

commentletters



From: Jesse Noell <noelljesse@gmail.com>
Sent: Tuesday, January 17, 2017 11:55 AM
To: commentletters; Mangelsdorf, Alydda@Waterboards
Subject: Re: Upper Elk River SWB comment

Please strike the word "that" in the second line of our comment.

On Tue, Jan 17, 2017 at 11:41 AM, Jesse Noell <noelljesse@gmail.com> wrote:

To: State Water Board

From: Jesse Noell and Stephanie Bennett

Adoption of Resolution Number R1-2016-0017 is improper because the TMDL Action Plan implements permit policy and actions that create and maintain unreasonable and un-natural invasion and occupation of residents' lands. The Regional Board has failed for over 25 years to control discharge of sediment and peak flow to levels that are natural and reasonable. Instead Regional Board Orders have affirmatively forced residents to suffer physical invasion and occupation of their land and property, ingress and egress and R1-2016-0017 maintains physical invasion and occupation and damage and threats to health and safety into the future. R1-2016-0017 permits additional discharge of sediment in amounts that aggrade the bed and banks of the river channels. This permitted discharge violates the Basin Plan Prohibitions and creates an obstruction of flood flow that causes the flow to divert onto residents' lands. This permitted discharge severely impairs our domestic water supplies. This permitted discharge severely impairs and extinguishes our subsistence on salmon fisheries.

We raised objections to the TMDL prior to the Regional Board adoption, pointing out why and how the adopted TMDL denies our fundamental constitutional rights. The final version of the Basin Plan amendment adopted by the Regional Board accommodates waste discharge in amounts that are un-natural and cause unreasonable invasion, occupation, damage to the lives and property of residents while threatening our health safety and welfare, and denying us liberty.

The responses provided by the North Coast Water Board were inadequate or incorrect because:

- 1) the accommodation of industrial wastes by proposed construction of an enlarged channel segment on the North Fork will not prevent physical invasion and occupation of all residents' lands (South Fork or Mainstem);

2) the accommodation of industrial wastes by construction of an enlarged sediment transport channel on residents' lands that is designed to accommodate uncontrolled sediment discharge from the discharger's lands disproportionately externalizes costs and impacts onto classes of persons and individuals in a manner that is not in the maximum benefit to the majority of Californians and is a dishonest use of taxpayer money;

3) the accommodation of industrial wastes by construction of an enlarged channel creates severe impacts to salmon and migratory bird feeding and breeding success by reducing habitat and cover;

4) the failure to control sediment discharge on the discharger's lands to levels that do not interfere with domestic water supplies does not recover the beneficial uses of water, or recover the salmon fishery;

5) the Clean Water Act TMDL was not enacted to deny residents' right to exclude the wastes of strangers or to damage residents' lands without due process and just compensation in violation of California and United States Constitutions.

Each of the comments was timely raised before the North Coast Water Board.

Sincerely,

Jesse Noell and Stephanie Bennett

Please see attached photos # 963, 964, 965, 966, 967, 408, 443, 438 and our Petitions for redress.

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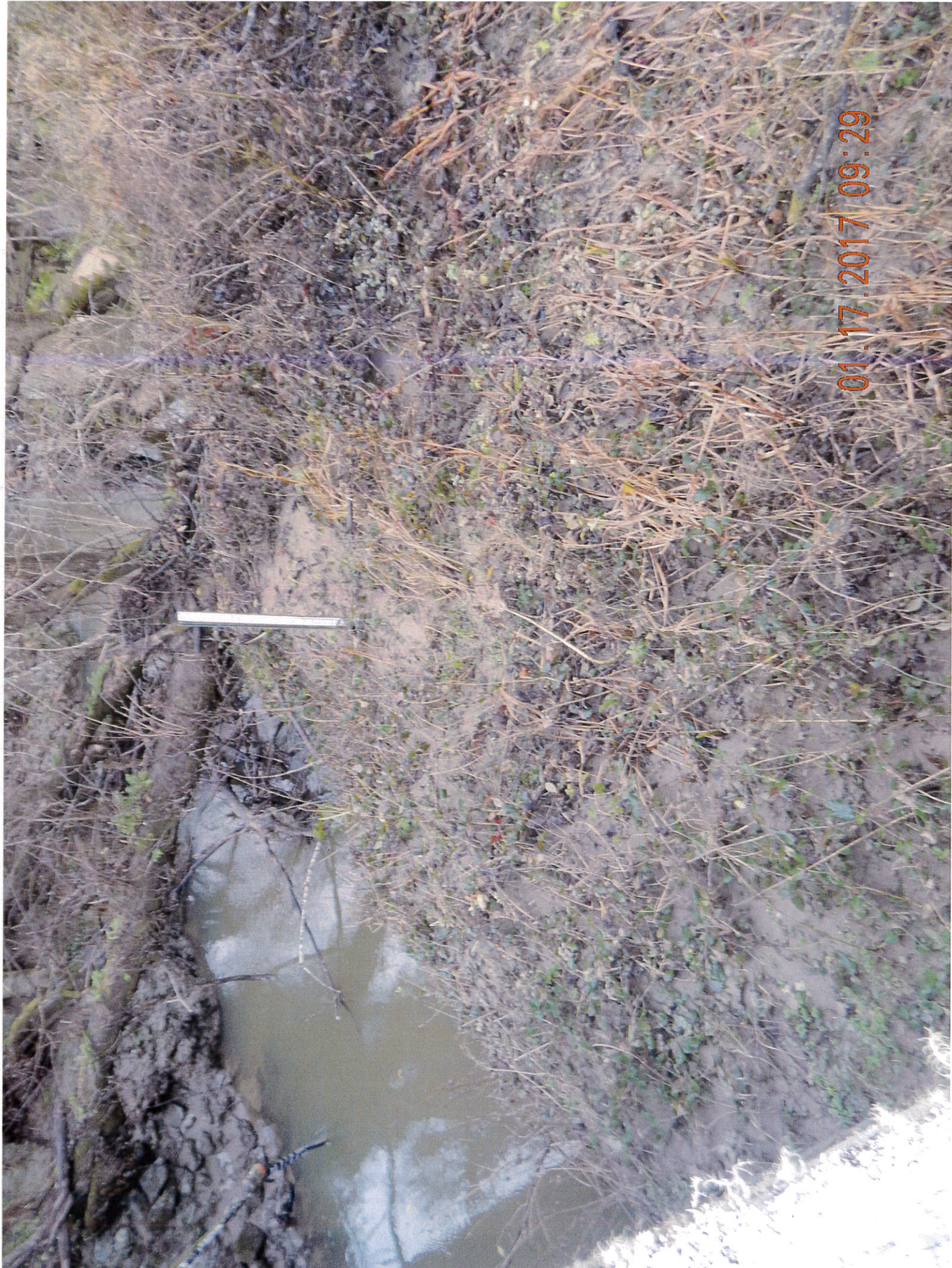


