



ENVIRONMENTAL LAW FOUNDATION

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January 9, 2023

Via E-mail

Matthias St. John
Executive Officer
North Coast Regional Water Quality Control Board
5550 Skylane Boulevard, Suite A
Santa Rosa, California 95403
Matt.St.John@waterboards.ca.gov

**Re: Comments on Renewal of Scott and Shasta River Agricultural Waivers,
Order No. 2023-0005**

Dear Mr. St. John and Members of the Board:

Environmental Law Foundation, Friends of the Shasta River, Pacific Coast Federation of Fishermen's Associations ("PCFFA"), Institute for Fisheries Resources ("IFR"), and Save California Salmon write to oppose the adoption of Order No. 2023-0005, Short-Term Renewal of Order No. R1-2018-0018 Scott River TMDL Conditional Waiver of Waste Discharge Requirements and Order No. R1-2018-0019 Shasta River TMDL Conditional Waiver of Waste Discharge Requirements ("Draft Order").¹

These Ag Waivers fail to comply with applicable law, including Water Code section 13269, the Nonpoint Source Policy, and the Antidegradation Policy, by failing to require dischargers to cease causing or contributing to exceedances of water quality objectives, failing to require adequate monitoring, and failing to include adequate time schedules and quantitative milestones. The Draft Order is also inconsistent with the State Water Resource Control Board ("State Board")'s Resolution No. 2021-0050 on racial equity.² We ask that the Regional Board adopt an order that complies with applicable law by ensuring achievement of water quality objectives, avoiding degradation of high-quality waters, and including adequate monitoring and reporting to demonstrate

¹ This letter will refer to Order No. R1-2018-0018 as the "Scott Waiver," to Order No. R1-2018-0019 as the "Shasta Waiver," and to both collectively as the "Ag Waivers."

² State Water Resources Control Board, Resolution No. 2021-0050, Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversity, Inclusion, Access, and Anti-Racism ("Racial Equity Resolution"), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2021/rs2021-0050.pdf (accessed January 8, 2023).

achievement of those goals.

If the Board cannot develop an adequate permitting scheme that protects the vulnerable and ecologically critical Scott and Shasta rivers from discharges of waste by the time that the current order expires in April, our organizations ask that it consider a renewal of no more than one year to develop such an order.

FACTUAL BACKGROUND

The Scott River is listed as impaired for sediment, suspended material, and settleable material.³ It is out of attainment for temperature.⁴ It is also impaired for biostimulatory substances, aluminum, and pH from Young's Dam to Boulder Creek.⁵ Portions of the Scott Valley are also impaired for sedimentation/siltation.⁶

The Shasta River is impaired for organic enrichment/dissolved oxygen ("DO"), mercury, and temperature.⁷ The mainstem Shasta is impaired for aluminum.⁸ Monitoring in 2017 showed high bacteria levels in parts of the Shasta watershed.⁹

Both streams are tributaries of the Klamath River, which is impaired for low dissolved oxygen, high water temperature, and high nutrient levels.¹⁰

These impairments negatively impact ESA- and CESA-listed species including

³ North Coast Regional Water Quality Control Board, Water Quality Control Plan for the North Coast Region (2018) (Basin Plan) at p. 4-64, available at https://www.waterboards.ca.gov/northcoast/water_issues/programs/basin_plan/190204/Final%20Basin%20Plan_20180620_lmb.pdf (accessed January 4, 2023).

⁴ *Ibid.*

⁵ North Coast Regional Water Quality Control Board, 2018 303(d) List for the North Coast Region (2018) ("303(d) List") at p. 9, available at [https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/303d/pdf/220812/20220812%202018%20303\(d\)%20List%20For%20the%20North%20Coast%20Region%20CORRECTED.pdf](https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/303d/pdf/220812/20220812%202018%20303(d)%20List%20For%20the%20North%20Coast%20Region%20CORRECTED.pdf) (accessed January 4, 2023).

⁶ *Ibid.*

⁷ Basin Plan at p. 4-79.

