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Petitioners

Sent Via: Electronic Submission

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

<u>In the Matter of Declined Petition for</u>)	
<u>Degradation Hearing and/or Alternative</u>)	
<u>Domestic Water Supply ---North Coast Region</u>)	PETITION FOR
)	REVIEW
)	

Pursuant to Section 13320 of California Water Code Section 2050 of Title 23 of the California Code of Regulations (CCR), Jesse Noell and Stephanie Bennett petition the State Water Resources Control Board ("State Water Board") to review and explain the final decision of the California North Coast Regional Water Quality Control Board's refusal to implement the Anti-Degradation Process on the South Fork of Elk River ("the nuisance reach"). The issues in this petition were raised in timely written comments, ongoing oral discussions with the Regional Board, and persistently raised over the last two decades.

1. NAME AND ADDRESS OF THE PETITIONERS:
JESSE NOELL and STEPHANIE C. BENNETT
8050 ELK RIVER ROAD
EUREKA, CA 95503
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:

Petitioners seek review of the North Coast Regional Board's

failure to provide a rational, legal, and transparent basis for their denial to protect Petitioners' sole domestic water supply.

The North Coast Regional Board's denial of our Petition (filed February 22, 2013) is entirely baseless, and therefore, must be predicated on prejudice and prayer.

This irrational denial of our request to protect our domestic water supply and the existing uses lavishly demonstrates the North Coast Regional Board's violations of:

- 1) the California Constitution, Article X, sec. 2
- 2) the Clean Water Act (CWA)
- 3) the Basin Plan Prohibitions and Objectives
- 4) the federal & state Anti-Degradation policies
- 5) California Health and Safety Code sections 116990, 116995
- 6) California Civil Code section 3334(b)

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

Denial letter issued on September 23, 2013.

4. A FULL AND COMPLETE STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER.

a) It is inappropriate for a public agency to engage in arbitrary and capricious official decisions. The Regional Board is relying on "underground rules" to guide their performance. The public is deprived of equal protection and due process. Petitioners, specifically, are subjected to malicious and intentional injury.

b) It is inappropriate for the Regional Board to fail to uphold California's Constitutional policy that establishes domestic water supply as the priority use of water in this state. By failing to uphold the priority use, Regional Board singled out selected private persons to bear a disproportionate burden for the public benefit. The Regional Board created exemptions for special neighbors to pollute that priority use, which result in the intentional violation of Petitioners' rights, real property, and health. The Regional Board's exemptions are not in the maximum benefit of all Californians.

c) It is improper for the public agency with the comprehensive control of water quality to be unprepared to implement the Basin Plan Objectives regarding domestic water supplies. Californians expect that regional boards throughout the state commonly face this incompatibility of residential use and agricultural discharge. Public water quality agencies are expected to be proactive in their implementation of the legislative intent by requiring a valid monitoring plan prior to

the discharge. This proactive monitoring plan is even more essential when a planned discharge will knowingly affect sole domestic water supplies. Yet the North Coast Regional Board delayed for more than six months, waiting until fecal discharge had contaminated Petitioners' water supply before requesting a valid monitoring plan.

d) It is inappropriate for Regional Board to not collect baseline data from the South Fork Elk system, including the high quality waters flowing from Little South Fork Elk River. It is inappropriate for Regional Board to fail to monitor the extent to which high quality waters are degraded by pollution sourcing from logging and cattle operations. Regional Board must collect baseline data for comparison with water quality objectives if Regional Board is to carry out Anti-degradation Policy. By failing to do so, Regional Board renders anti-degradation analysis impossible and therefore violates Anti-degradation Policy.

e) It is inappropriate for a public agency to rely on faith-based criteria to inform their decisions. As of early October 2013, Regional Board members admitted that they have no current valid data upon which to demonstrate that the Basin Plan Objectives are being met. Yet prior data demonstrated both causation and contamination by the regulated activity—violations of the Basin Plan Objectives and the Basin Plan Prohibitions. Despite the WWWDR which places limits on harvested area in an attempt to control sediment discharge, mean suspended sediment concentration (SSC) residuals (not explained by instantaneous flow or antecedent precipitation index) increased 89% between 2008 and 2013.

California Code of Regulations 22 CCR 2231(d) clearly requires that the WWWDR must ensure rapid, *not delayed* compliance with applicable water quality objectives. Instead the Regional Board has regulated increasing pollution and nuisance for the past 5 years. This regulation and outcome are inconsistent with the findings of the WWWDR Order and the underlying CEQA Negative Declaration. In spite of this increase in nuisance conditions, the Regional Board has refused to conduct state anti-degradation analysis. Regional Board has failed to bring its WWWDR into compliance as required by 68-16 and APU 90-004.