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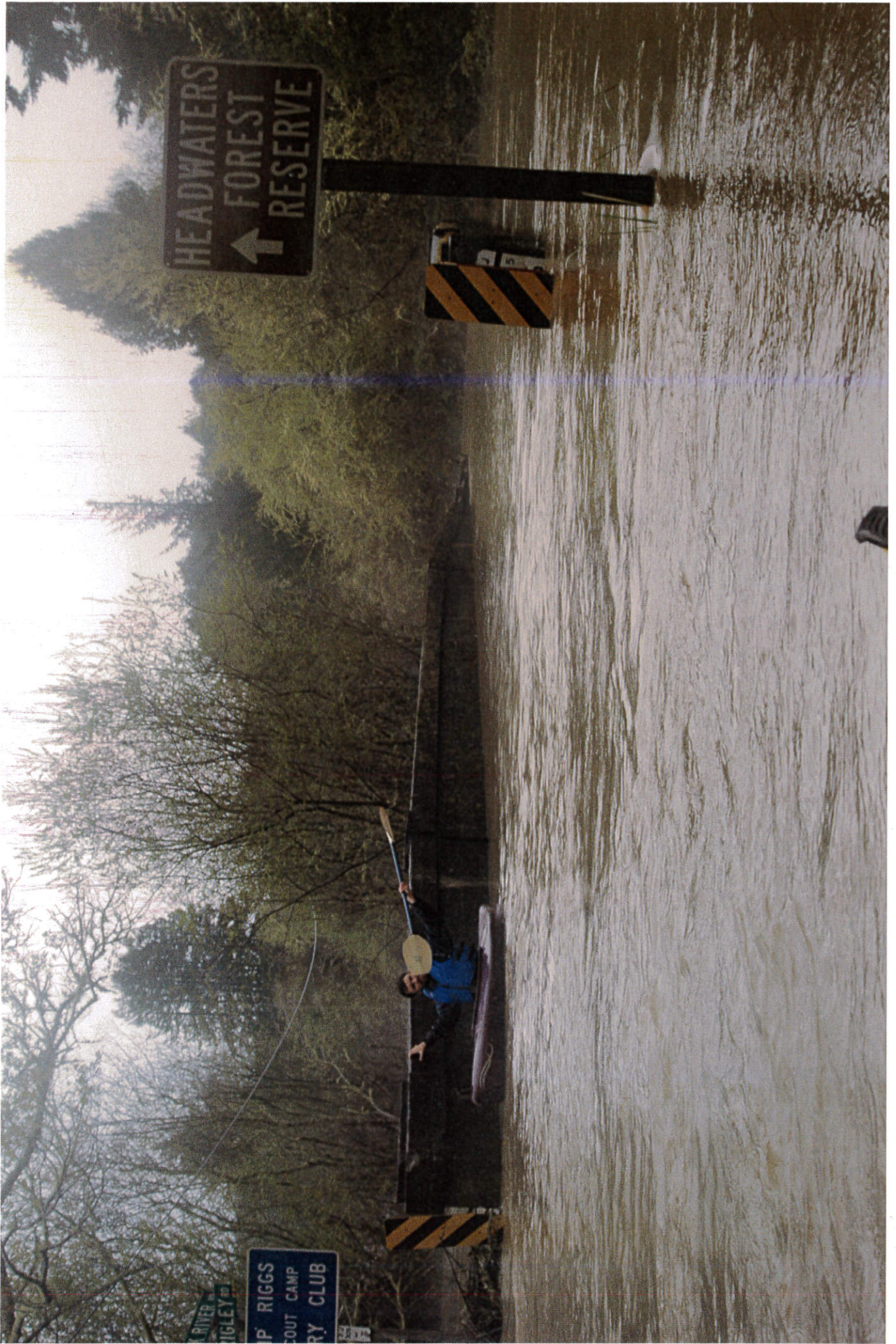
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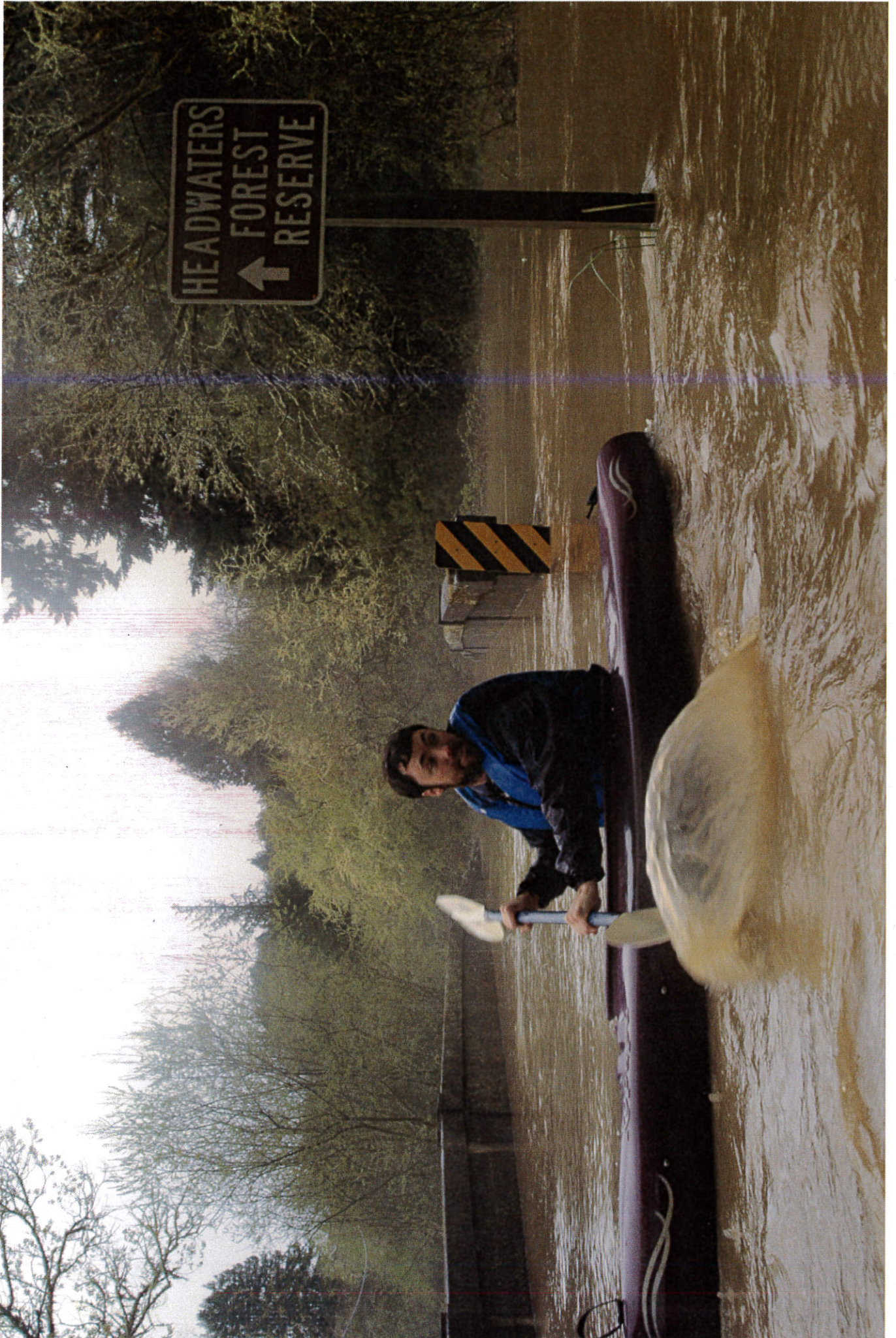


