in that they are all owned either predominantly or in whole by the Pacific Lumber Company, they have all been subjected to extremely aggressive rates of harvest by PL and, as a result, they have all been declared to be significantly cumulatively impacted due to sediment, with timber harvesting as a contributing factor².

The relationship between accelerated rates of timber harvest by the Pacific Lumber Company and the resultant cumulative impacts to the Freshwater and Elk River watersheds has been well established as fact. Watershed residents and the Humboldt Watershed Council had brought these impacts to the attention of the Regional Water Board as far back as 1997. On September 9th, 2000, RWB staff issued their *Staff Report for Proposed Regional Water Board Actions in the North Fork Elk River, Bear Creek, Freshwater Creek, Jordan Creek and Stitz Creek Watersheds*, which thoroughly documented the cumulative impacts of PL's accelerated logging in these watersheds, and established the over-arching need to greatly curtail the rate of harvest.

In 2001, the Humboldt Watershed Council petitioned the State Water Board regarding sediment impairment and timber operations in these watersheds. As an eventual result of that petition, the Regional Water Board commissioned the Independent Scientific Review Panel (ISRP), whose objective was *"to strengthen the science basis for its decision-making for protecting and restoring the sediment-impaired beneficial uses of waters in the Elk River and Freshwater, Bear, Jordan, and Stitz Creek watersheds in Humboldt County, California."*

The Independent Scientific Review Panel issued two reports (ISRP I and ISRP II), concluding that they could find *"no science basis to expect that implementing minor improvements within the existing (HCP/THP/SYP) system will ultimately lead to significant improvements in water quality."*³ The ISRP also determined that Cumulative Watershed Effects assessment should be done on the watershed scale, rather than the THP scale, and endorsed the Empirical Sediment Budget model

² See Staff Report for the April 2002 Regional Water Board meeting and Executive Officer's Summary Report, Item 15, for the June 26, 2003 meeting.

³ See August 12, 2003 Independent Scientific Review Panel Phase II Report

developed by Dr. Leslie Reid as a “*robust and statistically defensible*” tool for establishing the degree of relationship between timber harvesting and landsliding.

In the latter part of 2003, the Regional Water Board held a series of public workshops to take input from stakeholders on the ISRP’s findings. The Board was scheduled to provide direction to staff pursuant to the ISRP at its December meeting. But on November 5th the RWB approved WDRs in Freshwater and Elk River (Orders R1-2003-0119 and R1-2003-0118) in advance of final action pursuant to the ISRP. These WDRs were meaningless, as they gave PL another year’s worth of logging in these watersheds with no restrictions on rate of harvest or road building, and without addressing the cumulative impacts of logging. The Humboldt Watershed Council filed suit against the Regional Water Board to have these meaningless WDRs rescinded, and to halt PL’s logging in Freshwater and Elk River until such time as *meaningful* WDRs were issued.

On December 3rd, 2003, the RWB provided direction to staff, pursuant to the ISRP, public input, and tremendous evidence in the administrative record, to develop Watershed-Wide Waste Discharge Requirements (WWWDR) for timber harvest operations in the Freshwater and Elk River watersheds. These WWWDRs would be significantly stronger than the meaningless WDRs approved in November, in that they would address the rate and scale of PL’s logging, and the cumulative impacts. Unfortunately, these new WWWDRs would not have any effect on PL’s logging in 2004, as the Board’s previous WDR’s had effectively given PL a free ride for the next year.

The Board’s first motion on the issue (Item 17) acknowledged the ineffectiveness of currently-existing means to address the cumulative impacts in these watersheds:

“The Regional Water Board concludes that additional Regional Water Board regulatory and non-regulatory action, beyond the current program outlined in Item 17A, are necessary to address the water quality impacts due to rate and scale of land disturbing activities in the Five Watersheds.” (Motion 1) ⁵

General WDRs were a part of the current program in both watersheds at that time⁶, and thus the Board had already noted that they are insufficient for addressing the critical needs of these impaired watersheds. To address the deficient nature of the General WDRs, the Board also passed motion 2, stating:

