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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

SIERRA CLUB, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, FRIENDS OF THE EEL RIVER, FRIENDS OF THE NAVARRO WATERSHED, ENVIRONMENTAL PROTECTION INFORMATION CENTER, NORTHCOAST ENVIRONMENTAL CENTER, and KLAMATH RIVERKEEPER, non-profit organizations, Petitioners, vs. NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD, and STATE WATER RESOURCES CONTROL BOARD, state agencies, Respondents.	Case No.: VERIFIED PETITION FOR WRIT OF MANDATE (Code Civ. Proc. § 1085)

INTRODUCTION

1. In this action, Petitioners Sierra Club, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Friends of the Eel River, Friends of the Navarro Watershed, Environmental Protection Information Center, Northcoast Environmental Center, and Klamath Riverkeeper (collectively, "Petitioners") challenge the failure of Respondents North Coast Regional Water Quality Control Board ("Regional Board") and State Water Resources Control Board ("State Board") (collectively, "Respondents") to adopt a program of implementation for total maximum daily loads ("TMDLs") within the North Coast Region of California, which comprises all

basins draining into the Pacific Ocean from the California-Oregon state line to the boundary of the Estero de San Antonio and Stemple Creek in Marin and Sonoma Counties. This failure has resulted in a lack of progress in addressing the serious problems facing North Coast rivers and streams, which remain impaired by pollutants such as sediment, nutrients, high temperatures, low dissolved oxygen levels, and turbidity.

2. Pursuant to a 1997 Consent Decree ("Consent Decree") with several of the Petitioners as well as other conservation and fishing organizations, the U.S. Environmental Protection Agency ("EPA") was required to approve or establish TMDLs for 17 specific waterbodies in the North Coast Region, divided into 38 segments, under Section 303(d) of the federal Clean Water Act, 33 U.S.C. § 1313(d). The final TMDLs were to be completed no later than December 31, 2007, although that deadline was recently extended by three years for work in the Klamath Basin.

3. While EPA has largely followed the schedule for adopting TMDLs set forth by the Consent Decree, Respondents have violated their non-discretionary duty to develop implementation plans for those TMDLs, as required by the Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Water Code §§ 13000-13953.4. In fact, of the 33 TMDLs approved or established by EPA under the Consent Decree, only the Garcia River, Scott River, and Shasta River currently have finalized and enforceable implementation plans. Respondents have also failed to incorporate numerous EPA approved or established TMDLs and implementation plans into its water quality control plan for the North Coast Region ("North Coast Basin Plan"), as required by both the Clean Water Act and Porter-Cologne Act.

4. Respondents' failure to establish a program of implementation for TMDLs, and to incorporate established TMDLs and implementation measures into the North Coast Basin Plan, has resulted in the continued degradation of water quality in the Region's rivers and streams. Accordingly, Petitioners seek a writ of mandate from this Court to compel Respondents to develop a program of implementation for TMDLs in the North Coast Region that have been approved or established by EPA, and to incorporate established TMDLs and implementation measures into its North Coast Basin Plan.

JURISDICTION AND VENUE

5. This action is brought pursuant to Code of Civil Procedure Section 1085. Venue is proper in the Superior Court for the County of San Francisco under Code of Civil Procedure Section 401 because Respondent State Water Resources Control Board is a state agency based in Sacramento County and the California Attorney General has an office in San Francisco, California.

PARTIES

6. Petitioner SIERRA CLUB is a nationwide non-profit conservation organization formed in 1892 with over 750,000 members, approximately 185,000 of whom reside in California. The Sierra Club's purposes are to explore, enjoy, and protect the wild places of the Earth, to practice and promote responsible uses of the Earth's ecosystems and resources, to educate and enlist humanity in the protection and restoration of the quality of the natural and human environment, and to use all lawful means to carry out those objectives. For many years, the Sierra Club and its members have advocated for the protection of public lands and forest ecosystems throughout California, including the North Coast Region. The Sierra Club Redwood Chapter has approximately 9,000 members in northwestern California. In 1997, Sierra Club was a plaintiff in a suit against EPA for its failure to establish TMDLs for impaired waterbodies in the North Coast Region. *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus*, Case No. C-95-4474 MHP. Since that time, the Sierra Club and its members have commented on or participated in the development of several TMDLs in the North Coast Region.

7. Petitioner PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS ("PCFFA") is the largest trade organization of commercial fishing men and women on the west coast. PCFFA is a federation of 15 port associations and marketing associations in California, Oregon and Washington. Collectively, PCFFA's members represent over 1,200 commercial fishing families, most of whom are small and mid-sized commercial fishing boat owners and operators. Most of PCFFA's members derive all or part of their income from the harvesting of Pacific salmon, a valuable business enterprise for the West Coast and California economies. The decline of California's salmon species has severely impacted PCFFA members in California by limiting commercial harvest opportunities, both through lost production of impaired stocks and because of

restrictions imposed on the fishing fleet to protect impaired salmon populations. Habitat losses have cost the west coast salmon fishing industry (including both commercial and recreational components) many thousands of salmon-produced family wage jobs over the last 20 years. These losses are directly related to widespread freshwater habitat destruction and impairment of water quality from human activities such as dam construction, water diversions, agriculture, logging, mining, and grazing. PCFFA has been active for nearly 30 years in efforts to rebuild salmon populations and correct water pollution problems in North Coast streams and rivers, as well as watersheds connected to these rivers. In 1997, PCFFA was the lead plaintiff in a suit against EPA for its failure to establish TMDLs for impaired waterbodies in the North Coast Region. *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus*, Case No. C-95-4474 MHP. Since that time, PCFFA and its members have commented on or participated in the development of several North Coast TMDLs.