The Basin Plan Objectives are intended to establish limits for sediment discharged by timber operations and for the pathogens and contaminants discharged by cattle operations. When raw, untreated cattle feces comes in contact with the timber sediment sludge, these globs of pollutants combine in the water. The pathogens in the raw feces "hide" in the spaces of the sediment glob matrix which is already filling the river channel. This chronic suspended sediment load renders disinfection of pathogens exceedingly difficult and expensive. This is a difficulty and an expense not experienced by Petitioners and their neighbors, until Regional Board approved the discharge prior to ensuring that existing beneficial uses were maintained, and in the absence of sufficient monitoring data.

f) It is inappropriate for a public agency to endanger the health and safety of selected persons without their consent. Because Regional Board relies on insufficient and inaccurate data to allow continued degradation of Petitioners' sole

domestic water supply, they are merely experimenting with their policy. Regional Board failed to obtain Petitioners' permission to be human subjects in their raw feces contamination experiment.

Regional Board is aware of extensive studies that show that pathogens from discharges from livestock into surface water supplies are extremely toxic to humans. Furthermore, Regional Board refused to warn any downstream residents that their domestic water supplies will be contaminated from planned, raw fecal discharge in combination with the already existing chronic severe suspended sediment concentrations.

Regional Board delayed implementation of a fecal monitoring plan for the intended discharge, and by its own admission, now has inadequate data upon which to base its plan. Particularly egregious, is that the Regional Board (RB) sacrificed Petitioners' health and safety in order to illegally privilege the economic gain of special dischargers. This sacrifice violates the intent of the Legislature—"to eliminate any economic incentive to trespass as a means of waste disposal."

g) It is inappropriate for a public agency to regulate pollution by privileging special polluters to violate the rights, the health, the safety, and the communities of common residents. The Regional Board's petition denial letter documents a long, ongoing policy of privileging polluters to violate Basin Plan Objectives, Anti-degradation Policy for existing uses, and Health and Safety Codes. This RB policy is non-responsive, non-transparent, and counterproductive to ensuring the health and safety of humans.

g1) Regional Board irrationally relies on a recreational beach standard to regulate water quality in a residential community, while knowing that this weak standard will not uphold the priority use of water in this state, domestic supply. Petitioners are informed and believe that the law requires that the domestic water supply standard is the relevant standard to be implemented on the South Fork Elk River. RB specifically intends that their policies will contaminate Petitioners' water supply, or else they would have applied the appropriate lawful standard.

g2) Five years ago, the Regional Board Executive Officer Cat Kuhlman declared: "I can't tell *that man* what to do," referring to her intimidation by this exclusive polluter. Ms. Kuhlman attempted to explain the discrepancy between her agency's stated mission and its performance in our community. She was actually ashamed that she could not enforce the law in the South Fork Elk River because of the political power of those special polluters.

Petitioners had already met with Jonathan Bishop, Deputy Director of Water Quality and heard a similar sentiment. Mr. Bishop explained that even though there were clear mandates to protect human health and the beneficial uses on the South Fork of Elk River, his agency was impotent to restrict the special polluters of timber and agriculture.

This refusal to enforce RB's mandatory duties, provides such polluters with capricious exemptions and exceptions to the Basin Plan Prohibitions and Objectives.

h) It is improper and dangerous to democracy, for a public agency to submit an official response to a Petition without providing objective, legal, and rational

explanations for their official decision. The public expects, and our state and federal Constitutions require logical, legal, and transparent responses to the public's concerns. Objective policies and transparent legal support are indicators that the decider of a petition's fate is wise and moral. Otherwise, official agency decisions are merely the capricious whims of a politically selected board. Is that the legislative intent?

The Regional Board's: Response, Current Petition and Regional Water Board Decision section in their denial to Petitioners, contains no explanation at all. After devoting much ink to Petitioners' persistent history of requesting relief from regulated pollution, Regional Board uses three action verbs to comprise its entire response: *reviewed, discussed, and directed...to deny.*

Just what did the Board discuss that they cannot reveal to Petitioners? And, with whom did they discuss it? Isn't their analysis of their discussion the essence of democratic decision-making? The public is entitled to be informed of the guiding principles our public agents are relying upon to uphold the legislative intent of our public policies. Yet RB demonstrated in its response that it is incapable of responding intelligently and lawfully to Petitioners' serious issues.

Reviewed, discussed, and directed to deny explain nothing, yet say everything. Regional Board is not serving the public with its secrecy. Regional Board's response to Petitioners relies on vaporous innuendo at best, and capricious privileging at worst.

5. THE MANNER IN WHICH THE PETITIONERS ARE AGGRIEVED

Petitioners Jesse Noell and Stephanie Bennett are husband and wife who own and reside in a century old farmhouse on the South Fork of Elk River. Petitioners' finances, health, property, and rights are directly harmed by Regional Board refusal to implement an effective and legally appropriate policy of regulating surface water contamination from timber and cattle activity in their residential neighborhood.

a) Petitioners are aggrieved financially. Regional Board's refusal to enact mandatory protections for the beneficial uses and domestic water supply, places an immediate financial burden on Petitioners. The cost of sanitizing their domestic water supply must now be raised to protect against toxic fecal pathogens. This impact is clearly abatable and was preventable, yet RB refuses to prevent or abate. This new economic burden on Petitioners, assures an economic gain for the polluters.