⁸ *Ibid.*

⁹ Unpublished data from personal communication between Bill Chesney, Regional Board and Dave Webb, Friends of the Shasta River. Spreadsheet attached to submitting email separately as Exhibit G, filename "G Copy of Shasta River 2017 WQ charts and data".

¹⁰ *Ibid.*

Chinook and Coho salmon.¹¹ Other important species negatively impacted by these water quality problems include lamprey, steelhead, and sturgeon.¹² NOAA Fisheries has stated that “[i]ncreased water temperature is one of the most widespread (and greatest) stresses” for Coho.¹³ High temperatures have negative effects at all life stages, “often resulting in mortality.”¹⁴ Insufficient DO levels, adverse pH conditions, high nutrient levels, and turbidity all have significant negative effects on salmonid survival.¹⁵

These species, especially Coho and Chinook, have seen rapidly decreasing populations since 2018 and are at significant risk.¹⁶ Indeed, since the TMDL Action Plan was adopted in 2007, populations of both Coho and Chinook have declined significantly. Since 2014, Chinook escapement has never exceeded 3,000 adults in the Scott, as compared to a 50-year average of more than 4,000.¹⁷ And Coho have shown almost no recovery in the Scott, with populations of all three brood years critically low since 2007.¹⁸ In the Shasta, Coho are on the brink of extirpation, with fewer than 100 returning adults in recent years, while Chinook have not rebounded to historic levels.¹⁹

¹¹ *Id.* at pp. 4-64, 4-79.

¹² *Ibid.*

¹³ NOAA Fisheries, Final Recovery Plan for the Southern Oregon/Northern California Coast Evolutionarily Significant Unit of Coho Salmon (*Oncorhynchus kisutch*) (2014) (“Coho Recovery Plan”), at p. 3-13, available at <https://www.fisheries.noaa.gov/resource/document/final-recovery-plan-southern-oregon-northern-california-coast-evolutionarily> (accessed January 9, 2023).

¹⁴ *Ibid.*

¹⁵ *Id.* at p. 3-13 to p. 3-14.

¹⁶ CDFW, Interim Instream Flow Criteria for the Protection of Fishery Resources in the Scott River Watershed, Siskiyou County (Feb. 6, 2017), pp. 8-13 (“Flow Criteria”). On May 3, 2021, CDFW transmitted a package to the State Board containing four documents: (1) a letter from Charlton H. Bonham to Eileen Sobeck regarding the need for immediate action on the Scott River (“CDFW Letter”), (2) the Flow Criteria, (3) a memorandum from Tina Bartlett, CDFW with the subject Influence of Scott River in-stream flow on the distribution and migration timing of fall Chinook Salmon and Coho Salmon, dated May 3, 2021 (“CDFW Flow Memo”), and (4) CDFW’s comments on the Scott Valley Groundwater Sustainability Plan (“CDFW SGMA Comments”). The entire package is attached hereto as Exhibit A.

¹⁷ CDFW Letter at p. 9.

¹⁸ *Id.* at p. 11. Even the best year of Coho escapement, Brood Year 1’s 2,644 adults in 2013, is far below the minimum recovery goal of 6,500 spawners in the Scott. (Coho Recovery Plan at p. 4-6.) And only two other years since 2007 have seen even 1,000 returning adults.

¹⁹ See Shasta Coho and Chinook population data available at <https://casalmon.org/statewide-status/#coho> (accessed January 9, 2023).

LEGAL FRAMEWORK

Discharges of waste into waters of the state are “privileges, not rights.” (Wat. Code § 13263, subd. (g).) Anyone discharging or proposing to discharge waste must file a report of waste discharge and the Regional Board must then issue waste discharger requirements. (*Id.* §§ 13260, 13263.) A Regional Board may issue a conditional waiver of waste discharge requirements (“waiver”) subject to certain mandatory requirements. (*Id.* § 13269.)