8. The INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a nonprofit organization responsible for meeting the fishery research and conservation needs of working men and women in the fishing industry by executing PCFFA's expanding salmon habitat protection program. Established in 1992 by PCFFA, IFR maintains its headquarters in San Francisco, California. From its inception, IFR has helped fishing men and women in California and the Pacific Northwest address salmon protection and restoration issues, with particular focus on dam, water diversion, water quality, and forestry concerns. IFR is an active leader in several restoration programs affecting winter-run and spring-run chinook salmon and coho salmon, including removal of antiquated storage and hydroelectric dams. PCFFA and IFR have actively advocated for the protection and restoration of flows and water quality critical to the health of North Coast rivers and streams and their economically important salmon runs. Over the past few years, IFR and its members have commented on or participated in the development of TMDLs in the North Coast Region.

9. Petitioner FRIENDS OF THE EEL RIVER ("FOER") is a non-profit organization with over 2,500 members based in the North Coast Region of California. The mission of FOER is to restore the Eel River and its tributaries to a natural state of abundance, wild and free, and its

immediate goal is to remove two antiquated dams that block hundreds of miles of prime salmon spawning grounds. Supported by a large contingent of scientists and fisheries experts, sport fishing alliances, river recreationalists, and concerned citizens, FOER has been acknowledged and praised for its devotion to the monitoring, defense and advocacy of the Eel River for the benefit of watershed integrity, forest, soil, fish, wildlife, air, and river health. FOER and its members have participated in the development of TMDLs in the North Coast Region, particularly those TMDLs in the Eel River watershed.

10. Petitioner FRIENDS OF THE NAVARRO WATERSHED is an unincorporated association of activists who reside in the Navarro River watershed in Mendocino County. Its purpose is to preserve and restore riparian habitat in the Navarro River and its tributaries to protect and enhance water quality and to allow for fish spawning and growth. Friends of the Navarro Watershed works to maintain instream flows necessary to support fisheries habitat through the engagement of state regulatory agencies and participation in the Navarro Restoration Plan. In addition, its members engage the Mendocino County Planning Commission and Board of Supervisors in the attempt to improve the regulatory environment in the county. Members of the Friends of the Navarro Watershed utilize the Navarro River for recreational fishing for steelhead trout and salmon. Friends of the Navarro Watershed was a plaintiff in the 1997 suit against EPA for its failure to establish TMDLs for impaired waterbodies in the North Coast Region. *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus,* Case No. C-95-4474 MHP. Since that time, Friends of the Navarro Watershed and its members have commented on or participated in the development of several North Coast TMDLs, including the Navarro River TMDL for sediment.

11. Petitioner ENVIRONMENTAL PROTECTION INFORMATION CENTER ("EPIC") is a community based, non-profit organization that actively works to protect and restore forests, watersheds, coastal estuaries, and native species in northwest California. EPIC was established in 1977 when local residents came together to successfully end aerial applications of herbicides by industrial logging companies in Humboldt County. EPIC has been at the forefront of environmental protection in northwest California since that time, working to ensure that state and federal agencies follow their mandate to uphold environmental laws and protect endangered

species. EPIC uses an integrated, science-based approach that combines public education, citizen advocacy, and strategic litigation to produce needed policy reforms and legal actions to inform the public and advocate for reform. EPIC was a plaintiff in the 1997 suit against EPA for its failure to establish TMDLs for impaired waterbodies in the North Coast Region. *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus,* Case No. C-95-4474 MHP. Since that time, EPIC and its members have commented on or participated in the development of several North Coast TMDLs.

12. Petitioner NORTHCOAST ENVIRONMENTAL CENTER ("NEC") is a non-profit organization whose mission is to promote understanding of the relations between people and the biosphere and to conserve, protect and celebrate terrestrial, aquatic and marine ecosystems of northern California and southern Oregon. Since its establishment in 1971, NEC has worked to conserve the area's biological assets and to stimulate public awareness in securing the future of these natural treasures, which are vital to sustaining physically, economically, and culturally healthy communities. NEC has been at the forefront of every regional environmental struggle for decades, including efforts to protect ancient redwoods, wild rivers, and endangered species. NEC was a plaintiff in the 1997 suit against EPA for its failure to establish TMDLs for impaired waterbodies in the North Coast Region. *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus*, Case No. C-95-4474 MHP. NEC has long been concerned with development of sound TMDL standards for North Coast rivers and streams. NEC has provided significant input on TMDLs for sediment and temperature impaired streams in several areas, including Freshwater Creek, Scott and Shasta Rivers, upper- and mid-Klamath River, Eel River, Redwood Creek, Mattole River, and Mad River.