Petitioners' contractual relationship with the state of California and the county of Humboldt, is based on residential zoning which intends the residential use of their home. Petitioners' home has been a residence for over 100 years. This zoning extracts the highest property tax rate from Petitioners (residential tax base). The public, and Petitioners, expect that their government agencies will honor this contract by ensuring that this residential use is supported.

When RB arbitrarily refuses to uphold residential uses, and instead, promotes agricultural use & pollution, RB is declaring that the residential tax base is inappropriate for this residential community on the South Fork of Elk River.

If residential use is not the priority use for homes on the South Fork, then mortgages must be adjusted, home-owners' insurance must be adjusted, fire and flood insurance must be adjusted to reflect these damages. County tax assessors must also reflect this diminution of property value by lowering the taxes assessed on homes that are already damaged and continue to be damaged by agricultural pollution.

b) Petitioners are aggrieved by discrimination and unequal treatment by their government. RB's act of not prohibiting pollution from agriculture results in confirmed contamination to domestic water supplies. Yet RB refuses to prevent, abate, or even provide relief to this assertively contaminated water. In contrast, on the North Fork of Elk River where residents' water supplies are also contaminated, RB ordered that discharger to provide an alternative, safe water supply for those specific residents only. RB arbitrarily excluded residents on the South Fork Elk from similar protections, even though they suffer from the same pollution from the same discharger. RB has provided no explanation for its disparate treatment of similarly affected families. Again, RB is enacting secret policies that result in discrimination, favoritism, and intentional injury to selected residents.

c) Petitioners are aggrieved by being deprived of the use and enjoyment of their property. Their primary use of this property is as a family home; this has been the primary use for over 100 years. When Petitioners' sole domestic water supply is assertively degraded, contaminated, and polluted, the value of Petitioners' home is diminished. Petitioners are facing the imminent loss of all use of their home if an alternative water supply is not provided by those who chose to degrade it.

Petitioners must legally disclose this loss of water supply to prospective buyers and therefore must lower the price of their home to reflect these damages. This is a damage to Petitioners' finances, to Petitioners' expectation of the use and enjoyment of their home, and to Petitioners' rights as equal citizens under the law.

d) Petitioners are aggrieved by the overt discrimination of being treated as second-class citizens. RB's own findings clearly demonstrate that residents of Elk River are suffering real and severe property damages. (See WWWD 2006; see 2010 analysis by Jack Lewis of RB monitoring data and rainfall data; see 2012 CDF pre harvest first reports and THPs 1-12-110 HUM, 1-12-113 HUM) Yet RB relies on CDF's arbitrary designation that these damages are "less than significant" and therefore, no Anti-degradation hearing is required. Protections for these "less than significant" families are then unavailable. With this government designation of "less than significant," timber and agricultural polluters have permission to discharge pollutants that would otherwise be illegal if "significant people" were injured. Petitioners are still wondering who these "significant families" are and where they reside in this state, for it's definitely not on the South Fork Elk.

RB's failure to enforce mandatory protections from known water contaminants like raw feces is both frightening and very offensive. Since RB provides no transparent explanation for their privileging of this illegal discharge, Petitioners can only assume that it is malicious and intended to injure Petitioners. This theory is consistent with RB's reference to Petitioners as "the nuisance people."

6....THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONERS REQUESTS.

a) Petitioners request the State Board to unequivocally and officially declare what the priority use of water is on the South Fork of Elk River. Also, provide the transparent, legal basis for this official designation. Regional Board cannot and will not answer that question despite repeated inquiries by Petitioners.

Please answer: On the South Fork of Elk River, is the priority use domestic supply as declared in Article X Section 2, or is it recreational use, or is the priority use conveyance of industrial and agricultural waste discharge?

b) Petitioners request the State Board to divulge the legal, transparent, and objective basis upon which the Regional Board decided to degrade the existing use of Petitioners' sole domestic water supply. Merely referencing that it *reviewed*, *discussed*, and *denied*, does not inform the public of Regional Board's processes. Petitioners, who suffer the results of Regional Board's capricious policies, can only conclude that Regional Board violates the Clean Water Act, the Basin Plan Objectives and Prohibitions, the Anti-degradation Policy, and Health & Safety codes. State Board is encouraged to correct possible misperceptions by Petitioners and the public, by providing a transparent explanation

c) Petitioners request the State Board to divulge the legally appropriate exemptions and exclusions afforded to polluters on the South Fork of Elk River. These exemptions are likely the basis of the secret *discussions* and *review* that RB conducted in deciding to deny Petitioners' Petition. If these exemptions to the Clean Water Act, the Basin Plan Objectives and Prohibitions, the Anti-degradation Policy, and Health & Safety codes are lawful, then State Board will be readily able to explain them. Petitioners have already asked the Regional Board to reveal and explain these same exemptions, but RB declined to reveal their reasoning in their response to Petitioners' Feb. 22, 2013 Petition.

