



April 1, 2014

Felicia Marcus, Chair, and Board Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
*Via Electronic Mail*

Re: Release of North Coast Regional Water Quality Control Board "Public Review Draft Staff Report for the 2012 Integrated Report" (March 14, 2014)

Dear Chair Marcus and State Water Board Members:

We are writing in response to the recent release of the North Coast Regional Water Quality Control Board's "Public Review Draft Staff Report for the 2012 Integrated Report"<sup>1</sup> (Draft Staff Report). The Draft Staff Report fails to list any waterways in the North Coast as impaired due to altered flows under Categories 4C or 5. This is at odds with extensive evidence put before the State Water Resources Control Board (State Water Board) and the North Coast Regional Water Quality Control Board regarding the dire state of these waterways with regard to flow.

In the nearly four years following our initial submission of data to support flow listings in August 2010, the undersigned tribes, fishing groups and conservation groups have worked collaboratively with the State Water Board to illustrate the clear need, and basis in science and law, for the requested Section 303(d) flow listings. We have presented before the Board in a special hearing, met with Board staff and members repeatedly, collected requested information about flow listing strategies in other states, created a shortlist of priority waterways impaired by flow, and endeavored to address any other questions or issues raised by the Board and staff. At the State Water Board's request, we even drafted Lines of Evidence for the Shasta River, Scott River, Mattole River, and the Upper Main Eel River, to provide examples of how these listings might be supported in the final Staff Report.

We find the proposed Staff Report's failure to include *any* flow listings to be unsupportable. The decision to not list these waterways for impairment caused by flow apparently was made because "[t]he... Listing Policy does not provide guidance for evaluation of water quality impairments related to reduced flow." However, the reliance on the Listing Policy is misplaced. The Clean Water Act, its implementing regulations and U.S. EPA Guidance, provide the overarching legal and regulatory direction for state action. As described in detail in our previous comment letters, the state must comprehensively identify impaired waterbodies *regardless* of whether that impairment is a

<sup>1</sup> Available at:

[http://www.waterboards.ca.gov/northcoast/water\\_issues/programs/tmdls/303d/140313/FINAL2012IR\\_PublicReviewDraft\\_StaffReport\\_March10\\_2014.pdf](http://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/303d/140313/FINAL2012IR_PublicReviewDraft_StaffReport_March10_2014.pdf).

“pollutant” or “pollution”; that distinction only applies to the need to complete a TMDL.

Moreover, it is incorrect to state, as does the Staff Report, that “[i]n the absence of a statewide methodology for assessing flow through the Integrated Report process, Regional Water Board staff are unable to continue any further assessment of the data.” California completed several listing cycles successfully before the Listing Policy was adopted. States rarely create such a difficult hurdle to acknowledge and act on the degradation of its waterways.<sup>2</sup>

Even assuming that Listing Policy guidance on flows would be beneficial in close cases, the waterways that our groups identified on a priority shortlist (see attached) were selected because they are the most egregiously impaired due to altered flows – in some cases having no flow *at all* for months of the year when flows historically were regularly present. The Staff Report itself acknowledges that there is a “near complete dewatering of fisheries habitat” in the Shasta River below Dwinnell Dam, that flows were “absent” in the Gualala River, and that summer and fall flows in Mark West Creek were “either dry” or “too low to measure.” The data submitted and “reasonably available” show that these conditions result from over-diversion and pumping for agricultural and urban uses, to the detriment of waterways and fish.

The listing of waterways impaired by flow will also help create a scientifically-based catalog of flow conditions, the need for which is evident as we experience one of the driest years on record. Scientists warn that our current drought may become the “new normal.” The state particularly does not need Listing Policy language for those waterways that are dry for so much of the year; salmonids cannot exist without water, as the state well knows. Adequate flow is clearly essential to fishing and other water-based beneficial uses. Without water, these uses will be impaired, as the data put before the Boards, and other “reasonably available” data, demonstrate.

The Staff Report recommends as Next Steps that state staff “develop a state-wide scientifically defensible approach to evaluating flow impairment in order to ensure consistency and objectivity,” an approach which “should be applicable to any stream in the state.” The rivers and streams for which flow impairment listings are needed – especially the native fish that depend on them – simply do not have the years that historically such policies will take to develop and implement.<sup>3</sup>

Continued refusal by the state to take even the most straightforward steps – such as recognizing that a dry waterbody is impaired because it cannot support fish – raises serious public trust concerns. We

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<sup>2</sup> California is one of only *three* states nationwide that has not at least scheduled a public review on a draft final 2012 303(d) list. Among all other states, only Washington and Florida, which have moved to rotational systems, have yet to schedule public reviews on a final draft 2012 list.

<sup>3</sup> For example, California Coastkeeper Alliance was required to bring suit in 2007 to compel the Department of Fish and Wildlife and State Water Board to work together to implement mandates to set minimum flows and reflect those numbers in the approval of water rights permits. CA. Pub. Res. Code Sec.s 10000 *et seq.* The actions subsequent to the conclusion of this matter have been hampered by lack of sufficient funding, communication and other impediments, with the result that water diversions continue – and in many places are escalating – despite the needs of waterways and fish. *See, e.g.*, DFW, “Instream Flow Program Annual Report 2011” (Feb. 2012), available at: [http://www.dfg.ca.gov/water/instream\\_flow.html](http://www.dfg.ca.gov/water/instream_flow.html). Immediate action is needed to – *at a minimum* – formally recognize that “no water” is a problem the state will acknowledge and act on.

hope that the Regional Water Board and State Water Board will change course on this issue and recognize the mandate for meeting Clean Water Act requirements to list these waters.

One final note on the process for public review and comment of this important document: the public has been waiting two years since the federal deadline for submittal of California's proposed 303(d) list, and almost four years since the deadline for submittal of scoping comments, for a response from the state. Given the extraordinary passage of time and the keen public interest in the health of North Coast waters generally, we are concerned that the Regional Water Board is allotting only five weeks for public review of the many hundreds of pages of the Report and its appended Fact Sheets. An alert to those who had provided scoping comments, at a minimum, would have allowed for a more meaningful level of public input than the rushed process before us. We urge the State Water Board to correct this flawed public process as it moves forward through the other Regional Water Boards.

Given the escalating threats facing the region's waterways and salmonids and the excessive length of time between listing cycles, we urge the State Water Board and North Coast Regional Water Board to take immediate action to incorporate flow listings into the 2012 303(d) List.

We look forward to conversing with you further on these time-critical issues. Thank you.

Sincerely,

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