*“In Response to Item 17, the Regional Water Board concludes that staff shall require submittal of reports of waste discharge, leading to WDRs, on a watershed, watershed segment or watershed unit (to be mapped at the Executive Officer’s discretion) in Elk River and Freshwater Creek. Sufficient notice shall be given to allow adequate time for preparation of environmental documentation.”*⁷

The Board had, thus, already stated its considered judgment that the GWDR, as a part of the current program, was insufficient for dealing with the condition of these watersheds, and that the staff must instead prepare WWWDRs. The Board had also acknowledged that permitting of individual THPs was inadequate for addressing cumulative impacts, and thus permitting must be done on a watershed scale, which the General WDR does not do.

Over the following year, RWB staff worked closely with PL to obtain the Reports of Waste Discharge (ROWD) necessary for drafting the WWWDRs, but PL chose not to comply. Due to its own lack of compliance, PL placed itself in the position of not having permit coverage for THPs in Freshwater and Elk River beginning January 1, 2005.

⁴ See August 12, 2003 Independent Scientific Review Panel Phase II Report

⁵ See December 3, 2003, Regional Water Board Motions, Item 17

⁶ See Schedule of Activities in the Five Watersheds, Item 17A – December 2003

⁷ See December 3, 2003, Regional Water Board Motions, Item 17

On November 29th, 2004, the Regional Water Board heard from Staff, Pacific Lumber Company, the Humboldt Watershed Council, and the public in regard to interim permitting for PL's timber harvests in Freshwater and Elk River watersheds. The Executive Officer's Summary Report for that item makes it clear that PL, through its own willful decision not to comply with orders for Reports of Waste Discharge, had put itself in the position of not having permit coverage for its THPs in these watersheds for the beginning of 2005:

"Due to PALCO's failure to submit a complete report of waste discharge, staff did not have the information necessary to prepare draft watershed-wide waste discharge requirements (WWDRs) for timber operations in the Elk River and Freshwater Creek watersheds. Without a draft permit, staff have been unable to conduct the necessary environmental review or take the other steps necessary to provide coverage to PALCO for its operations in these watersheds beginning January 1, 2005⁸."

After hearing from staff, PL, the Humboldt Watershed Council,⁹ and numerous members of the public, the Regional Board provided direction to the Executive Officer:

"The board would direct the EO to consider a limited number of THP's for enrollment in the general waste discharge requirements if and to the extent that she can establish a record and basis for finding eligibility. And then I would like as another part of the motion that we, let me add to the motion that we reaffirm the board motions and hearing record of December 2003 and our general waste discharge and waiver policies as adopted." (John Corbett)¹⁰

The direction to enroll THPs in these watersheds into the GWDR is contradictory to the administrative record for these watersheds, as noted by Catherine Kuhlman at the meeting, with the comment that *"We have such a substantial record that it's hard to walk away from it, or just make it go away, without opening up the Board to legal action."*¹¹ It is also contrary to the Board's previous direction of December 3, 2003, which had already demonstrated an awareness that the GWDR was insufficient.

Most immediately, the Board's direction is contrary to the terms of the GWDR, itself (Order No. R1-2004-0030), specifically sections V.A.4 and V.A.5, which proscribe its use in watersheds where cumulative impacts are present due to past land use activities. This fact is acknowledged and memorialized by the Executive Officer in the text of the enrollment letters, which reads:

Section V ("Recission and Denial of Coverage") in the General WDR contains two specific provisions of concern in these circumstances, parts A.4 and A.5. These parts provide that General WDR coverage shall be denied when the Executive Officer determines that there are conditions unique to the watershed, including, among other things, cumulative impacts, special hydrographic characteristics, extensive timber harvesting activities, intensity of ground disturbing activities, large acreage ownership holdings, rainfall, slopes, soil, affected domestic water supplies, increased flooding, or more generally, where past land use activities having resulted in the discharge of human generated sediment in an amount which warrants further regulation.¹²

In addition to those points raised by the comment above, use of the General WDR in these watersheds is also self-proscribed by Section III.C.1, which specifically states:

⁸ See Item 14, Discussion of permitting for Scotia Pacific Company, LLC., Salmon Creek Corporation, Pacific Lumber Company (PALCO) and Green Diamond Resource Company, Elk and Freshwater Watersheds, Humboldt County

⁹ See November 29th, 2004 letter from Humboldt Watershed Council to NCRWQCB

¹⁰ See Excerpt from November 29, 2004 RWB Meeting, PALCO motions made by the Board

¹¹ A video tape of the November 29, 2004 RWB meeting has already been provided to the NCRWQCB.