d) Petitioners request that the State Board order the Regional Board to implement a proper, legal, and transparent Anti-Degradation Hearing for the contamination of the domestic water supply of the residential community of the South Fork Elk River. If State Board determines that an Anti-Degradation Hearing is not applicable, please reveal the basis for your determinations.

e) If the State Board finds that the Regional Board **did act in violation** of the Clean Water Act, and/or the Basin Plan Objectives and Prohibitions, and/or the Constitution, and/or Health & Safety codes, and/or failed to harmonize with the Legislative intent of Civil Code 3334(b)(1) then Petitioners request that the State Board meet in person with Petitioners to explain how and when Petitioners' remedies will be implemented. Petitioners will bear the expense of driving 600 miles roundtrip to Sacramento to facilitate these discussions.

f) Petitioners request that the State Board order the Regional Board to expedite TMDL Implementation process on the South Fork Elk River, as Regional Board staff has already advised. Please provide a legal and transparent basis for your determination.

g) Petitioners request the State Board to reveal and explain the legal, objective criteria used to determine what sort of humans are "significant" and which are "less than significant." This designation is critical to both CDF and Water Quality as it determines whether damages are "significant" and therefore, whether Anti-Degradation must be implemented. Is this determination based on custom, policy, geography, race, income, or simply CDF's assertions?

7....A STATEMENT OF THE POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION.
POINTS & AUTHORITIES

Referring to section 4: The reasons the actions were inappropriate

- 4. a): U. S. Constitution
- 4. b): b) 1 Article X, Section 2 California Constitution
- b) 2 Holtz 3Cal.3d 296 at p. 303
- 4. c): c) 1 California Government Code 65008.
- c) 2 Dan Shelton, Research Leader, Environmental Microbial Safety Lab, Agricultural Research Service, U.S. Department of Agriculture: "For example, pre-weaned calves typically shed *Cryptosporidium parvum* that is highly infectious for humans, frequently at high levels".
- c) 3 Research Article: "Management Reduces E. coli in Irrigated Pasture Runoff, K. Knox, K. Tate, R.A. Dahlgren, E.R. Atwill "Pathogens that cause illness in humans include protozoa such a *Cryptosporidium parvum* and *Giardia duodenalis*, as well as bacteria such as *Salmonella* and *Escherichia coli* O157:H7, a virulent strain of the commonly found coliform."
- c) 4 Atwill et al. 2003;) "Pathogen contamination can come from sources such as discharge from ... livestock"
- c) 5 Jack Lewis, 2010; Analysis of Effect of Cattle Grazing on Total Coliform and E-coli Concentrations during June and July 2010 at Westfall Ranch
- 4. d): d)1 State Water Board Order 68-16

- d) 2 Federal Anti-degradation Policy
- d) 3 Asociacion de Gente Unida por el Agua, et al., v. Central Valley Regional Water Quality Control Board 210 Cal. App. 4th 1255, 1270
- 4. e): e) 1 Salmon Forever's Analysis of data, South Fork Elk River
- e) 2 Salmon Forever's 2013 Annual Report on Suspended Sediment, Peak Flows, and Trends in Elk River and Freshwater Creek, Humboldt County, California SWRCB Agreement No. 07-508-551-0. Figure 18 is the plot "Sequence of residuals from bivariate regression model predicting log(SSC) at station SFM as a linear function of log(discharge) and hourly API(H82_{0.5}).
- 4. f): f) 1 A trespass violates the landowner's property rights and "need not take the form of a personal entry onto the property by the wrongdoer." (Elton v. Anheuser-Busch Beverage Group, Inc., supra, 50 Cal.App.4th at p. 1306, 58 Cal.Rptr.2d 303.)
- f) 2 "There is nothing in Civil Code section 3334 (b) (1) or its legislative history to suggest that the phrase, "benefits obtained" should be read narrowly. To the contrary, the intent of the legislature was to eliminate any economic incentive to trespass as a means of waste disposal." Starrh and Starrh Cottongrowers v. AERA Energy LLC Ct. Appeal 5 th Dist. CA July 20, 2007 .
- 4. g): g) 1 California Health and Safety Code Sections 116990, 116995
- g) 2 Regional Board's Petition denial Letter dated 9/23/13
- g) 3 Personal communications to Jesse Noell, Stephanie Bennett and Kristi Wrigley
- 4. h): h) 1 Amendment V to the U. S. Constitution, Boiling v. Sharpe
- h) 2 Amendment XIV to the U.S. Constitution, Due Process Clause and Equal Protection Clause
- 5. d): d) 1 Jack Lewis, 2010; Analysis of Effect of Cattle Grazing on Total Coliform and E-coli Concentrations during June and July 2010 at Westfall Ranch

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGERS, IF NOT THE PETITIONER.