Water Code section 13269 requires that a waiver be “consistent with any applicable state or regional water quality control plan and” be “in the public interest.” It further requires that the waiver’s conditions include monitoring. (Wat. Code § 13269, subd. (a)(2).) Monitoring must be designed to “adequacy and effectiveness of the waiver’s conditions.” (*Ibid.*) “Monitoring results shall be made available to the public.” (*Ibid.*)

Waivers are subject to the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (“Nonpoint Source Policy”).²⁰ The Nonpoint Source Policy contains additional mandatory requirements for discharges of nonpoint source pollution, including discharges resulting from agricultural activities. (Nonpoint Source Policy at pp. 6-7.)

The Nonpoint Source Policy establishes five mandatory “key elements” that all regulatory programs governing nonpoint source pollution must contain. The four elements relevant to Scott and Shasta Waivers are:

KEY ELEMENT 1: An NPS control implementation program’s ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements

KEY ELEMENT 2: An NPS control implementation program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purpose(s), the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation

²⁰ State Water Resources Control Board, Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (2004), available at https://www.waterboards.ca.gov/water_issues/programs/nps/docs/plans_policies/nps_iepolicy.pdf (accessed January 2, 2023).

program shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

KEY ELEMENT 4: An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.²¹

Shortly after the approval of the Scott and Shasta Ag Waivers, the Court of Appeal issued its decision in *Monterey Coastkeeper v. State Water Resources Control Board* (2018) 28 Cal.App.5th 342 (*Coastkeeper*). This decision confirmed that waivers must be consistent with the Nonpoint Source Policy and that the five key elements are mandatory. (*Id.* at 349; see also Wat. Code § 13240.)

In addition, the Regional Board must comply with the Antidegradation Policy.²² The Antidegradation policy requires the Regional Board to take the following steps: It must set a baseline level of water quality and determine whether water quality will be degraded by proposed action. If the water is high quality and it will be degraded, the Regional Board must determine whether such degradation is (1) consistent with maximum benefit to people of the State, (2) will not unreasonably affect present and anticipated beneficial uses, and (3) will not result in water quality less than that in the Basin Plan and other policies. And the Regional Board must require any discharge of waste into high quality waters to implement “best practicable treatment and control” (“BPTC”) necessary to assure that pollution or nuisance will not occur and that the highest water quality consistent with maximum benefit to the people of the State will be maintained.²³

The Basin Plan for the North Coast Region establishes beneficial uses and sets water quality objectives (“WQOs”) for the Scott and Shasta Rivers. Both rivers’ designated beneficial uses include existing warm and cold freshwater habitat; wildlife habitat; rare, threatened or endangered species habitat; and spawning and migration

²¹ Nonpoint Source Policy at pp. 11-13.

²² State Water Resources Control Board, Resolution No. 68-16, Statement Of Policy With Respect To Maintaining High Quality Of Waters In California (1968) (“Antidegradation Policy”), available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1968/rs68_016.pdf (accessed January 3, 2023); see also *Asociacion de Gente Unida por el Agua v. Central Valley Regional Board* (2012) 210 Cal.App.4th 1255 (*AGUA*); State Water Resources Control Board, Administrative Procedures Update 90-004 (1990) (“APU 90-004”), available at https://www.waterboards.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf (accessed January 3, 2023).

²³ Antidegradation Policy at p. 1.

habitat.²⁴ The Basin Plan sets water quality objectives for a number of pollutants, including biostimulatory substances, dissolved oxygen, sediment, temperature, settleable material, and turbidity.²⁵ Of particular note, the WQO for DO is set at a minimum of 5.0 mg/L on a daily basis or 6.0 mg/L for a 7-day moving average.²⁶ The WQO for temperature requires that the natural receiving water temperature for coldwater habitat waters, including the Scott and Shasta, not be increased by more than 5 degrees above receiving water temperature. While the Basin Plan recognizes that immediate compliance with WQOs is not always feasible, it requires “attainment of water quality objectives within the shortest feasible period of time.”²⁷

