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FRIENDS OF THE EEL RIVER



August 8, 2014

John W. Corbett, Chair, and Board Members
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403
Via Electronic Mail: patti.corsie@waterboards.ca.gov

Re: Comment Letter – Resolution No. R1-2014-0043 and Staff Report for the 2012 Integrated Report for the Clean Water Act Section 305(b) Surface Water Quality Assessment and the 303(d) List of Impaired Waters

Dear Chair Corbett and North Coast Regional Water Board Members:

We are writing in response to the recent release of proposed Resolution No. R1-2014-0043 (Resolution) and the “Staff Report for the 2012 Integrated Report for the Clean Water Act Section (CWA) 305(b) Surface Water Quality Assessment and the 303(d) List of Impaired Waters” (Staff Report). The undersigned organizations have been actively involved in the 2012 Integrated Report process for four years and welcome the opportunity to comment here. We incorporate by reference our April 1, 2014 comment letter written to Chair Marcus and the State Water Resources Control Board (State Water Board) and copied to North Coast Regional Water Quality Control Board (North Coast Board) Executive Officer Matthias St. John.

We welcome the Resolution’s direction to “coordinate with the Division of Water Rights on the development of flow objectives or other flow criteria, as appropriate” (§ 11), in combination with the recent North Coast Board scoping for a flow (hydrology) objective as part of the 2014 Triennial Review of the North Coast Water Quality Control Plan.

However, we continue to question the fact that the proposed Staff Report identifies no water bodies as impaired due to altered flow. The North Coast Board has sufficient information to move forward on flow listings now, not years in the future, particularly with respect to the Scott and Shasta Rivers. Water segments that are impaired by altered flow should be placed in

Category 4c, which is for water segments “impaired or affected by non-pollutant related [*i.e.*, ‘pollution’] cause(s).” While the Staff Report asserts that a formal methodology is necessary to determine whether flow is a “cause” of or “factor” contributing to impairment, if a waterway is completely or nearly dewatered, arguing that flow is a merely a “factor” contributing to impairment collides with the facts of impairment. Moreover, flow can be *both* a contributing source of impairment (*e.g.*, for temperature impairment) *and* a cause of impairment – just as is the case for pollutants. As described in a May 15, 2013 comment letter first submitted to the State Water Board, and later submitted to the North Coast Board as part of NGO comments on the draft 303(d) List,¹ other states regularly make flow impairment listings without a statewide policy specific to this particular impairment, and so can California.

As described in the above-referenced May 15th letter, there are a number of benefits associated with identifying waterways as impaired due to altered flow, in addition to closer compliance with the Clean Water Act. First, flow impairment identification will allow for higher prioritization of identified, impaired waterways on lists of bond and other funds earmarked for restoration of impaired waters. Second, flow impairment identification can ease the burden of proof in state regulatory processes that can address flow needs, such as waste and unreasonable use hearings and public trust doctrine applications. Third, flow impairment identification can support better local land use and planning decisions by requiring decisionmakers to consider flow impacts in CEQA assessments. Finally, flow impairment identification allows the state to better track and highlight the primary causes of waterway impairment. For example, USGS reports that “hydrologic alteration” is the primary threat to waterways nationwide, but that data is lost in California, which does not track flow impairments. These and other benefits are not realized by merely (and incorrectly) identifying flow as only a factor that contributes to pollutant impairments.

In addition to these practical benefits, delaying action until there is a formal methodology solely for flows is also inconsistent with the facts and the Listing Policy. As to the latter, the State Water Board’s decision to include a “weight of evidence” approach in the Listing Policy² *already* provides a statewide approach to address flow-impaired waterways, one that is consistent with the approaches used in many other states. With respect to the former, the Staff Report specifically found that readily available information on the Scott and

¹ Letter from Earth Law Center and California Coastkeeper Alliance to SWRCB, “Inclusion of Impairments Due to Low Flow in the California 2012 Section 303(d) List” (May 15, 2013), available at:

http://www.earthlawcenter.org/static/uploads/documents/303d_listings_letter_May_15_2013_1.pdf. For example, Ohio and Tennessee use biological criteria to raise a red flag on flow, then conduct a deeper investigation to determine if there is a flow impairment (particularly where there are dams). Wyoming usually identifies higher sediment levels than would be expected, then makes listings on a case-by-case basis with no formal adopted process. Idaho starts most listings by identifying sediment or temperature issues, then examines structural issues, and finally makes a decision on a case-by-case basis. Michigan focuses on listing waterways as impaired by altered flow when staff observe channelization and drain/ditch issues.