Petitioners Jesse Noell and Stephanie Bennett have complied with this section 8 requirement by sending this Petition to:

- Northcoast Regional Water Quality Control Board, 5550Skylane Blvd. Suite A Santa Rosa 95403
- State Water Resources Control Board 1001 I Street Sacramento CA 95814
- Westfall-Mazzucchi Ranch, 8224 Elk River Road, Eureka, CA
- Humboldt Redwood Company LLC P.O. Box 37 Scotia, CA 95565
- Green Diamond Resource Company P.O. Box 1089 Arcata CA 95518

9. A STATEMENT THAT THE ISSUES RAISED IN THE PETITION WERE PRESENTED TO THE REGIONAL BOARD BEFORE THE REGIONAL BOARD ACTED, OR AN

EXPLANATION OF WHY THE PETITIONER COULD NOT RAISE THOSE OBJECTIONS BEFORE THE REGIONAL BOARD.

The Petitioners presented these issues via a written Petition dated February 22, 2013. Petitioners offered to clarify their petition for the North Coast Regional Board, if desired. Petitioners specifically objected (by phone, by email, by letter, and in person) to the Regional Board's action of adding insult to injury by permitting unlawful raw feces discharge into the S. Fork Elk River without implementing Anti-Degradation policies.

Petitioners offered to drive 400 miles round trip to RB's office, if that would assist RB in addressing their petition.

Petitioners heard nothing from the Regional Board until more than 180 days had elapsed and RB delivered their response on September 23, 2013.

For almost twenty years, Regional Board has been acutely aware of Petitioners' issue: Petitioners have always objected to the arbitrary and capricious degradation of their community's sole domestic water supply. (see RB's denial to Petitioners—attachment of history of Petitioners' complaint. See administrative record as far back as 1995)

Sincerely,
Jesse Noell and Stephanie Bennett



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

North Coast Regional Water Quality Control Board

September 23, 2013

Mr. Jesse Noell
Ms. Stephanie Bennett
8050 Elk River Road
Eureka, CA 95503

Subject: Petition Response

File: Westfall – Mazzucchi Ranch, 8224 Elk River Road, Eureka, Humboldt County

Introduction, Acknowledgement of Petition, and Regional Water Board Actions

On February 22, 2013, Mr. Noell and Ms. Bennett filed a petition with the North Coast Regional Water Quality Control Board (Regional Water Board) to provide them a replacement alternative clean water supply. In the petition, Mr. Noell and Ms. Bennett state that their domestic water supply located in the South Fork Elk River has been “deliberately impaired for at least 15 years from human-caused activities” related in part to E-coli bacteria from a “government-approved” cattle operation. This is not the first correspondence received on this matter. A chronological summary of correspondence and events is presented in Attachment A.

Since May 2009, Mr. Jesse Noell and Ms. Stephanie Bennett have filed numerous complaints about the Westfall – Mazzucchi Ranch grazing operation with the Regional Water Board, and taken several legal actions, including lawsuits and claims for damages. The Westfall – Mazzucchi Ranch is located at 8224 Elk River Road, west of Eureka in the South Fork Elk River Watershed upstream of Mr. Noell’s and Ms. Bennett’s domestic water diversion. In response to the complaints, our agency issued Order No. R1-2009-0057 (Order) pursuant to Water Code section 13267(b) on June 26, 2009. The Order was issued to Andy and Sandy Westfall for the purpose of inspecting the grazing operation and reviewing submitted information to ensure the protection of water quality. The Order required the Westfalls to arrange a site inspection with Regional Water Board staff by July 3, 2009, and submit information on the grazing operation, including a monitoring plan, by July 22, 2009. The Westfalls complied with the Order. In a letter dated August 12, 2010, Mr. Westfall was notified that the grazing operation information submittal in response to the Order and the field observations had satisfactorily fulfilled the inspection and technical document submittal requirements of the Order.

DAVID M. NOREN, CHAIR | MATTHIAS ST. JOHN, EXECUTIVE OFFICER

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In addition, Regional Water Board staff conducted a carefully designed monitoring study and issued a report dated December 1, 2010, titled *Discussion Regarding Concerns of Elevated Bacteria Concentrations in SF Elk River as a Result of Westfall Ranch Cattle Operations*. Data was collected and evaluated against the Regional Water Board's Basin Plan indicator bacteria objectives as well as the Humboldt County Health Standards for beach monitoring. The data was analyzed using the Wilcoxon paired-sample test to determine if there was a significant statistical difference between upstream and downstream bacteria concentrations. The results of the monitoring study were mixed. While Basin Plan contact recreation water quality objectives for fecal indicator bacteria (FIB), as well as Humboldt County Department of Health and Human Services public beach health standards for FIB were exceeded in some cases, generally there was not a statistically significant difference between FIB concentrations downstream of the Westfall Ranch compared to upstream. In fact, during the dry season, the period when cattle are present on the ranch, FIB concentrations upstream of the ranch were higher than those FIB concentrations downstream of the ranch, at statistically significant differences. On the other hand, FIB concentrations from samples collected downstream of the wet ford crossing were higher than those FIB concentrations sampled upstream of the wet ford, and at a level of statistical significance for total coliform.