13. Petitioner KLAMATH RIVERKEEPER is a non-profit organization based in the Klamath Basin watershed of Northern California and Southern Oregon. The mission of Klamath Riverkeeper is to restore water quality and fisheries throughout the Klamath watershed, bringing vitality and abundance back to the river and its people. Working closely with Klamath River tribes, fishermen, and recreational groups, Klamath Riverkeeper employs a four-pronged approach in its campaigns and projects consisting of science-informed policy advocacy within existing regulatory

processes; a legal strategy; grassroots outreach and education; and scientific needs analysis and water quality monitoring. Klamath Riverkeeper's current projects and campaigns include promoting strong water pollution control plans and TMDLs within the Klamath Basin, working to protect spring and fall chinook salmon and summer steelhead runs and to encourage fish passage at dams across the region, and pursuing an aggressive legal strategy to address the toxic algae problem caused by Klamath River dams.

14. Petitioners bring this action on their own behalf and on behalf of their members, employees, and supporters who are residents and taxpayers of the State of California. Many of these persons live, work, recreate, and travel in the vicinity of the North Coast Region and the site of the impaired rivers and streams that are the subject of this action. They use, on a continuing and ongoing basis, the resources in and surrounding these North Coast rivers and streams for recreational, commercial, scientific, aesthetic, historical, educational, cultural, inspirational, spiritual, conservation, and other purposes such as fishing, camping, hiking, bird-watching, wildlife observation and study, contemplation, photography, and general enjoyment of the beauty of the wildlife, land, and other resources in the area. These individuals intend to continue using and enjoying these resources in the future and have an interest in knowing that North Coast rivers and streams remain unimpaired and alive with wildlife and other natural wonders.

15. Petitioners and their members have suffered and will continue to suffer adverse impacts as a result of the Respondents' failure to develop a program of implementation for North Coast TMDLs or to incorporate established TMDLs and implementation measures into the North Coast Basin Plan, as alleged herein. These impacts include the impairment of the recreational, commercial, scientific, aesthetic, historical, educational, cultural, spiritual, conservation, and other values of these rivers and streams. These are actual, concrete injuries to Petitioners and their members that would be redressed by the relief sought herein.

16. Petitioners do not have a plain, speedy, and adequate remedy at law because Petitioners, their members, and the public have been and will continue to be irreparably harmed by the ensuing environmental damage and by Respondents' continuing violations of the Porter-Cologne Act, Clean Water Act, and the public trust. In addition, the limited administrative review

provision in Section 13320 of the Porter-Cologne Act does not provide for administrative review of the violations of law alleged herein.

17. Respondent NORTH COAST REGIONAL WATER QUALITY CONTROL BOARD ("Regional Board") is a public agency of the State of California with responsibility for adopting water quality control plans and revisions thereto, including TMDLs and implementation plans, for the North Coast Region.

18. Respondent STATE WATER RESOURCES CONTROL BOARD ("State Board") is a public agency of the State of California established by the Legislature in 1967, consisting of five members appointed by the Governor. The State Board's purpose is to exercise the adjudicatory and regulatory functions of the state in the field of water resources in order to provide for the orderly and efficient administration of the water resources of the state. Among other duties and powers, the State Board has responsibility for establishing statewide policy for water quality control in California, as well as approving water quality control plans and revisions thereto adopted by any of the nine regional water quality control boards, including Respondent Regional Board.

STATUTORY BACKGROUND

19. The quality of our nation's water is governed by a complex statutory and regulatory scheme that implicates both federal and state administrative responsibilities.

I. The Federal Water Pollution Control Act.

20. The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, commonly known as the "Clean Water Act" (the "Clean Water Act" or "Act"), was enacted in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end, the Act utilizes two fundamental approaches to control water pollution. First, the National Pollutant Discharge Elimination System ("NPDES") in Section 301 of the Act provides EPA with the authority to issue permits that establish technology-based effluent limitations on point sources of pollution. *Id.* at § 1311. The term "point source" is defined to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding

operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id*. at § 1362(14).

21. Second, Section 303 of the Act requires states to establish "water quality standards," which "define the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." *Id*. at § 1313; 40 C.F.R. § 130.2. Any new or revised water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water . . . taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2).

22. Water quality standards consist of three key elements: (1) the "designated uses" of each particular water body, such as recreation, navigation, or the propagation of fish, shellfish, and wildlife; (2) "water quality criteria" to protect the designated uses; and (3) an antidegradation policy that prohibits the worsening of water quality. *Id.* at § 1313(c)(2)(A); 40 C.F.R. § 131.6(d). The Clean Water Act provides that water quality standards "shall be such as to protect the public health or welfare [and] enhance the quality of water" and "shall be established taking into consideration their use and value for . . . propagation of fish and wildlife." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i).

23. The Clean Water Act requires that state authorities periodically review water quality standards and secure EPA's approval of any revisions of those standards. 33 U.S.C. § 1313(c)(1). States must also develop and update water quality management plans that contain these revised standards and provide for their implementation. *Id*. at § 1313(e); *see* 40 C.F.R. § 130.6.