The Basin Plan also incorporates the TMDL Action Plans for the Scott and Shasta Rivers.²⁸ These requirements include “no net increase in receiving water temperature from tailwater return flows” and a limit of 0.85 mg/L for DO in tailwater return flows in the Shasta.²⁹ The TMDL Action Plan for the Scott includes requirements for provision of sufficient shade along the Scott and its tributaries to attain temperature WQOs.³⁰ The Action Plans also include requirements for meeting temperature targets along specified reaches of the Shasta.³¹

In 2021, the State Board adopted the Racial Equity Resolution. This resolution recognizes that:

The colonization, displacement, and genocide of Native American people in the United States have contributed to the loss of water resource and watershed management practices that supported Native American people’s traditional food sources and ways of life.

Watersheds are now primarily managed through large-scale diversion of water for municipal, industrial, agricultural, and commercial beneficial uses to the detriment of traditional, local,

²⁴Basin Plan at pp. 2-4 to 2-6. The Klamath River, to which both the Scott and Shasta are tributaries, is additionally designated for subsistence fishing and Tribal Cultural uses. (Basin Plan at p. 4-79.)

²⁵ Basin Plan at pp. 3-3 to 3-4.

²⁶ Basin Plan at p. 3-4.

²⁷ Basin Plan at p. 3-8.

²⁸ Basin Plan at pp. 4-63, 4-79.

²⁹ Basin Plan at p. 4-80

³⁰ Basin Plan at pp. 4-65 to 4-67, 4-71 to 4-77.

³¹ Basin Plan at p. 4-83.

and cultural uses and without compensation, recognition, or replacement. . . .

As a result, California Native American Tribes continue to face barriers to defining, quantifying, accessing, protecting, and controlling their ancestral lands, water rights, instream flows, cultural resources, and beneficial uses. Redistribution of water has reduced or eliminated access to healthy traditional food sources such as smelt, salmon, freshwater mussels, and freshwater plants. . . . In addition, low or non-existent instream flows, and associated water quality problems, impair or prevent water-related cultural, spiritual, and subsistence practices.³²

The North Coast Regional Board is in the process of developing its own Racial Equity Resolution, and Save California Salmon has submitted extensive comments urging the Regional Board to strengthen its resolution. In particular, Save California Salmon has called upon the Regional Board to acknowledge the specific harm done to Tribes by the Regional Board’s ongoing failure to implement programs that attain water quality objectives in the Scott and the Shasta—a failure which has caused and continues to cause ongoing harm to Tribes.³³

Order No. R1-2023-0005

The Draft Order, Order No. R1-2023-0005, renews the waivers established by Order No. R1-2018-0018 and Order No. R1-2018-0019. It makes no substantive changes to those waivers. The Scott and Shasta Waivers, in turn, are renewals with few substantive changes of waivers first issued in 2006 and renewed in 2012.

The Draft Order does recognize, in similar language to Finding 18 of both the 2018 Scott and Shasta Waivers, that the Regional Board “intends to address water quality concerns associated with agriculture in the Scott River watershed through a permitting program (i.e., order) more consistent with approaches implemented in other parts of the state.” This approach could include “a tiered structure, employing multiple levels of permitting rigor commensurate with the level of discharge or threat of discharge, and may require active enrollment procedures and payment of fees.”³⁴

The Staff Report also contains language asserting that meeting the TMDL limits and protecting beneficial uses is impacted by the lack of streamflow in the Scott and

³² Racial Equity Resolution at p. 3.

³³ Regina Chichizola, Save California Salmon, Letter to North Coast Regional Water Quality Control Board (Nov. 7, 2022), attached as Exhibit B.

³⁴ Ag Waivers at p. 5.

Shasta, a result of agricultural water extractions.³⁵

DISCUSSION

The Draft Order, like the Ag Waivers it renews, fails to comply with the Water Code, the Nonpoint Source Policy, the Antidegradation Policy, and the Basin Plan.