² The Listing Policy states that “When all other Listing Factors do not result in the listing of a water segment but information indicates non-attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence demonstrates that a water quality standard is not attained. If the weight of evidence indicates non-attainment, the water segment *shall* be placed on the section 303(d) list” (emphasis added). SWRCB, “Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List” (Sept. 2004), p. 8, available at: http://waterboards.ca.gov/water_issues/programs/tmdl/docs/ffed_303d_listingpolicy093004.pdf (Listing Policy).

Shasta Rivers *does* indicate flow impairment – yet neither is identified as impaired. For other, low flow waterways, the Staff Report found that “the information and data submitted [...] did not include enough information to meet all the criteria [...]” However, “*all* existing and readily available water quality-related data and information”³ – which requires going beyond consideration of submitted data – must be considered, especially in light of the now six-year time frame for the biennial listing cycle.

A statewide policy for identifying flow impairments for the 303(d) list, if developed by the State Water Board for close cases (*i.e.*, unlike the Scott and Shasta Rivers), must comply with the letter and intent of CWA Section 303(d) to serve as a backstop to protect waterways where pollution controls fail to protect beneficial uses. Particularly in light of the state’s significant deviation from the federally mandated, biennial 303(d)/305(b) report schedule, any decisionmaking structure to identify flow-impaired waterways must err on the side of recognizing and listing threatened and impaired waterways, rather than erecting further roadblocks to identifying and restoring essential flows. Delays for the development of a flows listing policy would interfere with the need to immediately identify the most egregious cases of water bodies impaired due to altered flow, including the Scott and Shasta Rivers.

Finally, we would like to respond to the Staff Report’s assertions in Appendix IV that “[t]he Clean Water Act Section 303(d) List identifies only those waters that are impaired by pollutants, as defined in CWA Section 502(6). Altered flow is considered a condition of pollution, not an impairment caused by a pollutant, and therefore is not a part of the 303(d) List.” CWA Section 303(d)(1)(A) establishes the requirements for the 303(d) list as follows:

Each state shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

In other words, if (after the identified Section 301 pollution controls are put in place) a water body’s water quality standards are not being met, then “those waters” “shall” be identified under Section 303(d) – regardless of whether due to pollutant or pollution. Indeed, Section 303(d)(1)(A), which mandates such identification of impaired waters, includes only the word “pollution.” The word “pollutant” does not become relevant until Section 303(d)(1)(C), which addresses total maximum daily loads (TMDLs). Identifying a waterway as flow impaired under Category 4c is thus consistent with inclusion on the Section 303(d) list, which by the CWA’s own language encompasses “pollution.”

The identification of flow-impaired waterways under Section 303(d)(1)(A) is a separate and distinct task from determining whether or not TMDLs are required to address those impairments. This latter task is described in CWA Section 303(d)(1)(C) as follows:

Each State shall establish for the waters identified in paragraph [303(d)](1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies ... as suitable for such

³ 40 C.F.R. § 130.7(b)(5) (emphasis added).

calculation....

Unlike Section 303(d)(1)(A), Section 303(d)(1)(C) does specifically reference “pollutants,” but in the context of developing a TMDL only. In other words, Section 303(d) of the CWA requires states to identify all impaired waterways – whether impaired by pollution or pollutants – and then to take that list and develop TMDLs for the pollutant impairments on the list. Several states (including Michigan and Tennessee) recognize this, and place waterways impaired by altered flow in their 303(d) List under Category 4c. California also can and should choose to include flow impairments under Category 4c in its Section 303(d) list – and at a minimum must specifically identify flow-impaired waterways as such in the state’s overall Integrated Report.

Finally, the Staff Report states that, if a statewide flow listing methodology is put in place, North Coast staff will consider recommending flow-altered waterways be included in Category 4c in the next (2018) Integrated Report cycle. Even if the target date can be achieved, which is uncertain given past delays, 2018 is too long to wait to begin identifying waterways that are clearly flow-impaired now. If listed, the benefits of such identification can begin almost immediately to protect such waters and the fish that depend on them, while other processes (such as flow objectives) move forward. We accordingly urge the appropriate identification of flow-impaired waterways in this listing cycle.

Thank you for your attention to these comments.

Sincerely,

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