24. Section 303(d) of the Clean Water Act further requires states to identify waterbodies that do not meet water quality standards and are not supporting their designated uses. 33 U.S.C. § 1313(d)(1). These waters are placed on a Section 303(d) List of Impaired Waterbodies, which identifies the pollutant or stressor causing impairment and establishes a schedule for developing a control plan to address the impairment. 40 C.F.R. § 130.7(b). The states are required to "establish

a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A).

25. Section 303(d) of the Act provides that the states must then establish a pollution control plan called a total maximum daily load ("TMDL") for each impaired water body and the particular pollutants impairing those waters. 33 U.S.C. § 1313(d)(1). The TMDL must contain a quantitative assessment of the pollution problem, must specify "wasteload allocations" for point sources and "load allocations" for nonpoint source pollution, as well as background sources, and must identify the reductions needed "to implement the applicable water quality standards with seasonal variations and a margin of safety." *Id*. at § 1313(d)(1)(C); 40 C.F.R. § 130.2(i).

26. TMDLs developed by the states are submitted to EPA, which can either approve the TMDLs or disapprove them and prepare its own version within 30 days. 33 U.S.C. § 1313(d)(2). Once TMDLs have been approved or established by EPA, the states must incorporate them into their existing water quality management plans. *Id*.

27. TMDLs prepared by EPA typically present background and analysis to support calculations of the load and wasteload allocations for an impaired water body, but do not include implementation or monitoring plans. This type of document is known as a "technical TMDL."

28. Following the establishment of a technical TMDL by EPA, or in developing their own TMDLs for EPA approval, states are charged with ensuring the necessary implementation actions are taken so that the pollutants of concern do not exceed the TMDL and associated load and wasteload allocations. *See* 33 U.S.C. § 1313(e); 40 C.F.R. § 130.6(c)(6). TMDL implementation is accomplished by the states through a variety of mechanisms, including limits on NPDES permits, waivers, enforcement orders, Memoranda of Understanding with other state, federal, or local agencies, best management practices for non-point source pollution, or monitoring actions. *See* 40 C.F.R. § 130.7.

II. The Porter-Cologne Water Quality Control Act.

29. The Porter-Cologne Water Quality Control Act (the "Porter-Cologne Act"), Water Code §§ 13000-13953.4, is the primary state law regulating water quality in California. By its own

terms, the provisions of the Porter-Cologne Act must be read to conform with the requirements of the federal Clean Water Act. Water Code § 13372.

30. The Porter-Cologne Act declares it to be State of California policy "that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." *Id*. at § 13000. The Porter-Cologne Act further declares that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." *Id.*

31. The Porter-Cologne Act places "primary responsibility for the coordination and control of water quality" on the State Board and the nine regional boards. *Id*. at §§ 13001, 13100, 13200. The State Board establishes statewide policy for water quality control in California. *Id*. at § 13140. In addition, the State Board is designated as the state water pollution control agency for purposes of the federal Clean Water Act. *Id.* at § 13160.

32. The Porter-Cologne Act requires each regional board, including Respondent Regional Board, to formulate and adopt "water quality control plans," commonly known as "Basin Plans," for all hydrologic areas within their region. *Id*. at § 13240. A water quality control plan "consists of a designation or establishment for the waters within a specified area" of all of the following:

> (1) Beneficial uses to be protected;
>
> (2) Water quality objectives; [and]
>
> (3) A program of implementation needed for achieving water quality objectives.

Id. at § 13050(j).

33. "Beneficial uses" of state waters to be protected against water quality degradation include "preservation and enhancement of fish, wildlife, and other aquatic resources or preserves." *Id*. at § 13050(f). "Beneficial uses" under the Porter-Cologne Act are equivalent to "designated uses" under the Clean Water Act. *Id.*; 40 C.F.R. § 131.3(f).

34. "Water quality objectives" are "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." Water Code § 13050(h). "Water quality objectives" under the Porter-Cologne Act are equivalent to "water quality criteria" under the Clean Water Act. *Id*.; 40 C.F.R. § 131.3(b).

35. The program of implementation for achieving water quality objectives must include a "description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private," a "time schedule for the actions to be taken," and a "description of surveillance to be undertaken to determine compliance with objectives." Water Code § 13242. Since TMDLs interpret or refine existing water quality objectives, they are required to include a program of implementation. *See* Memorandum from William R. Attwater, Chief Counsel, State Water Resources Control Board, to Gerard J. Thibeault, Executive Officer, Santa Ana Regional Water Quality Control Board, March 1, 1999, Exhibit 3 to the Declaration of George M. Torgun in Support of Petitioners' Verified Petition for Writ of Mandate ("Torgun Dec."), submitted herewith.

36. The Clean Water Act and the Porter-Cologne Act require states to have a "continuing planning process" that ensures water quality management plans ("Basin Plans") are reviewed and updated at least once every three years. 33 U.S.C. §§ 1313(c)(1), 1313(e); Water Code § 13240. In California, this periodic review of Basin Plans is commonly referred to as the "Triennial Review." The Triennial Review process must incorporate any new or revised water quality standards, any EPA-approved or established TMDLs, and implementation measures into existing Basin Plans. 33 U.S.C. §§ 1313(d)(2), 1313(e)(3)(C); *see* 40 C.F.R. §§ 130.5, 130.6(c)(1), 130.7(d)(2). Once TMDLs and implementation measures are incorporated into Basin Plans, they are commonly referred to as "Action Plans."