The Regional Board Has Failed to Show Any Improvement in Water Quality

At the outset, the Draft Order continues a failed approach that has not produced water quality improvements. The Scott and Shasta remain impaired for pollutants caused by agricultural discharges and the Regional Board's approach has not changed that situation. The Staff Report for the Draft Order does not include any monitoring data showing improvements in water quality over the past five years.³⁶ Nor is any recent monitoring data posted on the program pages for the Ag Waivers.³⁷ While the Staff Report states that certain ranches and reaches of the rivers have been "assessed" over the past few years, there is no data tying those assessments to improvements in water quality. And while the Draft Order asserts that ambient water quality monitoring has been taking place in the Scott and Shasta, the Regional Board has provided none of that data to the public, in violation of the Nonpoint Source Policy.³⁸

Other monitoring reports, to the extent they are available, paint a picture of continual failure to meet water quality objections. The Shasta Valley Resource Conservation District has performed water quality monitoring in the Shasta River for temperature and DO. In its report for the 2021 monitoring year, it showed multiple exceedances. The river exceeded the temperature TMDL at every site except one, for 48

³⁵ North Coast Regional Water Quality Control Board, Staff Report for Draft Order No R1-2023-0005 Short-Term Renewal of Order No. R1-2018-0018 Scott River TMDL Conditional Waiver of Waste Discharge Requirements and Order No. R1-2018-0019 Shasta River TMDL Conditional Waiver of Waste Discharge Requirements (2022) ("Staff Report") at p. 11-17, available at https://www.waterboards.ca.gov/northcoast/board_info/board_meetings/12_2022/pdf/3/220926_Staff-Report.pdf (accessed January 4, 2023).

³⁶ *Ibid.*

³⁷ Shasta River TMDL Website, https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/shasta_river/ (accessed January 4, 2023); Scott River TMDL Website, https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/scott_river/ (accessed January 4, 2023).

³⁸ Draft Order at pp. 4-5; see Nonpoint Source Policy at p. 14 ("[A]ll monitoring programs should be reproducible, provide a permanent/documented record and be available to the public.").

to 91 percent of days.³⁹ Every monitoring site experienced DO exceedances, with exceedances taking place between 6.7 and 64.6 percent of days monitored.⁴⁰

Despite publishing a Water Quality Compliance and Trend Monitoring Plan in 2011, recent water quality monitoring data in the Scott River is not available on the Regional Board's website nor on other publicly available resources.⁴¹

Under the Nonpoint Source Policy, it is the Regional Board's responsibility to demonstrate a "high likelihood" that the waiver will achieve WQOs. And Water Code section 13269 requires the Regional Board to "determine" that the waiver is compliant with the Basin Plan. Section 13269 also requires a waiver to have monitoring designed to verify "the adequacy and effectiveness of the waiver's conditions." It requires monitoring results to be made available to the public. (Wat. Code § 13269, subd. (a)(2).) The Regional Board must therefore put forth information showing that its approach is at least making progress. The lack of information in the record showing any progress currently precludes the Regional Board from finding that continuing its current approach will achieve water quality objectives. It also demonstrates that the Ag Waivers which the Board proposes to renew fail to require monitoring and reporting programs that are adequate to demonstrate that dischargers are complying with its conditions and that the conditions are effective.

The Draft Order Continues to Violate Applicable Law

The Karuk Tribe provided comprehensive comments on the Ag Waivers in 2017 and filed a petition with the State Board objecting to them in 2018. We attach those comments and the petition and incorporate them by reference.⁴² Because the Draft Order

³⁹ Shasta Valley Resource Conservation District, Annual Shasta River TMDL Monitoring Report 2021 (2022) at p. 15, attached as Exhibit C. It is not clear if the RCD Monitoring Reports are the same as or are identical to the monitoring referred to on page 5 of the Draft Order. (Reports for years 2017 through 2019 are attached as Exhibits H, I, and J.)

⁴⁰ *Id.* at p. 23.