Based on these monitoring results, Regional Water Board staff met with Mr. Westfall and his representatives several times to discuss implementation of management measures to reduce the risk of pollutant discharge from the Westfall - Mazzucchi Ranch. Management measures discussed included:

- Placement of gravel in the wet ford crossing to reduce the resuspension of fine sediment;
- Eliminating regular cattle access to the wet ford crossing;
- Limiting the number of cattle crossings across the wet ford and managing the crossings to move cattle as quickly as possible;
- Installing temporary fencing to establish various discrete pastures within the grazing lands on the ranch, and managing grazing within the pastures on a rotational basis;
- Avoidance of those pastures located closest to the SF Elk River during periods susceptible to rainfall-runoff events; and
- Not returning cattle to pastures closest to the SF Elk River until soils are dry.

Legal Filings and their Disposition

Mr. Noell and Ms. Bennett have taken several legal actions including lawsuits and claims for damages in response to the Westfall - Mazzucchi Ranch grazing operation. The following legal actions are listed in chronological order with their disposition.

On November 3, 2009, Ms. Bennett filed a claim with the California Victim Compensation and Government Claims Board against the State Water Resources Control Board and Deputy Director Jonathon Bishop, and the North Coast Regional Water Quality Control Board and Executive Officer Catherine Kuhlman, for the fecal contamination of a sole

source domestic water supply. The \$50,000 claim was for cost of a water treatment system and cost of developing of an alternative water supply. On December 17, 2009, the California Victim Compensation and Government Claims Board rejected Ms. Bennett's claim.

On December 16, 2009, Mr. Noell and Ms. Bennett filed a Claim for Damages with the clerk of the Humboldt County Board of Supervisors regarding the establishment pursuant to the Williamson Act of the Westfall Agricultural Preserve located at 8224 Elk River Road in Eureka. On February 16, 2010, the Humboldt County Office of Risk management rejected their claim.

On June 4, 2010, Mr. Noell and Ms. Bennett filed a lawsuit, Case No. DR100390 in the Superior Court of California, County of Humboldt, against the County of Humboldt, and Catherine Kuhlman, Executive Officer of the North Coast Regional Water Quality Control Board for declaratory relief, including the revision of oppressive legislation; for injunctive relief; for damages and interest; for attorney's fees and costs and interest; for expert fees and costs; for measures to enforce payment and/or judgment; and for such other relief including punitive damages the court may deem proper. On July 14, 2010, State Water Resources Control Board Assistant Chief Counsel, Ted Cobb, referred the case to Senior Assistant Attorney General Mary Hackenbracht for assistance. The Attorney General Office's analysis of the case concluded that the case had no legal merit and requested that a demurrer be filed immediately to dismiss the case. Additionally, it was stated, "Water Code section 13320 requires that an aggrieved person petition the State Water Resources Control Board for the Regional Water Board's failure to act. That was not done here." Both parties agreed to dismiss the case and waive all fees and costs. Mr. Noell agreed that if they wanted to pursue the subject matter they would first file a petition with the State Water Resources Control Board. The case was dismissed September 7, 2010.

Current Petition and Regional Water Board Decision

On February 22, 2013, Mr. Noell and Ms. Bennett filed the current petition with the Regional Water Board requesting that the Regional Water Board provide them "with an alternative clean water supply". Mr. Noell and Ms. Bennett state their domestic water supply located in the South Fork Elk River has been "deliberately impaired for at least 15 years from human-caused activities" related in part to E-coli bacteria from a "government-approved" cattle operation. Regional Water Board staff have thoroughly reviewed the chronology of events and water quality data generated in response to previous complaints, including the December 2010 report titled *Discussion Regarding Concerns of Elevated Bacteria Concentrations in SF Elk River as a Result of Westfall Ranch Cattle Operations*. On May 2, 2013 Executive Officer Matt St. John discussed the petition, chronology of events, and the relevant water quality data with Regional Water Board members in closed session. The Regional Water Board members directed Mr. St. John to deny the petitioners request for the Regional Water Board to provide the petitioners with an alternative clean water supply. Based on these findings, the absence of new information, and the direction from

Mr. Jesse Noell
Ms. Stephanie Bennett

- 4 -

September 23, 2013

the Regional Water Board members, Mr. Noell's and Ms. Bennett's request for the Regional Water Board to provide them with an alternative clean water supply is declined.

If you would like, I would be willing to facilitate a meeting between you and Mr. and Mrs. Westfall to discuss water quality protection measures on their ranch. Should you like for me to set up this meeting, or if you have any questions regarding this matter, please contact me at (707) 570-3762 or by email at matt.st.john@waterboards.ca.gov.

Sincerely,



Matthias St. John
Executive Officer

130923_SAG_dp_Noell_Petition_ASK01

Enclosure: Attachment A

cc: Ms. Samantha Olson, Office of Chief Counsel, Samantha.Olson@waterboards.ca.gov

ATTACHMENT A

Chronology of Events

2007 – Former Mazzucchi Ranch is sold to an interim landowner.

April 2008 – Mr. Andy Westfall purchases the former Mazzucchi Ranch.