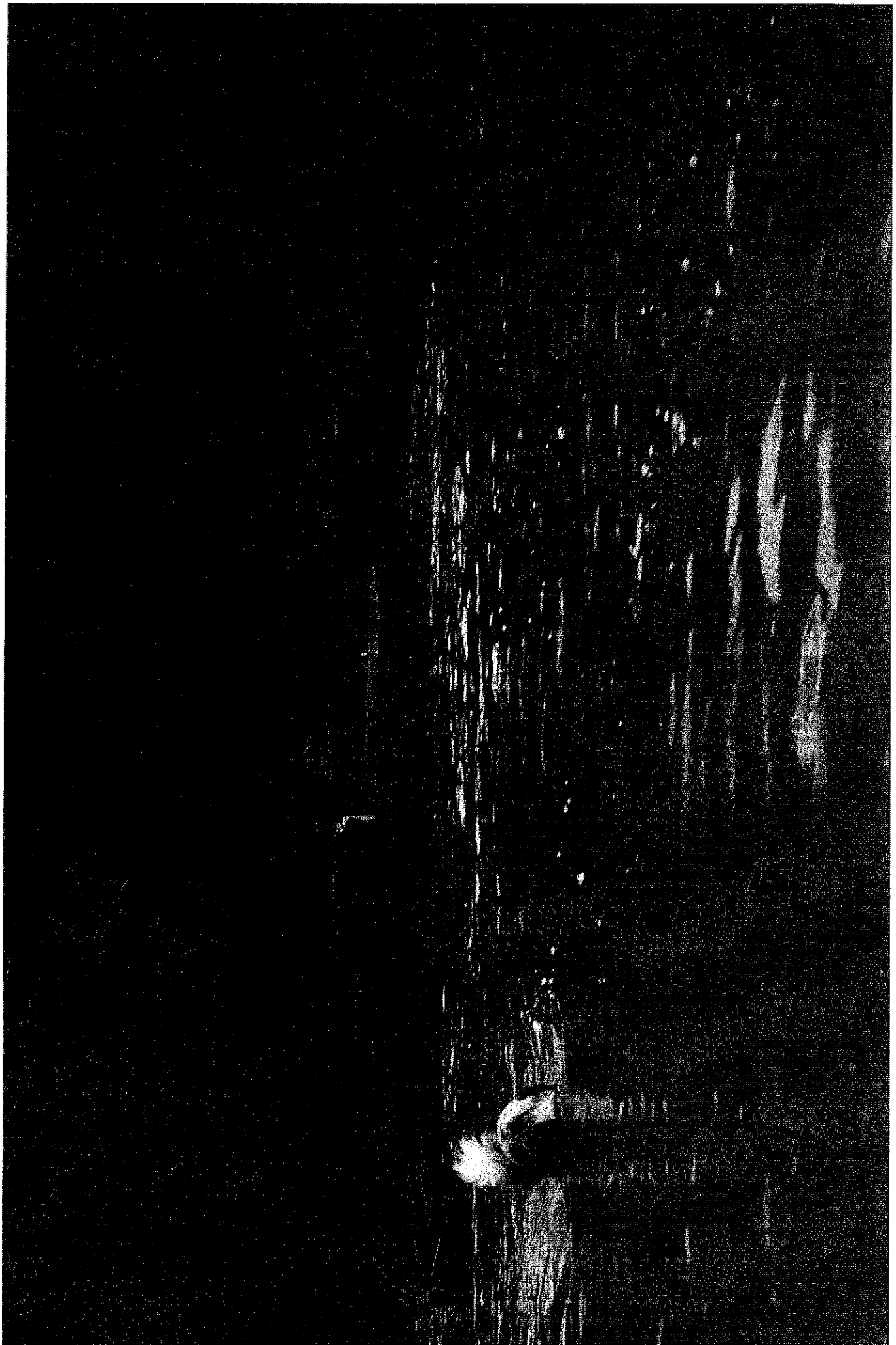


HEADWATERS
↑
FOREST
RESERVE

P RIGGS
SCOUT CAMP
RY CLUB

RIVER
IGLEY





PETITION/APPEAL FOR ENVIRONMENTAL JUSTICE/ EQUITY

1. Name, Address, Telephone, and e-mail of Petitioners:

--Kristi Wrigley: 2550 Wrigley Road, Eureka, CA 95503 (707)
443-1496 elkrra@gmail.com
--Jesse Noell & Stephanie Bennett: 8050 Elk River Road, Eureka,
CA 95503 elkrra@gmail.com
(The rest of the Petitioners are signed at the end of the Petition)

2. The action or inaction of the Regional Board being petitioned:

On May 7, 2014, at the North Coast Regional Water Quality Control Board ("RWB") workshop we presented Petitioners' Petition. (See attached Petition titled Environmental Equity/Justice) RWB considered it to be a comment. Then on June 19th in Santa Rosa, upon further discussion with Petitioners, RWB told Petitioners to follow the directions for filing a petition found on the State Water Board website.

3. The Date regional Water Board last acted, last refused to act, or was last requested to act:

June 19, 2014

4. Statement of reasons the action or inaction was inappropriate or improper:

- a) North Coast Regional Water Quality Control Board's (RWB) action refusing to accept Petitioners' Petition for a moratorium in a timely manner, is a denial of the right to petition government for redress. Justice delayed is justice denied to Petitioners.
- b) Rather than ensuring a margin of safety for its citizens, RWB selected a discrete group of citizens (upper Elk River residents) to receive certain increased harm by refusing to address our Petition.
- c) RWB's refusal to hear Petitioners' Petition for relief from certain threat of imminent harm, intentionally and exclusively selects Petitioners' neighborhood to bear a disproportionate burden of negative environmental impacts that are preventable by proper regulation of the dischargers' activities.
- d) RWB's act denies Petitioners equal protection under the Constitutions, Presidential Executive Orders, and Congressional intent.
- e) RWB's actions improperly or inappropriately exempt discharges from control where those discharges fill rivers with sediment, cause flooding, damage property, destroy and impair existing uses of water, and threaten health and safety.

5. How Petitioners are aggrieved:

- a) Petitioners have been denied the fundamental constitutional right to petition government for redress and due process.
- b) Petitioners suffer increasing private property damage as a direct result of RWB's actions and inactions: homes made unlivable, access interfered with, frequent and severe inundation, destruction of fences and septic systems, foundations, water systems, tanks, vehicles, equipment, crops, orchards.
- c) Petitioners suffer violations of many of their other Constitutional Rights as a direct result of RWB's actions and inactions.
- d) Petitioners suffer persistent, measurable damage to their health and safety as a reasonably foreseeable result of RWB's actions and inactions.
- e) Petitioners suffer from the intentional infliction of emotional distress as a reasonably foreseeable result of RWB's actions and inactions.
- f) Petitioners are denied equal protection as a reasonably foreseeable result of RWB's policies in Elk River that rely on exemptions for silviculture and agriculture, even when these "normal farming" activities result in abnormal damages to Petitioners.

6. The action Petitioners request the State Water Board to take:

- a) Immediate relief in the form of a moratorium (cease and desist) on logging and silvicultural activities until the beneficial uses of water are restored and the conveyance capacity of the river channels is recovered to the 1987 level.
- b) Immediate enforcement of environmental laws, regulations and policies to ensure the health, safety and security of upper Elk River residents' lives, homes, water and property.

7. Points & Authorities:

7a) The damage to Petitioners' private properties is well known and understood by RWB. The official record for over seventeen years is replete with demonstration of damages to property in this neighborhood of upper Elk River. In fact, RWB never disputes that Petitioners' properties are damaged as a result of RWB's regulatory policies. But for RWB's actions and inactions that exempt dischargers from compliance with the Clean Water Act and CWA section 404 permitting, and the Basin Plan, Petitioners would not be damaged. The source of these damages is universally agreed upon and scientifically verified: uncontrolled sources of erosion from timber harvest activities and pathogens from cattle in upper Elk River are the exclusive cause of damage to Petitioners' property. RWB has both the duty and the authority to prevent these damages, but chooses to violate that duty so that Petitioners will suffer. (See RWB Administrative Record)

7b) The official measure of RWB's performance in Elk River shows that RWB has failed to meet its own agency performance standards. During the past seventeen

years and continuing at present, the Basin Plan Prohibitions are continuously violated, the beneficial uses are not attained, and the Federal Anti-Degradation policy is violated. Petitioners have been extensively active in expressing their anguish over this persistent and preventable damage to their private property and their rights as Americans. (Last notification: see audio recording from May 7, 2014 workshop.)