⁴¹ North Coast Regional Water Quality Control Board, Scott River Watershed Water Quality Compliance and Trend Monitoring Plan (2011), available at https://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/scott_river/pdf/Compliance_and_Trend_Monitoring_FINAL.pdf (accessed January 5, 2023). This document recommends monitoring sediment parameters on frequencies from 5 to 10 years, turbidity on relatively constant basis from November to June, temperatures every hour from May through September, shade every fifth year, and photo monitoring every fifth year. It is unclear if the monitoring in the plan has ever taken place, or if Regional Board staff relied on this plan when developing the Ag Waivers or the Draft Order.

⁴² Letter from Russell "Buster" Attebery, Karuk Tribe, to Regional Board (July 7, 2017), attached as Exhibit D; Karuk Tribe, Petition Challenging Scott River TMDL Conditional Waiver of Waste Discharge Requirements, Order No. R1-2018-0018 ("Scott River Waiver") and the Shasta River TMDL Conditional

simply renews the 2018 Ag Waivers, they remain highly relevant.

To summarize those comments, the Ag Waivers violate the Nonpoint Source Policy for the following reasons:

- The Ag Waivers fail to comply with the Nonpoint Source Policy because they fail to require compliance with water quality objectives or even that dischargers not cause or contribute to exceedances of water quality objectives (Key Element 1). Indeed, the Ag Waivers fail to explicitly state their goals in violation of Key Element 1.
- The Ag Waivers fail to include a description of management practices required to be implemented, or the process to ensure and verify proper management practice implementation. As a result, the regional board cannot determine that there is a “high likelihood” that the Waivers will result in water quality objective attainment. The waivers also fail to include documentation showing effectiveness of management practices. (Key Element 2.) While paragraph 5 of each Ag Waiver describes some management practices, they are vague and largely optional. And the management practices contained in Appendix A of each Ag Waiver are again largely optional and refer to deadlines that have long passed with no evaluation of whether compliance was achieved.
- The Ag Waivers fail to include specific time schedules and corresponding quantifiable milestones designed to reach water quality objectives (Key Element 3). In *Coastkeeper, supra*, 28 Cal.App.5th at 369, the Court of Appeal held that “the NPS Policy expressly requires time schedules and quantifiable milestones; the purpose is to assure that the water quality objectives are eventually met.”
- The Ag Waivers fail to include a meaningful or adequate feedback mechanism (Key Element 4). In particular, they rely entirely on the Executive Officer’s discretion to impose monitoring, with no mandatory standards. This approach has been rejected by the courts. In *AGUA, supra*, 210 Cal. App.4th at 1276-77, the Court of Appeal found a violation of the Antidegradation Policy where a program relied on a Regional Board’s Executive Officer’s discretion to impose further monitoring, but included

Waiver of Waste Discharge Requirements, Order No. R1-2018-0019 (“Shasta River Waiver”) SWRCB/OCC File A-2602 (2018), attached as Exhibit E; Karuk Tribe, Reply: Regional Board Response to Own Motion Review of Scott River TMDL Conditional Waiver of Waste Discharge Requirements, Order No. R1-2018-0018 (“Scott River Waiver”) and the Shasta River TMDL Conditional Waiver of Waste Discharge Requirements, Order No. R1-2018-0019 (“Shasta River Waiver”) SWRCB/OCC File A-2602 (January 29, 2019), attached as Exhibit F.

no mandatory standards for such monitoring and contained no mechanism for the EO to detect the need for additional monitoring. These Ag Waivers suffer from the same flaws and would likely not survive court review. Key Element 4 requires that the public and the Regional Board be able to determine whether the program is meeting its goals or whether additional management practices or other actions are required. The Waivers include no mandatory monitoring and no reporting mechanism that ties management practice implementation to water quality outcomes.