¹² See attached letters from Catherine Kuhlman, NCRWQCB, to Steve Horner, Pacific Lumber Company, re: Application for coverage under Order No. R1-2004-0030 for Timber Harvest Plan(s) 1-00-428 HUM, 1-01-193 HUM, 1-03-198 HUM, and 1-04-168 HUM,

"If the Executive Officer determines that the Project as described may cause or contribute to a violation of applicable water quality requirements due to for example, including but not limited to, the cumulative impacts of past and planned timber harvest activities, the Discharger will be required to apply for coverage under individual WDRs."¹³

All of the above conditions exist in both Elk River and Freshwater. It is clear from the comments in the letters of enrollment that the EO is well aware of the fact that the GWDR is self-proscribed in this situation, and thus is aware that PL's THPs in these watersheds are simply ineligible for coverage. It must also be noted also that the Regional Board's November 29th motion reaffirms the GWDR policy as adopted, meaning that those terms which proscribe its use must be adhered to. Thus, the Regional Board's direction to staff was inappropriate, self-proscribed, and in conflict with both past direction and the administrative record.

The Board's action is an unfair granting of economic advantage to a recalcitrant violator.

Since its acquisition by MAXXAM Corporation, the Pacific Lumber Company has been a habitual and willful violator of the Basin Plan and the Forest Practice Rules. Between 1995 and 1997, the California Department of Forestry (CDF) cited PL for more than 250 violations of the Forest Practice Rules. The volume and severity of PL's violations was so overwhelming that, in November 1998, PL became the first and only timber company ever to have its license suspended in California. A CDF memo noted that the suspension was for *"gross negligence and willful disregard for the Forest Practices Act and the Forest Practice Rules."*¹⁴ PL's criminal record also includes violations of the Endangered Species Act, illegal logging of ancient redwoods, and providing falsified evidence to a federal judge.

Since approval of the company's Habitat Conservation Plan (HCP) in March 1999, PL's institutional disregard for the law has not waned. Between 1999 and 2004, PL was cited for another 325 violations of the Forest Practice Rules and its vaunted HCP. The vast majority of these violations (241) impacted water quality, including illegal cutting in riparian buffers, misclassifying streams, untreated erosion sites, and operating in saturated conditions.

Along with its 600+ violations of the Forest Practice Rules, PL has also been cited for over 220 violations of the Basin Plan. Cleanup and Abatement Orders have been issued in all of the 'Five Watersheds,' though none have been completed.

In 1998, Pacific Watershed Associates identified 544 erosion sites related to timber harvest plans in the Elk River watershed alone¹⁵. A January 1, 2004 NCRWQCB staff memorandum¹⁶ noted that after 5 years, only 20% of the sites had had any repair work done at all, and 10% of those had been repaired so poorly that they were a higher risk than before. Of the 80% of sites which were not repaired, many appear to have simply been allowed to deliver their full sediment load to the watercourse unabated. Corrective action is required by the HCP and Cleanup and Abatement Order 2002-0114 for an estimated 245 sediment sites that are in non-compliance in Elk River. To date, the Regional Water Board has taken no enforcement actions for these or hundreds of prior violations of basin plan prohibitions and objectives.