7c) RWB has stated that it cannot and will not perform its mandatory duties, thereby forcing Petitioners (the discrete neighborhood of upper Elk River) to suffer damages and the reasonably certain threat of imminent harm. RWB members Massey and Noren told Petitioners in late 2013, that much more data was needed in Elk River for the Board to be able to render good decisions. Then RWB declared through its executive officer, Matt St. John, that it was suspending monitoring of the South Fork Elk because some Elk River residents had petitioned the State Board for alternative supply.

7d) Jonathan Bishop, former State Deputy Director of Water Quality that oversees RWB, told Petitioners that North Coast Regional Water Quality was too intimidated by the timber industry to perform its duties sufficiently to protect upper Elk River Residents (Petitioners). Mr. Bishop (in the presence of his attorney, Ted Cobb) declared that RWB deliberately chose to violate Petitioners because they pose a lesser threat to RWB than the polluters whose activities necessarily must damage Petitioners. Mr. Bishop told Petitioners that the Timber & Ag Lobby was so powerful that water quality would not be protected.

7e) RWB former member Dina Moore told the public in open session, that the RWBoard's decision-making process turned on which party posed the greatest threat of lawsuits; not on upholding the mandatory duties of the agency as prescribed by the Legislature. (She said, "Gee; no matter how we decide, someone's going to sue us!") Since the timber industry has the greatest resources, RWB always decides in their favor, regardless of how wrong they are and of how much damage our disempowered community experiences as a result of RWB's policies. Dina Moore knows that the upper Elk River community has no political or economic power to confront the abuses of RWB or the timber industry.

7f) Current legal counsel for RWB, Samantha Olsen, told Petitioners that RWB will avoid litigation with the timber industry at all costs—including the (yet to be paid for) cost of violating Petitioners and their neighborhood. S. Olsen even suggested that Petitioners should just relax and accept even more damage from timber. She said, "C'mon, HRC deserves a clean slate" ...to continue its operations that have irrefutably been demonstrated to damage your private properties. When Petitioners attempt to confront these deliberate damages using public processes, S. Olsen disparages Petitioners by smearing them with the invective, "litigious." RWB Legal Counsel knows that the upper Elk River neighborhood lacks the political or economic power to confront these abuses and likewise knows that the polluters will force costly litigation if she doesn't give them what they want.

7g) The decision in Agin v. City of Tiburon, 447 U. S. 255 (1980), negates RWB's fear of a "takings suit" reprisal from polluters for restricting their hazardous activities. When a regulatory agency advances a legitimate state interest such as ensuring the health and safety of a disempowered community, the restricted party cannot prevail in claiming a regulatory takings. ("...regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.")

Timber owns more than 20,000 acres of land in upper Elk River. Petitioners' land holdings average 1.5 acres to 40 acres. Clearly, the timber companies' extensive land holdings provide alternative opportunities for their investments. Residents have one primary use and only one opportunity: to reside every day in their homes and to use their small holdings for normal family occupancy. Timber cannot make the argument that they are denied all economically viable use of their land; the moratorium requested lasts only until the worsened conditions are abated and does not apply to the timber dischargers other hundreds of thousands of acres that are located outside Elk River.

The District of Nevada Court, 34 F. Supp. 2d, at 1239, relied on the first alternative (1) "further development on high hazard lands such.... would lead to significant additional damage to the lake" and established that moratoriums are proper, i.e. not a taking, where erosion causes damage to esthetic values. *Id.*, at 1240. The U.S. Supreme Court in its decision relies upon this opinion. TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. v. TAHOE REGIONAL PLANNING AGENCY et al., 2002 US Supreme Ct.

7h) In Elk River, RWB's authorization of un-controlled erosion causes physical invasion and permanent occupation of residents' lands as the river channels infill. We can only guess that RWB must be relying on the "normal farming exemptions", or some other exemption, to allow this damage. Congress made clear its intent: "normal farming" is not the manner of farming that causes channels to infill resulting in flooding to neighboring private properties. In cases where farming or silviculture activity *does* cause channel infill and flooding, and does cause physical invasion and occupation of neighbors' lands, no such exemption is proper. See Kelo v. New London, U.S. Supreme Ct. —taking of a private home from one family, with due process & just compensation, and giving it to a developer---can be lawful ---but Elk River Petitioners are singled out by RWB to privately suffer losses --- **without due process and just compensation.** RWB has not demonstrated that it has eminent domain authority, and has undertaken no due process, or just compensation sufficient to comply with the Kelo Constitutional standard, or the Pumpelly v. Green Bay standard, nor the Lorretto standard, nor the Arkansas Game and Fish standard. RWB also violates Ca.Civ.Code 3334(b).

Thus, in the impaired watershed of Elk River, Section 404 regulation and permits should be required for timber operations in Elk River. Either RWB exceeds its authority by relying on improper exemptions, or Congress intends for private property to be damaged, invaded, and occupied by the discharged waste products of

privileged persons. Petitioners find no evidence that Congress intends dischargers' wastes to damage, invade, and occupy Petitioners' lands, homes, and farms.

This government-authorized physical invasion and permanent occupation of Petitioners' properties has been extensively studied and monitored by both public and private research. All credible scientists agree that timber activities have caused and will cause serious flood damage to the watershed and to Petitioners' private properties. RWB has no valid support to continue to authorize sediment-discharging activities, because at this point, any discharge harms Petitioners. RWB's tactics subject a disempowered neighborhood to tyranny.

Therefore, RWB has no valid basis to not accept Petitioner's request for a moratorium. (See the Congressional intent underlying U.S. Environmental Protection Agency and U.S. Department of the Army's Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)) and Presidential Executive Orders 13406 and 12898.)

7i) RWB advances no legitimate state interest in denying Petitioners' request for a moratorium. Furthermore, this channel infill in Elk River is prohibited by the Basin Plan. RWB has failed to meet the objectives of the Basin Plan, by authorizing known, hazardous activities that infill the river and deposit on Petitioners' private properties. RWB's failure as a Public Trust Agency, is evident in its own performance record over the past two decades as well as in the documentation of extensive damages suffered by Elk River residents.

7j) The State of California "declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water", now codified as Water Code, § 1254, and explicitly directed the Water Board to be guided by this declaration of policy.

7k) By delaying enforcement for decades, RWB has deliberately degraded the water quality of Upper Elk River in direct violation of the Clean Water Act, the Basin Plan, and Environmental Protection Agency directives. RWB enables violation of these laws by allowing continuing discharges without conducting proper, transparent anti-degradation procedures. The EPA required the State of California to adopt an anti-degradation policy consistent with its model. (See 40 C.F.R. section 131.6(d)). The EPA model requires that an anti-degradation policy **shall** maintain and protect "existing instream uses and the level of water quality necessary to protect existing uses." RWB's refusal to honor the mandatory language: "existing instream uses and the level of water quality necessary to protect existing uses" cannot provide immunity for the act of deliberately harming Petitioners.

RWB, as the trustee for the waters of Elk River, cannot legitimately deny Petitioners' request for a moratorium given the overwhelming threat of increased damage that will occur without the requested moratorium.

7l) The TMDL is a certain threat of imminent harm to the upper Elk River neighborhood. In fact, the proposed TMDL specifically prescribes a measurable level of harm that only Elk River residents ("Petitioners") must suffer. Given RWB's

demonstrated animus towards this community, this TMDL amounts to a loaded gun pointed at the heads of upper Elk River residents. RWB has their finger on the trigger because they fail to use their power to stop the controllable discharges (Cease and Desist, Cleanup and Abate, and Administrative Civil Liabilities.)