The Ag Waivers fail to comply with Water Code section 13269 and the Basin Plan because they fail to implement the specific, quantifiable requirements of the TMDL Action Plans as incorporated into the Basin Plans. There are no requirements that, for instance, dischargers create no net increase in temperature via tailwater discharges or that the specified shade targets are achieved. This fails to comply with section 12369's requirement that a waiver be consistent with the Basin Plan. The deadlines for these actions expired in 2017.⁴³

And the Ag Waivers fail to comply with the Antidegradation Policy. They fail to include any substantive antidegradation analysis, fail to make the required findings, and fail to define BPTC.

***The Draft Order Does Not Comply with the
State Board's Racial Equity Resolution***

The State Board in its Racial Equity Resolution reaffirmed its:

commitment to the protection of public health and beneficial uses of waterbodies in all communities, and particularly Black, Indigenous, and people of color communities disproportionately burdened by environmental pollution through: cleanup of contaminated soil, soil vapor and groundwater; control of wastes discharged to land and surface water; restoration of impaired surface waters. . . .⁴⁴

But despite years of advocacy by members of Tribes and other groups for clean water to support culturally vital salmonid recovery on the Scott and Shasta, the Regional Board is proposing the readoption of Ag Waivers that have shown little or no progress since 2006. This continuation of business as usual violates the spirit and the letter of the Racial Equity Resolution.

⁴³ Basin Plan at pp. 4-79 to 4-80.

⁴⁴ Racial Equity Resolution at p. 7.

Tribes and their members have been historically harmed and continue to be harmed by discharges of waste to the Scott and Shasta Rivers and the resulting decline in fisheries. It is the Regional Board's responsibility under Porter-Cologne and the Antidegradation Policy to protect water quality so that beneficial uses can be achieved and maintained. The Regional Board's failure to exercise its duties over the past half century and more perpetuates injustice against tribal communities. The Racial Equity Resolution recognizes the structural nature of this injustice; but it is up to the Regional Board to take tangible action to begin to rectify it.

Interaction Between Flows and Water Quality

The Staff Report appears to deflect some responsibility for the Ag Waivers' failure to achieve WQOs, asserting that both "watersheds have critical issues related to instream flows that impact their respective TMDLs," but that the State Board's "Division of Water Rights has the strongest authority" to address flows.⁴⁵

At the outset, we welcome the Regional Board's recognition that flows in the Scott and Shasta have been critically low and that action is necessary to restore adequate flows. We hope that the Regional Board will use its voice to advocate for flow protections in the future.

There is also an opportunity to review the impact of the emergency flow regulations on water quality. We hope that the Board performs an analysis of water quality in the Scott and Shasta over the course of the past several years with an eye towards whether the curtailments had a positive impact on achieving WQOs. If such an analysis has been performed, we ask that it be released.

We also disagree with the implication that the Regional Board has no authority over flows. Flow has been recognized as a component of water quality and states may impose flow conditions as part of water quality permits. (*PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 411 U.S. 700, 718-19.) In addition, the Regional and/or State Boards could have, but so far have not, listed the Scott, Shasta, and other North Coast rivers as impaired for flow under section 303(d) of the Clean Water Act. We hope that the recognition that flows are a "Critical Element Missing from the Waivers" prompts Board action on flows. (See Staff Report at p. 11.) And the Nonpoint Source Policy recognizes that "hydrologic modification" is a form of nonpoint source pollution, giving the Regional Board jurisdiction to address it.⁴⁶

But even if the Regional Board refuses to address flow through water quality permitting, it cannot avoid responsibility for adopting Ag Waivers that have failed to

⁴⁵ Staff Report at p. 11.

⁴⁶ Nonpoint Source Policy at p. 7.

address agricultural discharges. The Ag Waivers must be revised to ensure that dischargers are not causing or contributing to exceedances of water quality objectives. While flow requirements are needed, beneficial uses will not be protected while hot and dirty tailwater is being discharged into the river, while cattle can graze freely up to the river bank, or while riparian shade is continually removed.