These violations are egregious, and the fact that the RWB has taken no punitive action against the discharger cannot be justified. Every one of the hundreds of PWA sites which remain uncorrected, after more than 5 years, are violations of the Basin Plan. It is hard to see PL as anything other than a recalcitrant violator, who has no doubt benefited greatly from this

¹³ See NCRWQCB Order No. R1-2004-0030

¹⁴ See EPIC: Maxxam/Pacific Lumber's Lawless Logging Continues, May, 2004

¹⁵ See Pacific Watershed Associates spreadsheet of sediment sites in Elk River

¹⁶ See January 21, 2004 NCRWQCB staff memorandum re: Current Status of Elk River PWA sites that were evaluated

noncompliance, and from the RWB's failure to regulate. The SWRCB Water Quality Enforcement Policy¹⁷ specifically directs the Regional Board to take action against the following:

- Any knowing, willful, or intentional violation of (the Porter Cologne act).
- Any violation of (the Porter Cologne act) that enables the violator to benefit economically from noncompliance, either by realizing reduced costs or by gaining a competitive advantage.
- Any violation that is a chronic violation or that is committed by a recalcitrant violator.
- Any violation that cannot be corrected within 30 days.

Given the above, it is shocking that the Board would grant GWDRs to PL in these watersheds based upon what amounts to a 'gentlemen's agreement' that PL will do the necessary mitigations. This cannot be seen as anything other than an unfair granting of economic advantage to a recalcitrant violator. It is a serious violation of the SWRCB's Water Quality Enforcement Policy which must not be allowed to stand.

The Board's action is discriminatory, and violates the State of California's definition of Environmental Justice.

As has already been discussed, residents of these watersheds, and the Humboldt Watershed Council, have appealed to the Regional Water Board repeatedly¹⁸ over many years for relief from the nuisance flooding which has resulted from the non-regulation of Pacific Lumber Company's aggressive timber harvesting. These residents have experienced real, tangible, damages to their health, safety, property, and liberty, and these damages have cost them financially. Despite the tangible and verifiable nature of these damages, these residents have yet to receive any regulatory assistance of any kind from either the State or Regional Water Boards. In fact, the Regional Board has, by its actions, made it clear that it is unwilling to provide relief of any kind.

This failure to provide relief is not due to any lack of knowledge or information. The RWB has repeatedly and extensively investigated the mechanism by which floodwaters and sediment physically invades the property of downstream residents, leaving no doubt that PL's upstream activities are the cause. Despite this clear causal relationship, the Board and Staff have denied residents' repeated pleas for remedial action in the form of dredging, providing alternative water supply, raising homes and foundations above floodwaters, or any other kind of relief. In addition, the RWB has not provided a contingency emergency action plan. Instead, what the RWB *has* provided is a permit for PL to continue this physical invasion of property, which continues to threaten the health, safety, property, and liberty of the residents. As pointed out previously, these and the previous permits were provided "as *an accommodation to PALCO's operational needs...*" Thus the provision of economic relief for PL, while failing to provide physical or economic relief for the residents, has required the residents of these watersheds to submit to a takings of their property, with correlated threats to their health, safety, and liberty.

California law defines Environmental Justice as:

"...the fair treatment of people of all races, cultures and income with respect to the development, adoption, implementation and enforcement of environmental laws, regulations and policies." (Government Code Section 65040.12 and Public Resources Code Section 72000)

The Board's action, when combined with the Board's history of inaction on the part of the residents, have the net effect of giving second-class status to the physical and economic needs of the residents of these watersheds. Thus, the Board's action is discriminatory, and violates the State of California's definition of Environmental Justice.

¹⁷ See SWRCB Water Quality Enforcement Policy, February 19, 2002 pages 3,4,11,26,39,42

¹⁸ See Attachment 4; Summary of Litigation and Petitions Filed by Pacific Lumber, Downstream Residents and Environmental Groups.

(5) The manner in which the petitioner is aggrieved.

Past history, the administrative record, and repeated scientific analyses have all established that PL's excessive rate of harvest in these watersheds has been responsible for greatly increased flooding, which has caused extensive property damage and threatened public health and safety. It has been established as fact that the past and current rates of harvest in these watersheds contribute sediment delivery to the watercourses, which then settles out in the lower reaches. It has been further established that this sediment delivery due to timber harvesting has reduced the channel capacity in Elk River by over 60% since 1967¹⁹, meaning that the channel is no longer capable of holding the amount of water that it once did. This forces typical storm flows out of the stream channel, invading the private property of residents.