7m) Furthermore, the TMDL specifically intends to *not* attain the Basin Plan Objectives (BPO) for at least twenty years into the future. The BPOs are specifically intended to protect human life and property. Therefore, the TMDL demands that Petitioners will continue to suffer illegitimate damages for decades and provides no mechanism for relief of past or future damages. (See EPA Janet Parrish admonishment to North Coast Regional Water Quality Control Board, May 2014.--- EPA agreement with RWB that TMDL would be implemented by 2002)

7n) RWB's proposed TMDL is pursuant to the Federal Clean Water Act and therefore subject to federal requirements. The Presidential Executive Order 13406: "Protecting the Property Rights of the American People" signed by George W. Bush on June 23, 2006 limits "the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."

Thus, RWB's proposed TMDL would be an action in excess of authority to the extent that the Federal TMDL inflicts damage on upper Elk River residents while benefitting private timber operations.

7o) Discharge is a privilege, not a right. RWB, as a public trust agency, has no authority to elevate anyone's privilege over the rights of others. Timber's discharges to the waters Elk River cannot legitimately supersede the vested rights of Petitioners.

7p) The official record over the past twenty years unambiguously reveals RWB's animus towards Petitioners in authorizing the privileges of timber to supersede the rights of Elk River residents. RWB routinely denies all requests from Elk River residents to restrict timber activities that knowingly will damage Elk River residents. Cal. Gov. Code 65008 renders null and void any action taken by a local government agency that denies to any individual or group of individuals the enjoyment of their residence, landownership, or tenancy.

7q) US Constitution--14, 5 (nor shall government take private property for public use without due process and just compensation), 4 (seizure/occupation of property), 8 (unusual punishment)

7r) RWB did not comply with Congress's intent that ACOE permits be obtained when it authorized discharges in Elk River to infill the channels with sediment discharged by logging. Instead, RWB continues to permit activity, knowing that channel infill will result. When channel infill was documented and obvious, RWB permitted more activity knowing that more infill would result.

7s) CA AB 685 Human Right to Water: Most upper Elk River residents rely on surface waters from Elk River for domestic use.

7t) Executive Orders 12898, 13406: Federal money is not to be used by State of California to carry out discriminatory policy directly harming Petitioners.

7u) The only State policy that has ever begun to achieve the Basin Plan performance objectives was the moratorium in 97-2002. Where police power is exercised to protect the public from dangerous deteriorated conditions and damage, not to confer economic benefits on operations, Courts have upheld the exercise, 248 U. S. 498; 239 U. S. 394; 237 U. S. 171; 225 U. S. 623; 127 U. S. 678; 123 U. S. 623. For decades the State Water Board has allowed RWB to let the deteriorating conditions fester, and the SWB has not intervened, nor has the Attorney General for California as it did in Lake Tahoe.

7v) The decision in Agins v. City of Tiburon, 447 U. S. 255 (1980), demonstrates how Plaintiffs are aggrieved: "regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land." The District of Nevada Court, 34 F. Supp. 2d, at 1239, rejected the first alternative based on its finding that "further development on high hazard lands such... would lead to significant additional damage to the lake." *Id.*, at 1240. See TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. v. TAHOE REGIONAL PLANNING AGENCY et al., 2002 US Supreme Ct.

7w) "Long-established precedent, however, declares that courts have concurrent jurisdiction in water right controversies. The Legislature, instead of overturning that precedent, has implicitly acknowledged its vitality by providing a procedure under which the courts can refer water rights disputes to the water board as referee. We therefore conclude that the courts may continue to exercise concurrent jurisdiction, ..." National Audubon Society v. Superior Court, 33 Cal.3d 419

7x) Andrew Baker, WQ inspector, in 1991-92 warned of substantial damage from timber operations in the upper North Fork: deteriorating conditions followed- Petitioners' rights were impaired and properties were invaded and occupied by the resulting floods and pollutants. (This record demonstrates that lax RWB policy has enabled violation of Federal Anti-degradation Policy for over 22 years)

6y) A long line of decisions indicates that remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction. The United States Supreme Court held this in light of California v. United States (1978) 438 U.S. 645. On remand, the California Supreme Court found no federal preemption, and further held that intervenor's claim was not defeated by failure to exhaust administrative remedies. Noting that "the courts [had] traditionally exercised jurisdiction of claims of unreasonable water use" EDF II, 26 Cal.3d 183, 199

7z) Bob Klamp, RWB, declared in 2008 that the domestic standard of protection for water quality in Elk River was the operative policy as "no degradation procedure had ever been undertaken."

8. Copies of the Petition have been sent to the Regional Board and the Dischargers:

- a) Green Diamond Corporate Headquarters
1301 Fifth Avenue Suite 2700
Seattle, WA 98101-2613
gschuler@greendiamond.com
- b) California Timberlands Division
P.O. Box 68
Korbel CA 95550-0068
grynearson@greendiamond.com
- c) Humboldt Redwood Company, LLC
125 Main Street
P.O. Box 712
Scotia, CA 95565
mjani@hrcllc.com
mjani@mendoco.com
- d) North Coast Regional Water Quality Control Board
5550 Skylane Blvd. Suite A
Santa Rosa CA 95403-1072
matt.st.john@waterboards.ca.gov

9. A statement the issues raised in the Petition were raised before the Regional Board acted, or an explanation of why the Petitioners could not raise those objections before the Regional Board.

Statement of Petitioners: For the past 17 years Petitioners continuously alerted RWB that it continues to fail to remedy worsening conditions in our public watercourses, fails to control discharges and fails to prevent accelerated erosion. Instead RWB knowingly enables worsening conditions to manifest. These conditions directly threaten the lives and health and safety of Petitioners, and directly damage Petitioners' property. In desperation, we wrote and then read the Environmental Equity/Justice Petition to the RWB on May 7, 2014 in Fortuna, CA and the issues were referenced again at the June 19 meeting in Santa Rosa, CA where RWB directed Petitioners to follow the directions for petitions (appeals) on the State Water Board website. After 17 years of trying, Petitioners find they cannot raise these issues in a manner that is treated as a proper objection before the Regional Board. At this point we can only conclude that the Regional Board exercises some unidentified discretionary basis to provide dischargers with exemptions from compliance with Basin Plan Objectives, Prohibitions, the Water Code, and the Clean Water Act.

1. Name, Address, Telephone, and e-mail of Petitioners:

--Kristi Wrigley, member of the Elk River Residents' Association: 2550 Wrigley Road, Eureka, CA 95503
(707) 443-1496 elkrra@gmail.com

--Stephanie Bennett, member of the Elk River Residents' Association: 8050 Elk River Road, Eureka, CA
95503 elkrra@gmail.com

--Jesse Noell, guardian for Plaintiffs "Future Generations", member of the Elk River Residents'
Association: 8050 Elk River Road, Eureka, CA 95503 elkrra@gmail.com

2. The action or inaction of the Regional Board being petitioned:

Final Adoption of the Action Plan for the Upper Elk River Sediment TMDL (Action Plan)[the final step in a systematic deprivation of our Constitutional Rights, water and property rights, life liberty and pursuit of happiness.]