NEXT STEPS

We are encouraged that the Regional Board recognizes, in some sense, that more is required. Finding 18 of both Ag Waivers, carried into the Draft Order in Finding 10, states that the Regional Board will develop, at some unspecified point in the future, a more robust permitting structure for agricultural discharges. It is worth noting, however, that the features of such a permit as described in Finding 10 would not, by themselves, demonstrate compliance with the legal requirements outlined in this letter.

We also recognize that the events of the past few years—wildfires, drought, and the pandemic—have placed significant strains on the Regional Board. And we recognize the practical reality that there may not be enough time to develop a compliant waiver before the current order expires in April.⁴⁷

But the Draft Order calls for a renewal of a further five years to develop this new permit. A five-year delay is unacceptable. The Scott and Shasta Ag Waivers have been out of compliance for almost two decades. During that time, the Regional Board has shown no improvement in water quality and salmonid populations continue to crash. The Regional Board should grant a renewal of *no longer than one year* to allow for development of a new order that complies with applicable law.

As discussed above, such an order should:

- Incorporate the TMDL Action Plans and their quantified goals and targets;
- Clearly state that it is intended to meet water quality objectives;
- Describe the required management practices and include robust, scientific, and documented connections between those practices and water

⁴⁷ This practical recognition is not a concession of any right to petition or otherwise challenge the Regional Board's failure to adopt a compliant waiver. The Regional Board has been and continues to be in violation of the law as outlined in this letter and all of the undersigned organizations reserve their respective rights to challenge that violation of law in any appropriate forum, including but not limited to a petition to the State Board under Water Code section 13320 and subsequent mandamus action pursuant to Water Code section 13330.

quality outcomes;

- Require mandatory time schedules with quantifiable milestones to meet water quality goals;
- Contain robust, public, and permanently documented monitoring and reporting programs that inform the public and the Board whether the program is achieving its water quality goals;
- Contain an antidegradation analysis that complies with Resolution 68-16, APU 90-004, and *AGUA*;
- Be based on an administrative record that includes monitoring of in-stream water quality, riparian shade conditions, reporting on the success or failure of the waiver program, as well as public reporting on ranch assessments and plans.

INTERIM ACTIONS

While the Regional Board prepares the more substantive order envisioned by Finding 10, there are ways that this Order can be strengthened to lay the groundwork for such an order.

Currently, the Ag Waivers require submission of reports and demonstration of compliance only by growers identified by the Executive Officer.⁴⁸ The Regional Board should amend the Draft Order to require enrollment of all dischargers before adoption of the next order. Key Element 1 of the Nonpoint Source Policy requires the “identification of the participant” dischargers.⁴⁹ And the Policy encourages Regional Boards to “to have an enrollment process for coverage under the waiver of WDRs so that the RWQCBs can identify the dischargers who are required to comply with the general waiver of WDRs.”⁵⁰ An enrollment process would provide notice to dischargers that they must comply with the requirements of the Waivers. Enrollment would also serve to put dischargers on notice that more stringent regulation could be coming in the future.

CONCLUSION

For the reasons above, we request that the Regional Board approve a renewal of

⁴⁸ E.g., Scott Waiver at p. 3 (“Dischargers who are not required to submit plans and are not otherwise notified by Regional Water Board staff need not file anything with the Regional Water Board . . .”).

⁴⁹ Nonpoint Source Policy at p. 12.

⁵⁰ *Id.* at p. 5.

the Ag Waivers *for no longer than 12 months* to allow the development of a robust, compliant permit for agricultural discharges in the Scott and Shasta watersheds. In the interim, we request an amendment to the Draft Order to require mandatory enrollment of dischargers.

We thank you for the opportunity to comment and look forward to participating further in this process.

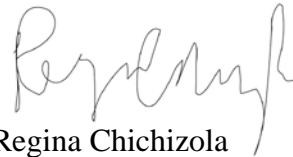
Sincerely,



Nathaniel Kane
Executive Director
Environmental Law Foundation



Glen Spain
NW Regional Director/Acting Executive
Director and General Legal Counsel
PCFFA/IFR



Regina Chichizola
Save California Salmon



Dave Webb
Friends of the Shasta River