This invasion of private property has caused, and continues to cause, damage to homes, foundations, driveways, fences, septic systems, wells, furniture, vehicles, livestock, etc. It has also forced hundreds of residents to be held against their will by floodwaters which prohibit them from entering or exiting their property, keeping families apart for days at a time, or forcing them to assume great personal risks to their health and safety in crossing floodwaters.

On December 3, 2003, the Regional Water Board finally responded to years of intensive study and testimony on the causal relationship between PL's logging and the continuing impairment and flooding in these watersheds. The Board passed 7 individual motions to address the situation. The first of these motions memorialized the Board's recognition of the current situation, and the need for further action.

"The Board concludes that additional regulatory and non-regulatory actions beyond the current program are necessary to address the water quality impacts due to the scale and rate of land disturbance activities in the 5 watersheds." (Motion 1, by Richard Grundy)

With this statement, the Regional Water Board recognized the mechanism whereby excessive timber harvesting in these watersheds has caused the current cumulatively-impacted condition. Thus the Board cannot claim ignorance of the further impacts which will be caused by the continued permitting of logging under the current program, including GWDRs.

It has been well established as fact that PL's practices have harmed the residents of these watersheds. It has also been well established as fact that the Forest Practice Rules, PL's HCP, and other regulatory measures currently being used, including the GWDR, are all inadequate to protect these residents from further harm. Therefore, the Board's direction, and the Executive Officer's action pursuant to that motion, to permit continued operations under those same inadequate regulatory measures will do direct harm to the residents of these watersheds, whose interests the Humboldt Watershed Council represents.

(6) The specific action by the state or regional board which petitioner requests:

The Petitioners request that the State Water Board immediately rescind the Regional Water Board's motion from March 16, 2005, along with any and all letters of enrollment given to PL and any other action by the Executive Officer pursuant to that motion. We also request that the State Board impose an immediate, emergency stay to the Board's motion and pursuant actions, and to PL's operations pursuant to the permits, and direct the Executive Officer to take no further action outside of the current course to develop watershed-wide waste discharge requirements, as directed by the Regional Water Board on December 3, 2003.

¹⁹ See Preliminary Flood Assessment of Lower Elk River, Rose Patenaude, P.E, NCRWQCB

(7) A statement of points and authorities in support of legal issues raised in the petition, including citations to documents or the transcript of the regional board hearing:

The points and authorities to support the legal issues raised herein have all been discussed in detail under Section 4, above. Documents and transcripts referenced have all been footnoted. Applicable code sections which are violated by the actions of the Board and the EO include, but are not limited to:

- Government Code Section 65040.12
- Public Resources Code Section 72000
- Water Quality Control Plan For The North Coast Region (Basin Plan), June 28, 2001
- Multiple sections of the Porter-Cologne Clean Water Act, including, but not limited to Sections 13050(m), 13301, 13304, 13308, 13350, 13351, 13376, 13377, 13381, 13382, 13384, 13387
- Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.)
- SWRCB Water Quality Enforcement Policy, February 19, 2002

Section 13350(m) of the Porter-Cologne Clean Water Act defines nuisance as anything which meets all of the following requirements:

1. Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.
2. Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.
3. Occurs during, or as a result of, the treatment or disposal of wastes.

The Supreme Court has determined that government action which results in a permanent physical occupation of private property is invariably a taking and is not subject to a balancing process. (*Loretto v. Teleprompter Manhattan CATV Corp.*, supra, 458 U.S. at p. 432 [73 L.Ed.2d at p. 880].) The court declined to draw a distinction between a physical invasion by the government, versus an invasion by a third party authorized by the government. (at p. 432, fn. 9 [73 L.Ed.2d at p. 880].) "*The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.*" (*Yee v. City of Escondido, Cal.*, supra, 503 U.S. at p. 118 L.Ed.2d at p. 164, 112 S.Ct. at p. 1528)

Additionally, the State Water Board should be aware that significant liabilities have been incurred for contractual agreements that are based upon historic flood frequency, flood stage and flood zoning that are interfered with by these agency actions. See *Associated California Loggers, INC v. Kindler* (1978) 79 Cal. App. 3d 34 citing *Barlow v. Collins*, 397 U.S. 159.