3. The Date regional Water Board last acted, last refused to act, or was last requested to act:

May 12, 2016

4. Statement of reasons the action or inaction was inappropriate or improper:

The actions or inactions are inappropriate or improper because they are designed to "accommodate important economic development" while systematically, deliberately, and purposefully harming petitioners. It is improper for government to externalize the costs of pollution onto petitioners. Ca.Civ.Code 3334 (b). Government improperly or inappropriately exercised their power causing direct physical harm, and plans to extend the duration of plaintiff's harm for at least another twenty years. Government improperly or inappropriately exercised their power over the past 25 years devastating public trust resources that provide long term sustenance for human beings in order to provide short term economic advantages to special persons. The TMDL plans to continue improper and inappropriate short term government actions while relying on speculative mitigations that have not been funded by the Legislature or Congress. Government's unfunded speculative mitigations are improper, unconstitutional, and fraudulent. The unfunded mitigations upon which government is granting permits to discharge wastes to the Waters of the United States are designed to render the taxpayer liable so that the discharger benefits.

Government action and inactions are improper or inappropriate because they impede the circulation and flow of Elk River, reduce the reach and breadth of Elk River, create increased flood height and frequency, permits destabilization of the Elk River Watershed, impairs or destroys existing uses of water and water rights, unreasonably subjects private property to unnatural harm, prevents recovery of the cold water fishery within a reasonable time frame, and undercuts or violates various salmonid incidental take permit conditions and impedes movement towards properly functioning habitat conditions for coho.

The government actions and inactions are improper or inappropriate because they threaten catastrophic consequences which have already begun and will progressively worsen in the near future.

Plaintiffs include a group of individuals who are improperly or inappropriately forced to suffer concrete harm from excessive discharges to Elk River as a result of government's actions and inactions. Also among the plaintiffs are associations of activists who are beneficiaries of a federal public trust which is being harmed by substantial impairment and alienation of public trust resources through ongoing government actions that improperly or inappropriately allow timber harvest exploitation. Plaintiffs Jesse Noell and Kristi Wrigley participate as guardians for plaintiff "future generations."

Plaintiffs appeal North Coast Regional Water Quality Control Board's Upper Elk River TMDL and actions because the California government has known for decades that the harvest of trees per se causes significant adverse effects on the Elk River environment and has failed to take necessary action to curtail anthropogenic sediment and storm water discharges. Plaintiffs allege that the government and its agencies have taken action or failed to take action that has resulted in increased sediment delivery and storm water discharges through permitted timber harvest activities, transportation, and exportation. Plaintiffs assert that a reduction of suspended sediment concentrations adjusted for antecedent rainfall index and flow is possible, but government has failed to act to prevent improper take of coho; improper reduction of the breadth and reach of Elk River, and impeding the flow and circulation of Elk River; and has failed to act to restore the Waters of Elk River to fishable, swimmable, and drinkable waters as required by the Clean Water Act.

Plaintiffs allege the current actions and omissions of government [RWB, SWB] improperly or inappropriately make it extremely difficult for plaintiffs to protect their vital natural systems and a livable world.

Plaintiffs assert the actions and omissions of government [RWB, SWB] that impaired the reach and breadth of Elk River and impede the circulation and flow of Elk River "shock the conscience," and are infringing the plaintiffs' rights to life and liberty in violation of their substantive due process rights.

Plaintiffs also allege RWB actions have violated plaintiffs' equal protection rights embedded the Fifth Amendment by denying them protections afforded to previous generations and by favoring short term economic interests of certain citizens. Plaintiffs further allege defendants' acts and omissions violate the implicit right, via the Ninth Amendment, to a stable watershed and waters free from dangerous levels of pollutants and sediment. Finally, plaintiffs allege government [RWB, SWB] have violated a public trust doctrine, secured by the Ninth Amendment, by denying future generations' essential natural resources.

North Coast Regional Water Quality Control Board's (RWB) final Action Plan continues their pattern and practice of actions which delays attainment of Water Quality Standards, Prohibitions, and/or Objectives in a timely manner; denies us equal protection under the law, denies us economic and environmental justice. This Action Plan is a denial of our the right to be free from seizure, denial of due process, improper action pursuant to exercise of police power, intentional and knowing systematic destruction of

our sustenance by way of the cold water fishery and other public trust values, consistency with other Federal laws including but not limited to the Endangered Species Act, NEPA, CESA, APA; Justice delayed is justice denied to Petitioners and future generations.

It is improper for government to fail to ensure a margin of safety for its citizens by not doing so RWB1 selected a discrete group of citizens (upper Elk River residents) to receive certain continued harm.

RWB1's improper to avoid infringement of Petitioners' rights and to provide affirmative relief from certain threat of imminent harm, intentionally and exclusively selects Petitioners' neighborhood and the subsistence and commercial fishing community to bear a disproportionate burden of negative environmental impacts that are preventable by proper regulation of the dischargers' activities.

RWB's improper actions deny Petitioners and future generations of citizens equal protection under the law, Constitutions, Presidential Executive Orders, and Congressional intent.

RWB's actions improperly or inappropriately exempt discharges from control where those discharges fill rivers with sediment, cause flooding, damage property, destroy and impair existing uses of water, and threaten health and safety. It is improper to subject residents to physical invasion that results from exempting discharge by labelling the discharges as not feasible or practicable to control.

5. How Petitioners are aggrieved:

a) Petitioners have been denied the fundamental constitutional right to petition government for redress and due process.

b) Petitioners, who are residents, suffer increasing private property damage as a direct result of RWB's actions and inactions: homes made unlivable, access interfered with, frequent and severe inundation, destruction of fences and septic systems, foundations, water systems, tanks, vehicles, equipment, crops, orchards.

c) Petitioners, who are residents, suffer violations of many of their other Constitutional Rights as a direct result of RWB's actions and inactions.

d) Petitioners suffer persistent, measurable damage to their health and safety as a reasonably foreseeable result of RWB's actions and inactions.

e) Petitioners suffer from the intentional infliction of emotional distress as a reasonably foreseeable result of RWB's actions and inactions.

f) Petitioners as well as children, grandchildren and future grandchildren are denied equal protection as a reasonably foreseeable result of RWB's policies in Elk River. These policies rely on exemptions for silviculture and agriculture which authorize abnormal, unreasonable destruction of existing uses; destruction of homes, orchards, agricultural fields, including destruction of subsistence and commercial fishing livelihoods.

6. The action Petitioners request the State Water Board to take:

Through this action, plaintiffs ask the State Water Board and ultimately the courts to:

a) Immediate relief in the form of a moratorium (cease and desist) on industrial logging until the beneficial uses of water are restored and the floodwater conveyance capacity of the river channels are recovered to the 1987 level, and the water quality meets 1987 Water Quality Standards for each of the applicable beneficial uses.

b) Immediate enforcement of environmental laws, regulations and policies to ensure the health, safety and security of upper Elk River residents' lives, homes, water, and property, and to restore the cold water fishery. Ensure consistency with the Endangered Species Act Incidental Take Permit attainment of properly functioning conditions for Coho salmon.

c) Replace unenforceable language in the Elk River TMDL with prohibitions requiring attainment of water quality standards and recovery of channel conveyance prior to resumption of pollution discharge permit approval.

d) SWB to declare that the storm water discharge from logging in Elk River is a violation of WQ standards and is a significant contributor to the pollution of the waters of the USA.

e) SWB requests Region 9 regulate industrial logging discharges in Elk River under the permit required by CWA section 402(p)(2)(E) because Elk River critical core coho population has become severely depressed despite good ocean condition over most of the last 10 years.

f) The TMDL be consistent with all Federal laws.