37. A water quality control plan, or a revision thereof, adopted by a regional board is not effective until it is approved by the State Board. Water Code § 13245. Planning which covers waters regulated under the Clean Water Act also requires approval by EPA. 33 U.S.C. § 1313(c).

38. After a water quality control plan, or a revision thereof, is approved by both the State Board and EPA, it is binding on all state offices, departments, and boards whose activities may affect water quality, and it contains the applicable water quality standards for purposes of the federal Clean Water Act. *Id.* at § 1313(c)(3); Water Code § 13247.

FACTUAL BACKGROUND AND ENVIRONMENTAL IMPACTS

I. Basin Planning in the North Coast Region.

39. As discussed above, the Clean Water Act and Porter-Cologne Act require Respondents to develop and periodically update a Basin Plan for the North Coast Region. 33 U.S.C. § 1313(e); Water Code § 13240.

40. The goal of the North Coast Basin Plan is to provide a definitive program of actions to preserve and enhance water quality in the Region. The North Coast Basin Plan assesses the beneficial uses of waters in the North Coast Region and sets forth water quality objectives that are prescribed for the purposes of protecting those beneficial uses. The Implementation section of the North Coast Basin Plan describes the measures, including specific prohibitions, action plans, and policies, that form the basis for meeting water quality objectives and protecting beneficial uses. State Board plans and policies are also included, as well as Regional Board surveillance and monitoring activities.

41. Following passage of the Porter-Cologne Act in 1969, the Regional Board adopted an interim Basin Plan for the North Coast Region in 1971, followed by comprehensive plans for its two natural hydrologic basins (the Klamath River Basin and the North Coastal Basin) that were adopted by the Regional Board and approved by the State Board in 1975.

42. On April 28, 1988, the Regional Board combined and updated the two comprehensive plans into a single Water Quality Control Plan for the North Coast Region. This document, as amended, is the North Coast Basin Plan. *See* Exhibit 8 to Torgun Dec.

43. The North Coast Basin Plan has been amended several times to serve the needs of the Regional Board, its staff, and the public. Since 1997, Respondents have conducted four Triennial Reviews and have amended the North Coast Basin Plan on at least seven occasions.

II. 1997 Consent Decree.

44. On March 11, 1997, a coalition of conservation and fishermen's groups, including many of Petitioners here, entered into a Consent Decree with EPA regarding the establishment of TMDLs for impaired rivers in the North Coast Region. *See* Consent Decree, *Pacific Coast Federation of Fishermen's Associations, et al. v. Marcus,* Case No. C-95-4474 MHP (Mar. 11, 1997), Exhibit 1 to Torgun Dec. These groups had previously filed a complaint alleging that the State of California's failure to establish TMDLs for 17 waterbodies in the North Coast Region imposed a nondiscretionary duty on EPA to establish such TMDLs pursuant to Section 303(d) of the federal Clean Water Act, 33 U.S.C. § 1313(d).

45. Under the Consent Decree, the parties agreed to a schedule that required EPA to approve or establish TMDLs for the 17 specific North Coast waterbodies, divided into 38 segments, subject to revisions of the list consistent with the Clean Water Act. *See* Exhibit 2 to Torgun Dec. The waterbodies listed were impaired from pollutants such as sediment, temperature, nutrients, dissolved oxygen, and turbidity. EPA was required to assure that the TMDLs were established at a rate of at least one per year in 1997 and two per year in 1998 through 2007. The final TMDLs were to be completed no later than December 31, 2007, although that deadline was recently extended by three years for additional work on the Klamath Basin. *See* Exhibit 10 to Torgun Dec.

46. In the Consent Decree, the parties agreed that a TMDL is established when it has either been established by EPA itself, or when EPA approves a State-established TMDL. Although the State of California was identified as the lead agency for developing several of the TMDLs, EPA was ultimately responsible for TMDL establishment if the State failed to do so. Moreover, the inclusion of TMDLs in the applicable water quality management plan, as provided for by Section 303(e)(3) of the Clean Water Act, was not a requirement for the establishment of TMDLs under the Consent Decree.

III. Establishment of TMDLs Pursuant to the Consent Decree.

47. EPA has largely followed the TMDL Schedule as originally set forth by the parties under the Consent Decree, although some segments were subsequently removed from the Section 303(d) list of impaired waterbodies and a few time extensions have been granted. Specifically,

EPA has approved or established approximately 33 TMDLs under the Consent Decree since 1997. EPA modified the TMDL Schedule by delisting the Salmon River segment of the Klamath River for nutrients, the Lower Lost River segment of the Klamath River for temperature, and the Clear Lake Reservoir segment of the Klamath River for nutrients and temperature, removing the obligation to prepare a TMDL for those segments.

48. In addition, the parties have since agreed to schedule changes for TMDLs in the Klamath Basin, which are the only TMDLs remaining to be completed under the Consent Decree. Specifically, the current schedule requires the establishment of TMDLs for the Klamath River (Oregon border to Pacific Ocean) for nutrients and temperature by December 31, 2010. *See* Exhibit 10 to Torgun Dec.