(8) A statement that the petition has been sent to the appropriate regional board and to the discharger, if not the petitioner:

This petition has been sent concurrently to the following persons:

Catherine Kuhlman, Executive Officer
Sheryl Schaffner, Chief Counsel
North Coast Regional Water Quality Control Board
5550 Skylane Boulevard
Santa Rosa, CA 95403

Steven Horner
Director of Sustainable Forestry
The Pacific Lumber Company
PO Box 37
Scotia, CA 95565

(9) A statement that the substantive issues or objections raised in the petition were raised before the regional board, or an explanation of why the petitioner was not required or was unable to raise these substantive issues or objections before the regional board.

The substantive issues raised in this petition had been raised both verbally and in writing before the NCRWQCB at its March 16, 2005 hearing. Humboldt Watershed Council filed a petition and was granted a hearing for an emergency stay upon the first improper use of the GWDR in these impaired watersheds. The emergency stay was denied, but the appeal was never heard on its merits²⁰. The Humboldt Watershed Council has previously provided a video tape of the Board's discussion and motion from November 29th, 2004 meeting, and asks that it be admitted to the record as well. That video tape shows that the Board and staff were fully aware then of the conflict with using the GWDR in impaired watersheds.

In addition to issues raised at that meeting, significant points regarding the ongoing issues central to this petition have been repeatedly raised before the Regional Water Board over the last seven years on occasions too numerous to count. The Petitioners ask that all reports, letters, transcripts, studies, and other documents which the State and/or Regional Water Boards already have in their possession relative to HWC's previous petition (SWRCB/OCC FILE A-1683) be admitted to the record. Specific citations will be provided in future filings.

Conclusion

HWC, EPIC, watershed residents, and the public interest will be substantially and irreparably harmed by the implementation of the Board's motion, while dischargers will not suffer from a stay. Thus, the balance of harms at issue in the Petition heavily favors the granting of a stay. In addition, the motion has raised substantial questions of law, which, upon review in accordance the California Water Code and the California Environmental Quality Act, are highly likely to be resolved in favor of the Humboldt Watershed Council. Therefore, the State Board should issue a stay of any action taken pursuant to the Regional Board's motion of November 29th, 2004.

The State Water Resources Control Board has no acceptable recourse other than to immediately stay the actions taken by the Regional Board's Executive Officer on December 24, 2004, and to rescind the motion passed by the Regional Board on November 29th, 2004. To not do so would directly harm the health, safety, and property of the residents of these watersheds, whose interests the Humboldt Watershed Council represents.

The State Board's Denial of this Petition for a stay, and its tacit approval of both the Regional Board's motion and its implementation through the Executive Officer's action, will result in harm to residents, the environment, and other timber land owners, as well as to the State and Regional Boards and the public trust. Such denial:

1. will irreparably harm residents, HWC, and the environment by willfully allowing the continuation of practices which are well known to be responsible for past and continuing damage to health, safety, property, and the environment, and;
2. will signify tacit approval of this weak regulatory program to other Regional Boards across the state, thus encouraging the continued non-regulation of logging-related discharges and acceptance of the resultant threats to health, safety and property, and;
3. will subject the State and Regional Boards to legal action for discrimination, takings losses, and conspiracy charges related to the granting of unfair business advantage, and;
4. will present a dangerous precedent that directly harms the public trust.

²⁰ SWRCB/OCC FILE A-1683, Order WQO 2005-0001, January 20, 2005

The Regional Board's action is contrary to the public interest, and the Humboldt Watershed Council respectfully requests that the State Board immediately stay the implementation of this action, rescind the Board's motion which gave rise to the action, and fully review both the Regional Board's impropriety in passing the motion, and the Staff's impropriety in enrolling THP's into the GWDR pursuant to the Board's motion.

I hereby declare that the foregoing is true and correct to the best of my knowledge.

DATED: March 22, 2005, in Eureka, California.

Respectfully submitted,

Mark Lovelace
Humboldt Watershed Council
For the Environmental Protection Information
Center