7. Points & Authorities:

7a) The damage to Petitioners' private properties is well known and understood by RWB. The official record for over seventeen years is replete with demonstration of damages to property in this neighborhood of upper Elk River. In fact, RWB never disputes that Petitioners' properties are damaged as a result of RWB's regulatory policies. But for RWB's actions and inactions that exempt dischargers from compliance with the Clean Water Act and CWA section 402 and 404 permitting, and the Basin Plan, Petitioners would not be damaged. The source of these damages is universally agreed upon and scientifically verified: uncontrolled sources of erosion from timber harvest activities and pathogens from cattle in upper Elk River are the exclusive cause of damage to Petitioners' property. RWB has both the duty and the authority to prevent these damages, but chooses to violate that duty so that Petitioners will suffer. (See RWB Administrative Record)

7b) The official measure of RWB's performance in Elk River shows that RWB has failed to meet its own agency performance standards. During the past seventeen years and continuing at present, Basin Plan Prohibitions are continuously violated, beneficial uses are not attained, and the Federal Anti-Degradation policy is violated. Petitioners have been extensively active in expressing their anguish over this persistent and preventable damage to their private property and their rights as Americans. (Last notification: see audio recording from May 12, 2016 TMDL adoption.

7c) RWB has stated that it cannot and will not perform its mandatory duties, thereby forcing Petitioners (the discrete neighborhood of upper Elk River) to suffer damages and the reasonably certain threat of imminent harm. RWB members Massey and Noren told Petitioners in late 2013, that much more data was needed in Elk River for the Board to be able to render good decisions. Then RWB declared through its executive officer, Matt St. John, that it was suspending monitoring of the South Fork Elk because some Elk River residents had petitioned the State Board for alternative supply.

7d) Jonathan Bishop, former State Deputy Director of Water Quality that oversees RWB, told Petitioners that North Coast Regional Water Quality was too intimidated by the timber industry to perform its duties sufficiently to protect upper Elk River Residents (Petitioners). Mr. Bishop (in the presence of his attorney, Ted Cobb) declared that RWB deliberately chose to violate Petitioners because they pose a lesser threat to RWB than the polluters whose activities necessarily must damage Petitioners. Mr. Bishop told Petitioners that the Timber & Ag Lobby was so powerful that water quality would not be protected.

7e) RWB former member Dina Moore told the public in open session, that the RWBoard's decision-making process turned on which party posed the greatest threat of lawsuits; not on upholding the mandatory duties of the agency as prescribed by the Legislature. (She said, "Gee; no matter how we decide, someone's going to sue us!") Since the timber industry has the greatest resources, RWB always decides in their favor, regardless of how wrong they are and of how much damage our disempowered community experiences as a result of RWB's policies. Dina Moore knows that the upper Elk River community has no political or economic power to confront the abuses of RWB or the timber industry.

7f) Former legal counsel for RWB, Samantha Olsen, told Petitioners that RWB will avoid litigation with the timber industry at all costs—including the (yet to be paid for) cost of violating Petitioners and their neighborhood. S. Olsen even suggested that Petitioners should just relax and accept even more damage from timber. She said, "C'mon, HRC deserves a clean slate" ...to continue its operations that have irrefutably been demonstrated to damage your private properties. When Petitioners attempt to confront these deliberate damages using public processes, S. Olsen disparages Petitioners by smearing them with the invective, "litigious." RWB Legal Counsel knows that the upper Elk River neighborhood lacks the political or economic power to confront these abuses and likewise knows that the polluters will force costly litigation if she doesn't give them what they want.

7g) The decision in *Agins v. City of Tiburon*, 447 U. S. 255 (1980), negates RWB's fear of a "takings suit" reprisal from polluters for restricting their hazardous activities. When a regulatory agency advances a legitimate state interest such as ensuring the health and safety of a disempowered community, the restricted party cannot prevail in claiming a regulatory takings. ("...regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.")

Timber owns more than 20,000 acres of land in upper Elk River. Petitioners' land holdings average 1.5 acres to 40 acres. Clearly, the timber companies' extensive land holdings provide alternative opportunities for their investments. Residents have one primary use and only one opportunity: to reside

every day in their homes and to use their small holdings for normal family occupancy. Timber cannot make the argument that they are denied all economically viable use of their land; the moratorium requested lasts only until the worsened conditions are abated and does not apply to the timber dischargers other hundreds of thousands of acres that are located outside Elk River.

The District of Nevada Court, 34 F. Supp. 2d, at 1239, relied on the first alternative (1) "further development on high hazard lands such.... would lead to significant additional damage to the lake" and established that moratoriums are proper, i.e. not a taking, where erosion causes damage to esthetic values. *Id.*, at 1240. The U.S. Supreme Court in its decision relies upon this opinion. *TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. v. TAHOE REGIONAL PLANNING AGENCY et al.*, 2002 US Supreme Ct.

7h) In Elk River, RWB's authorization of un-controlled erosion causes physical invasion and permanent occupation of residents' lands as the river channels infill. We can only guess that RWB must be relying on the "normal farming exemptions", or some other exemption, to allow this damage. Congress made clear its intent: "normal farming" is not the manner of farming that causes channels to infill resulting in flooding to neighboring private properties. In cases where farming or silviculture activity does cause channel infill and flooding, and does cause physical invasion and occupation of neighbors' lands, no such exemption is proper. See *Kelo v. New London*, U.S. Supreme Ct. —taking of a private home from one family, with due process & just compensation, and giving it to a developer---can be lawful ----but Elk River Petitioners are singled out by RWB to privately suffer losses --- without due process and just compensation. RWB has not demonstrated that it has eminent domain authority, and has undertaken no due process, or just compensation sufficient to comply with the *Kelo* Constitutional standard, or the *Pumpelly v. Green Bay* standard, nor the *Lorretto* standard, nor the *Arkansas Game and Fish* standard. RWB also violates Ca.Civ.Code 3334(b).

Thus, in the impaired watershed of Elk River, Section 404 regulation and permits should be required for timber operations in Elk River. Either RWB exceeds its authority by relying on improper exemptions, or Congress intends for private property to be damaged, invaded, and occupied by the discharged waste products of privileged persons. Petitioners find no evidence that Congress intends dischargers' wastes to damage, invade, and occupy Petitioners' lands, homes, and farms.

This government-authorized physical invasion and permanent occupation of Petitioners' properties has been extensively studied and monitored by both public and private research. All credible scientists agree that timber activities have caused and will cause serious flood damage to the watershed and to Petitioners' private properties. RWB has no valid support to continue to authorize sediment-discharging activities, because at this point, any discharge harms Petitioners. RWB's tactics subject a disempowered neighborhood to tyranny.

Therefore, RWB has no valid basis to not accept Petitioner's request for a moratorium. (See the Congressional intent underlying U.S. Environmental Protection Agency and U.S. Department of the Army's Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)) and Presidential Executive Orders 13406 and 12898.

7i). RWB advances no legitimate state interest in denying Petitioners' request for a moratorium. Furthermore, this channel infill in Elk River is prohibited by the Basin Plan. RWB has failed to meet the objectives of the Basin Plan, by authorizing known, hazardous activities that infill the river and deposit on Petitioners' private properties. RWB's failure as a Public Trust Agency, is evident in its own performance record over the past two decades as well as in the documentation of extensive damages suffered by Elk River residents.

7j) The State of California "declared to be the established policy of this state that the use of water for domestic purposes is the highest use of water", now codified as Water-Code, § 1254, and explicitly directed the Water Board to be guided by this declaration of policy.

7k) By delaying enforcement for decades, RWB has deliberately degraded the water quality of Upper Elk River in direct violation of the Clean Water Act, the Basin Plan, and Environmental Protection Agency directives. RWB enables violation of these laws by allowing continuing discharges without conducting proper, transparent anti-degradation procedures. The EPA required the State of California to adopt an anti-degradation policy consistent with its model. (See 40 C.F.R. section 131.6(d)). The EPA model requires that an anti-degradation policy shall maintain and protect "existing instream uses and the level of water quality necessary to protect existing uses." RWB's refusal to honor the mandatory language: "existing instream uses and the level of water quality necessary to protect existing uses" cannot provide immunity for the act of deliberately harming Petitioners.