November 25, 2008 – Regional Water Board staff sends a letter to Mr. Westfall notifying him that impaired domestic and agricultural water supplies are located adjacent to the project area and the Elk River is the only source of domestic water for several downstream residents living along the river. Additionally, Mr. Westfall was requested to consult staff to ensure he develops a grazing project that will comply with applicable water quality laws.

May 29, 2009 – Regional Water Board staff receives a complaint that cows have been brought to the Westfall – Mazzucchi Ranch and grazing operations have started.

June 26, 2009 – Order No. R1-2009-0057 was issued pursuant to Water Code section 13267(b), to arrange a site inspection with Regional Water Board staff by July 3, 2009, and to submit information on the grazing operation including a monitoring plan by July 22, 2009.

July 1, 2009 – Regional Water Board staff inspects the Westfall – Mazzucchi Ranch with Mr. Westfall and his representatives. Staff finds that Mr. Westfall had incorporated numerous management practices to protect water quality and staff suggested additional recommendations to protect water quality.

July 21, 2009 – Mr. Westfall submits grazing operation information pursuant to Order No. R1-2009-0057.

August 17, 2009 – Mr. Noell submits a complaint to our agency regarding a bulldozer crossing the river, bulldozing in the river, bulldozing and chainsaw clearing of the river bank for over 300 feet, and cattle crossing the river “again and again.”

August 21, 2009 – Ms. Bennett submits a complaint to our agency regarding “100 cows walking across the river with their hooves covered in feces, 10,000 pounds of cow feces per day will be, if not already, in South Fork Elk River, and during winter floods residents will be surrounded by flood waters with feces.”

August 21, 2009 – Mr. Noell submits a complaint to our agency regarding the Westfall – Mazzucchi Ranch diverting excessive amounts of water from the South Fork Elk River.

August 24, 2009 – Inspection of the Westfall – Mazzucchi Ranch with Mr. Westfall and his representatives to investigate the most recent complaints. According to Mr. Westfall a bulldozer had crossed the river twice for the purpose of removing invasive species in the South and Northwest Pastures; chainsaw work removed fallen snags from the pastures; and cattle had crossed the river 4 times in 2 ½ months. Staff confirmed that Mr. Westfall has water rights for his diversion, and 6,000 feet of electric fence had been installed along the edge of the riparian zone to prevent cattle access to the riparian zone and river.

November 9, 2009 – Letter sent to Mr. Westfall acknowledging the implementation of new management techniques to prevent a discharge of waste including staff-suggested additional recommendations to protect water quality.

November 9, 2009 – Executive Officer Catherine Kuhlman sends a letter to Mr. Noell updating him on the Westfall – Mazzucchi Ranch grazing operation information submittal and implementation of a Regional Water Board supported South Fork Elk River monitoring plan.

November 9, 2009 – Mr. Westfall submits additional grazing operation information pursuant to Order No. R1-2009-0057.

December 6, 2009 – Executive Officer Catherine Kuhlman informs Mr. Noell that “Mr. Westfall... has put in place a series of best management practices designed to protect water quality. We will be monitoring water quality this spring before and after Mr. Westfall returns livestock to his property.”

December 30, 2009 – Mr. Westfall submits additional grazing operation information pursuant to Order No. R1-2009-0057.

March 1, 2010 through October 14, 2010 – South Fork Elk River bacteria sampling project is conducted by Regional Water Board staff.

June 1, 2010 – Regional Water Board staff inspects the Westfall – Mazzucchi Ranch with Mr. Westfall and reviews additional implemented management techniques.

August 12, 2010 – Executive Officer Catherine Kuhlman letter to Mr. Westfall states that the grazing operation information that was submitted pursuant to Order No. R1-2009-0057, and the field observations, have satisfactorily addressed the inspection and technical document submittal requirements contained in Order No. R1-2009-0057.

December 1, 2010 – A Regional Water Board staff Report titled “*Discussion Regarding Concerns of Elevated Bacteria Concentrations in SF Elk River as a Result of Westfall Ranch Cattle Operations*” is released.

December 27, 2010 – Mr. Noell emailed Regional Water Board senior Engineering Geologist, Mr. Neely, with several questions regarding the bacteria sampling of the South Fork Elk River.

January 11, 2011 – Mr. Jack Lewis submitted a white paper in response to the December 1, 2010 Regional Water Board monitoring report.

July 11, 2011 – Executive Officer Catherine Kuhlman sends a letter responding to Mr. Noell’s questions.

October 28, 2011 – Inspection of the Westfall – Mazzucchi Ranch with Mr. Westfall’s representative to evaluate the performance of the implemented best management techniques.

November 11, 2011 – Report authored by Professor Susan E. Marshall titled *Discussion Regarding Concerns of Elevated Bacteria Concentrations in SF Elk River as a Result of Westfall Ranch Cattle Operations* is released. The report was based on a master thesis done by graduate student Justin Harrison and on the Regional Water Board staff study (which shares the same title). It broadly agreed with the findings that there was no evidence that Mr. Westfall’s cattle operation is degrading water quality in the Elk River, and that *Bacteroides* testing suggests that deer are the most probable cause of fecal contamination in a tributary ephemeral stream.