IV. TMDL Implementation.

49. While approximately 33 TMDLs have been approved or established by EPA pursuant to the Consent Decree since 1997, the Regional Board has amended the North Coast Basin Plan to incorporate TMDLs and implementation measures in just three instances: (1) the Garcia River TMDL for sediment; (2) the Scott River TMDLs for sediment and temperature; and (3) the Shasta River TMDLs for dissolved oxygen and temperature. *See* Exhibit 8 to Torgun Dec. at ii.

50. According to the Regional Board's 2002 Section 303(d) list of water quality limited segments, at least ten impaired North Coast waterbody segments had a TMDL priority of "high," and were scheduled to be completed between 2002 and 2004. *See* Exhibit 4 to Torgun Dec. Of those ten high priority waterbodies, a TMDL for only one segment (the Garcia River) has been fully completed. The Regional Board's 2006 Section 303(d) list does not contain a priority ranking for water quality limited segments. *See* Exhibit 9 to Torgun Dec.

51. The Action Plan for the Garcia River Watershed Sediment TMDL ("Garcia River Action Plan") was originally adopted by the Regional Board on May 28, 1998 by Resolution No. 98-66, was subsequently revised by the Regional Board on December 10, 1998, and was revised and readopted by the Regional Board on June 28, 2001 in Resolution No. R1-2001-72. The Garcia River Action Plan was approved by the State Board on November 15, 2001 in Resolution No. 2001-126, by the Office of Administrative Law on January 3, 2002, and by EPA on March 7, 2002. *See*

Exhibit 8 to Torgun Dec. at 4-34. According to the North Coast Basin Plan, increased sedimentation in the Garcia River and its tributaries has reduced the quality and amount of instream habitat that is capable of fully supporting the beneficial use of a cold-water fishery, causing a reduction in the stocks of coho salmon and steelhead trout. *Id*. at 4-35. The Garcia River Action Plan seeks to restore these beneficial uses through various implementation and monitoring measures by 2049. *Id*.; *see also* 14 Cal. Code Regs. § 3904.

52. The Action Plan for the Scott River Sediment and Temperature TMDLs ("Scott River Action Plan") was adopted by the Regional Board on December 7, 2005 in Resolution No. R1-2005-0113, adopted by the State Board on June 21, 2006 in Resolution No. 2006-0046, approved by the Office of Administrative Law on August 11, 2006, and approved by EPA on September 8, 2006. *See* Exhibit 8 to Torgun Dec. at 4-53. As stated in the North Coast Basin Plan, excessive sediment loads and elevated water temperatures in the Scott River and its tributaries have resulted in degraded water quality and impaired beneficial uses, including contact and non-contact water recreation, commercial and sport fishing, cold freshwater habitat, and spawning, reproduction, and/or early development of fish. *Id*. at 4-53 – 4-54. The Scott River Action Plan seeks to attain these beneficial uses within 40 years, with regular monitoring and assessments being conducted to ensure that the various implementation actions prove to be adequate. *Id*. at 4-53; s*ee also* 14 Cal. Code Regs. § 3907.

53. The Action Plan for the Shasta River Temperature and Dissolved Oxygen TMDLs ("Shasta River Action Plan") was adopted by the Regional Board on June 29, 2006 in Resolution No. R1-2006-0052, adopted by the State Water Board on November 15, 2006 in Resolution No. 2006-0093, approved by the State Office of Administrative Law on January 9, 2007, and approved by EPA on January 26, 2007. *See* Exhibit 8 to Torgun Dec. at 4-66. According to the North Coast Basin Plan, the designated beneficial uses associated with the cold freshwater salmonid fishery are the uses most sensitive to the dissolved oxygen and water temperature impairments in the Shasta River and its tributaries. *Id*. The Shasta River Action Plan includes several specific implementation measures that must be assessed at least yearly to assure progress in achieving water

quality objectives and protecting the beneficial uses in the Shasta River watershed. *Id*. at 4-72 – 4-73; s*ee also* 14 Cal. Code Regs. § 3908.

54. On November 29, 2004, the Regional Board adopted the "Total Maximum Daily Load Implementation Policy Statement for Sediment-Impaired Receiving Waters in the North Coast Region" in Resolution No. R1-2004-0087 ("Sediment TMDL Implementation Policy"). *See* Exhibit 5 to Torgun Dec. The Sediment TMDL Implementation Policy noted that EPA had as of that time established sediment TMDLs for 15 waterbodies in the North Coast Region and recognized "an immediate need for the prevention and control of sediment waste discharges." *Id*. at 2. The Sediment TMDL Implementation Policy directed Regional Board staff to develop a work plan by December 31, 2005 that would set watershed priorities for addressing sediment waste discharges on a watershed-specific level. *Id*. at 3; *see also* Exhibit 7 to Torgun Dec.