RWB, as the trustee for the waters of Elk River, cannot legitimately deny Petitioners' request for a moratorium given the overwhelming threat of increased damage that will occur without the requested moratorium.

7l) The TMDL is a certain threat of imminent harm to the upper Elk River neighborhood. In fact, the proposed TMDL specifically prescribes a measurable level of harm that only Elk River residents ("Petitioners") must suffer. Given RWB's demonstrated animus towards this community, this TMDL amounts to a loaded gun pointed at the heads of upper Elk River residents. RWB has their finger on the trigger because they fail to use their power to stop the controllable discharges (Cease and Desist, Cleanup and Abate, and Administrative Civil Liabilities.)

7m) Furthermore, the TMDL specifically intends to not attain the Basin Plan Objectives (BPO) for at least twenty years into the future. The BPOs are specifically intended to protect human life and property. Therefore, the TMDL demands that Petitioners will continue to suffer illegitimate damages for decades and provides no mechanism for relief of past or future damages. (See EPA Janet Parrish admonishment to North Coast Regional Water Quality Control Board, May 2014.---EPA agreement with RWB that TMDL would be implemented by 2002)

7n) RWB's proposed TMDL is pursuant to the Federal Clean Water Act and therefore subject to federal requirements. The Presidential Executive Order 13406: "Protecting the Property Rights of the American People" signed by George W. Bush on June 23, 2006 limits "the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the

purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”

Thus, RWB’s proposed TMDL would be an action in excess of authority to the extent that the ~~Federal~~ TMDL inflicts damage on upper Elk River residents while benefitting private timber operations.

7o) Discharge is a privilege, not a right. RWB, as a public trust agency, has no authority to elevate anyone’s privilege over the rights of others. Timber’s discharges to the waters Elk River cannot legitimately supersede the vested rights of Petitioners. Cite to CWA, Nov 1978, highest water quality attained... this TMDL does not assure return of those rights in a timely manner if at all. It does assure more sediment because it allows an already harmful level of logging to continue and does not adhere to historical levels of logging which resulted in recovery of water quality in the past.

7p) The official record over the past twenty years unambiguously reveals RWB’s animus towards Petitioners in authorizing the privileges of timber to supersede the rights of Elk River residents. RWB routinely denies all requests from Elk River residents to restrict timber activities that knowingly will damage Elk River residents. Cal. Gov. Code 65008 renders null and void any action taken by a local government agency that denies to any individual or group of individuals the enjoyment of their residence, landownership, or tenancy.

7q) US Constitution--14, 5 (nor shall government take private property for public use without due process and just compensation), 4 (seizure/occupation of property), 8 (unusual punishment)

7r) RWB did not comply with Congress’s intent that ACOE permits be obtained when it authorized discharges in Elk River to infill the channels with sediment discharged by logging. Instead, RWB continues to permit activity, knowing that channel infill will result. When channel infill was documented and obvious, RWB permitted more activity knowing that more infill would result.

7s) CA AB 685 Human Right to Water: Most upper Elk River residents rely on surface waters from Elk River for domestic use.

7t) Executive Orders 12898, 13406: Federal money is not to be used by State of California to carry out discriminatory policy directly harming Petitioners.

7u) The only State policy that has ever begun to achieve the Basin Plan performance objectives was the moratorium in 97-2002. Where police power is exercised to protect the public from dangerous deteriorated conditions and damage, not to confer economic benefits on operations, Courts have upheld the exercise, 248 U. S. 498; 239 U. S. 394; 237 U. S. 171; 225 U. S. 623; 127 U. S. 678; 123 U. S. 623. For decades the State Water Board has allowed RWB to let the deteriorating conditions fester, and the SWB has not intervened, nor has the Attorney General for California as it did in Lake Tahoe.

7v) The decision in Agins v. City of Tiburon, 447 U. S. 255 (1980), demonstrates how Plaintiffs are aggrieved: “regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land.” The District of Nevada Court, 34 F. Supp. 2d, at 1239, rejected the first alternative based on its finding that “further

development on high hazard lands such... would lead to significant additional damage to the lake." Id., at 1240. See TAHOE-SIERRA PRESERVATION COUNCIL, INC., et al. v. TAHOE REGIONAL PLANNING AGENCY et al., 2002 US Supreme Ct.

7w) "Long-established precedent, however, declares that courts have concurrent jurisdiction in water right controversies. The Legislature, instead of overturning that precedent, has implicitly acknowledged its vitality by providing a procedure under which the courts can refer water rights disputes to the water board as referee. We therefore conclude that the courts may continue to exercise concurrent jurisdiction, ..." National Audubon Society v. Superior Court, 33 Cal.3d 419

7x) Andrew Baker, WQ inspector, in 1991-92 warned of substantial damage from timber operations in the upper North Fork: deteriorating conditions followed-Petitioners' rights were impaired and properties were invaded and occupied by the resulting floods and pollutants. (This record demonstrates that lax RWB policy has enabled violation of Federal Anti-degradation Policy for over 22 years)

6y) A long line of decisions indicates that remedies before the Water Board are not exclusive, but that the courts have concurrent original jurisdiction. The United States Supreme Court held this in light of California v. United States (1978) 438 U.S. 645. On remand, the California Supreme Court found no federal preemption, and further held that intervenor's claim was not defeated by failure to exhaust administrative remedies. Noting that "the courts [had] traditionally exercised jurisdiction of claims of unreasonable water use" EDF II, 26 Cal.3d 183, 199

7z) Bob Klampert, RWB, declared in 2008 that the domestic standard of protection for water quality in Elk River was the operative policy as "no degradation procedure had ever been undertaken."

8. Copies of the Petition have been sent to the Regional Board and the Dischargers:

a) Green Diamond Corporate Headquarters

1301 Fifth Avenue Suite 2700

Seattle, WA 98101-2613

gshuler@greendiamond.com

b) California Timberlands Division

P.O. Box 68

Korbil, CA 95550-0068

grynearson@greendiamond.com

c) Humboldt Redwood Company, LLC

125 Main Street

P.O. Box 712

Scotia, CA 95565

mjani@hrcllc.com mjani@mendoco.com

d) North Coast Regional Water Quality Control Board

5550 Skylane Blvd. Suite A

Santa Rosa CA 95403-1072

matt.st.john@waterboards.ca.gov

9. A statement the issues raised in the Petition were raised before the Regional Board acted, or an explanation of why the Petitioners could not raise those objections before the Regional Board.

Statement of Petitioners: For the past 17 years Petitioners continuously alerted RWB that it continues to fail to remedy worsening conditions in our public watercourses, fails to control discharges and fails to prevent accelerated erosion. Instead RWB knowingly enables worsening conditions to manifest. These conditions directly threaten the lives and health and safety of Petitioners, and directly damage Petitioners' property. In desperation, we wrote and then read the Environmental Equity/Justice Petition to the RWB on May 7, 2014 in Fortuna, CA and the issues were referenced again at the June 19 meeting in Santa Rosa, CA where RWB directed Petitioners to follow the directions for petitions (appeals) on the State Water Board website. After 17 years of trying, Petitioners find they cannot raise these issues in a manner that is treated as a proper objection before the Regional Board. At this point we can only conclude that the Regional Board exercises some unidentified discretionary basis to provide dischargers with exemptions from compliance with Basin Plan Objectives, Prohibitions, the Water Code, and the Clean Water Act.