January 11, 2011 – Mr. Jack Lewis submitted a white paper in response to the December 1, 2010 Regional Water Board monitoring report.

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**PETITION TO NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD
TO PROVIDE REPLACEMENT DOMESTIC SUPPLY
IMPAIRED AS A RESULT OF GOVERNMENT APPROVED ACTIVITY**

Domestic water supplies on the “nuisance reach” of the Elk River have been deliberately impaired for at least 15 years from human-caused activities. (See PHI report dated 12/03/12 for THP 1-12-113.) Prior to these deliberate and planned activities, the domestic water supply of the residents was superior to what it is today. Despite the legislative intent to protect the beneficial uses of water, these man-made activities have enjoyed exemptions from complying with this intent. The residents who are still suffering from this continuing degradation of their sole domestic water supply are not responsible for this destruction, but are paying an extraordinary price for their privileged neighbors’ exemptions.

The residents are still confused by such laws as the Porter-Cologne Act which was designed to eliminate any economic benefit from activity causing pollution. Yet, Humboldt County has provided tax breaks to ensure that this polluting cattle operation will continue directly upstream of our domestic water supply intakes. This is truly baffling considering that maintaining industrial cattle is not considered one of the beneficial uses, nor is it openly stated to be a priority use over domestic water supply. Intentional terrorism using biological agents is not revealed in the Porter-Cologne Act, either. How could such a life-threatening preventable activity be given priority status over the health and safety of real people?

The answer is not complicated: Cat Kuhlman, prior Executive Officer of NCRWQCB, told us, “I can’t tell *that man* what to do.” Jonathan Bishop, Deputy Director of the state’s Water Resources Control Agency, further explained why your agency must fail to protect our domestic water supply. He told us, “If I try to restrict timber harvest activities in your community, the governor will come over here and punch my face! But if you think timber is bad, just try to stop Big Ag.” This underground policy for ensuring privileges to an elite group of outlaws like *that man*, is killing this community. Evidently, “the nuisance people” in the “nuisance reach” are considered expendable.

NCRWQCB monitoring detected significant increase in fecal coliform downstream of this government-approved cattle operation. Statistical analysis of these increases in combination with rainfall records found significant correlation between rainfall and e-coli contamination. Even without taxpayer-funded studies, 21st century

sophistication forbids human-controlled mammals from defecating openly into any community's domestic water supply, even that of the expendable humans. Of course, that's why BLM requires its visitors to bag even the feces from a 10lb dog. We the public, expect that you as water quality experts would likewise demand that the feces from an 800lb mammal also be bagged.

We are unaware of any open and transparent anti-degradation hearing having been conducted to permit this notorious violation of the priority uses of water in our already impaired community. (See Public Records Act request to NCRWQCB dated 5/13/08.) Even if an "underground regulation" has exempted the polluters from complying with protections, any anti-degradation hearing does require that all existing uses be supported. Our existing use is for our family's survival.

NCRWQCB has refused to implement its authority to eliminate these sources of pollution that degrade domestic water supply. NCRWQCB has refused to use its Cease and Desist authority to control all controllable sources of pollution that are located upstream of domestic water supplies. NCRWQCB has confirmed Cat Kulhman's and Jonathan Bishop's explanations for its impotence: NCRWQCB is afraid to confront elitist polluters. We're not afraid anymore; deputize us residents and we'll confront every one of these scofflaws. We'll get this river cleaned up so that someday, the "nuisance reach" will be as healthy as the reach protected inside the Headwaters Forest.

This continuing pollution places both a disproportionate and terrifying burden on the "less than significant" victims who rely on protective agencies like yours, to regulate dangerous behavior. (See CDF's Bill Synder's assertion that Elk River residents are "less than significant.") In effect, this undue burden illicitly transforms one insignificant person's rights into a special person's privileges. You've never explained why we residents must suffer this unique burden yet you continue to employ policies that promote this genocide. Maybe you just don't like us.

For two decades, NCRWQCB has both stated and demonstrated its fear and impotence in preventing man-made disastrous pollution from special polluters. Since you have intentionally failed to prevent this disaster, then it's only fair that you now take responsibility to clean up the mess that you intended to create.

We are requesting that you provide us with a clean water supply. Such clean water can be conveniently delivered to our home to ensure that we are not continuing to suffer with disease and a total loss of use of our property. This delivery will promote jobs and support our local economy. Of course, this expense for this replacement water supply cannot be placed on the victims who had a clean water supply before government allowed it to be degraded.

Therefore, **we petition NCRWQCB to provide our family with an alternative clean water supply.** NCRWQCB has demonstrated that such a remedy for government-sponsored pollution is necessary on the North Fork of Elk River. (See

NCRWQCB Order 98-100.) Obviously your recent PHI report compels an equal response to protect us "less than significant" humans in "the nuisance reaches" on the South Fork. Twenty years of enduring monitoring experiments instead of protecting health and safety is enough. Bring us clean water.