55. On April 8, 2008, the Regional Board adopted a "Work Plan to Control Excess Sediment in Sediment-Impaired Watersheds" ("Sediment Work Plan"), which describes the actions that Regional Board staff "are currently taking or intend to take over the next ten years, as resources allow, to control human-caused excess sediment in the sediment-impaired water bodies of the North Coast Region." *See* Exhibit 11 to Torgun Dec. at 6. The Sediment Work Plan itself is not a program of implementation for existing sediment TMDLs that will be included in the Basin Plan, but instead outlines how such measures will be developed by Regional Board staff in the future. *Id*. The Sediment Work Plan also does not address monitoring, which is expected to be developed separately by Regional Board staff. *Id*. According to the Sediment Work Plan, "[a]n estimated twenty additional permanent technical staff, plus more support (e.g., clerical) staff, are needed to execute the tasks listed in this Work Plan and thereby reduce excess sediment and improve water quality." *Id*.

56. On June 22, 2005, the Regional Board adopted the "Salmon River Total Maximum Daily Load for Temperature and Implementation Plan" in Resolution No. R1-2005-0058 ("Salmon River Temperature TMDL"). *See* Exhibit 6 to Torgun Dec. For purposes of implementation, the Salmon River Temperature TMDL relies on a single permitting action that calls for the development of a memorandum of understanding ("MOU") between the Regional Board and the

U.S. Forest Service. *Id*. The Salmon River Temperature TMDL has not been incorporated into the Basin Plan.

57. Since the entry of the 1997 Consent Decree, which required TMDLs for 17 specific North Coast waterbodies divided into 38 segments, at least 49 additional impaired waterbodies have been added to the Section 303(d) list in the North Coast Region.

58. Since the entry of the 1997 Consent Decree, the Regional Board increased staffing up to 137 staff members in 2001, but staff declined to approximately 87 staff members by 2007.

V. Environmental Impacts of Impaired Waterbodies in the North Coast Region.

59. According to the North Coast Basin Plan, the rivers and streams in the North Coast Region have a diversity of designated beneficial uses, including cold freshwater habitat; rare, threatened, and endangered species; migration of aquatic organisms; spawning, reproduction, and/or early development of fish; commercial and sport fishing; municipal and domestic water supply; contact and non-contact water recreation; Native American cultural use; and subsistence fishing use. Exhibit 8 to Torgun Dec. at 2-1 – 2-18.

60. Many of the watersheds of the North Coast Region support plant and wildlife species that are considered rare, threatened, and endangered under state and federal laws, including Coho salmon (*Oncorhynchus kisutch*), Chinook salmon (*Oncorhynchus tshawytscha*), Lost River sucker (*Deltistes luxatus*), Shortnose sucker (*Chamistes brevirostris*), California freshwater shrimp (*Syncaris pacificaz*), Baker's larkspur (*Delphinium hesperium sp. Cuyamacae*), and Sebastopol meadowfoam (*Limnanthes vinculans*). *Id*. at 2-14.

61. Water quality objectives for inland waters in the North Coast Region include specific objectives for color, tastes and odors, floating material, suspended material, settleable material, oil and grease, biostimulatory substances, sediment, turbidity, pH, dissolved oxygen, bacteria, temperature, toxicity, pesticides, chemical constituents, and radioactivity. *Id*. at 3-3 – 3-5.

62. Water quality conditions in many North Coast rivers and streams do not meet applicable water quality objectives and impair the designated beneficial uses. For example, as noted in the Sediment Work Plan, ten out of fourteen hydrologic units in the North Coast Region include water bodies that are impaired by excess sediment, or approximately 61% of the area of the

Region. Exhibit 11 to Torgun Dec. at 5. Some of the most sensitive beneficial uses impacted by unnaturally high sediment loads are associated with the migration, spawning, reproduction, and early development of cold water fish such as chinook salmon, coho salmon, and steelhead trout. *Id*. In addition to harming aquatic life, excess sediment can limit the use of water for domestic consumption, agriculture, industry, wildlife, fishing, and recreation, and can cause or contribute to flooding. *Id*. Sediment impairment can result from a variety of factors, including timber harvest activities, road construction, agricultural operations, vineyards, and grazing.

63. Similarly, elevated temperatures impair beneficial uses of rivers and streams such as cold freshwater habitat; rare, threatened, and endangered species; migration of aquatic organisms; and spawning, reproduction, and/or early development of fish. *See, e.g.*, Exhibit 8 to Torgun Dec. at 4-53. Elevated temperatures can result from a variety of factors. For example, removing riparian vegetation during timber harvesting, road building, grazing, and urbanization can increase stream temperatures by removing stream shade. Changes in the timing and volume of natural streamflow due to water diversions and impoundments can affect water temperatures downstream by increasing the amount of solar radiation relative to the volume of water. Increased sediment input can also change the stream channel and temperatures by widening streams, filling pools, and eliminating riparian vegetation during flood events.

64. The decline in water quality and habitat conditions in the North Coast Region has greatly contributed to the diminishing populations of native salmon species and, in recent years, an unprecedented collapse of salmon stocks. A recent scientific review by the National Marine Fisheries Service ("NMFS") on salmonid abundance concluded that the California Coastal chinook salmon, Northern California steelhead, and California Coast coho salmon are "likely to become endangered in the foreseeable future," thus reconfirming the "threatened" status of these three species under the federal Endangered Species Act. *See* 70 Fed. Reg. 37,160 (June 28, 2005). NMFS has also found that salmonids in the North Coast Region continue to exhibit depressed population sizes relative to their historic abundance. *Id*. at 37,181.

65. The recent collapse of salmon stocks on the West Coast has resulted in severe restrictions on commercial and recreational salmon fishing, including the first-ever complete

closure of the commercial salmon fishing season in 2008. Recognizing that California's salmon runs are a vital component of our state's resources and contribute significant environmental, recreational, commercial, and economic benefits to the people, on April 10, 2008, Governor Arnold Schwarzenegger responded to the closure by declaring a State of Emergency and requesting financial assistance for fishermen and fishing communities. Exhibit 12 to Torgun Dec.

66. Many of these adverse impacts to salmon populations could be mitigated by incorporating appropriate TMDLs with enforceable implementation measures into the North Coast Basin Plan.

FIRST CAUSE OF ACTION

(Violation of Porter-Cologne Water Quality Control Act – Failure to Develop Implementation Plans for TMDLs)

67. Petitioners re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

68. As alleged above, the Porter-Cologne Act requires Respondents to formulate and adopt Basin Plans for all hydrologic areas within their region. Water Code § 13240. A Basin Plan "consists of a designation or establishment for the waters within a specified area" of all of the following: (1) beneficial uses to be protected; (2) water quality objectives; and (3) a program of implementation needed for achieving water quality objectives. *Id.* at § 13050(j).

69. Since December 1997, EPA has approved or established approximately 33 TMDLs for specific waterbody segments in the North Coast Region pursuant to the 1997 Consent Decree.

70. However, Respondents have failed to develop and incorporate a program of implementation into its North Coast Basin Plan for these EPA-approved or established TMDLs, except in the following instances: (1) the Garcia River TMDL for sediment; (2) the Scott River TMDLs for sediment and temperature; and (3) the Shasta River TMDLs for dissolved oxygen and temperature.

71. Although Respondents have developed an implementation plan for the Salmon River TMDL for temperature, the specific measures described in that plan have not been finalized or incorporated into the North Coast Basin Plan.

72. Similarly, the Sediment TMDL Implementation Policy and Sediment Work Plan do not provide an adequate program of implementation that can be incorporated into the North Coast Basin Plan, but instead outline how such measures will be developed by Regional Board staff in the future.

73. Consequently, water quality standards in numerous North Coast rivers and streams with approved or established TMDLs continue to be impaired by pollutants such as sediment, temperature, and turbidity, and do not meet applicable water quality objectives or support beneficial uses such as cold freshwater habitat or spawning, reproduction, and/or early development of fish.

74. Respondents' on-going failure to develop a program of implementation for TMDLs approved or established by EPA for impaired water bodies in the North Coast Region is arbitrary and capricious, and constitutes a prejudicial abuse of discretion, since Respondents have failed to proceed in a manner required by the Porter-Cologne Act.

SECOND CAUSE OF ACTION

(Violation of Porter-Cologne Water Quality Control Act and Clean Water Act – Failure to Incorporate TMDLs into Basin Plan)

75. Petitioners re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

76. As alleged above, the Clean Water Act requires that Respondents incorporate EPA approved or established TMDLs into existing Basin Plans. 33 U.S.C. §§ 1313(d)(2), 1313(e)(3)(C); 40 C.F.R. §§ 130.6(c)(1), 130.7(d)(2). At a minimum, Basin Plans must be reviewed and updated at least once every three years. 33 U.S.C. §§ 1313(c)(1), 1313(e); Water Code § 13240.

77. Although Respondents have conducted four Triennial Reviews of the North Coast Basin Plan since 1997, the only EPA approved or established TMDLs for the North Coast Region that have actually been incorporated into the Basin Plan are: (1) the Garcia River TMDL for sediment; (2) the Scott River TMDLs for sediment and temperature; and (3) the Shasta River TMDLs for dissolved oxygen and temperature.

78. Consequently, water quality standards in numerous North Coast rivers and streams with approved or established TMDLs continue to be impaired by pollutants such as sediment,

temperature, and turbidity, and do not meet applicable water quality objectives or support beneficial uses such as cold freshwater habitat or spawning, reproduction, and/or early development of fish.

79. Respondents' on-going failure to incorporate EPA approved or established TMDLs for the North Coast Region into the North Coast Basin Plan is arbitrary and capricious, and constitutes a prejudicial abuse of discretion, since Respondents have failed to proceed in the manner required by the Porter-Cologne Act and Clean Water Act.

THIRD CAUSE OF ACTION

(Violation of Public Trust Doctrine – Failure to Protect Beneficial Uses of Water Bodies)

80. Petitioners re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

81. Under the public trust doctrine, Respondents have a continuing duty to protect and preserve the state's tidelands and navigable waterways, the lands lying beneath them, as well as any streams and tributaries that affect any navigable waters, "as trustee of a public trust for the benefit of the people." *National Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 434.

82. Although traditional public trust values encompassed commerce, navigation, and fisheries purposes, the permissible range of values now includes recreational, aesthetic, and ecological uses. *See, e.g., National Audubon Soc'y,* 33 Cal.3d at 434-35. "There is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, open spaces, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Id.*

83. Under California law, the Porter-Cologne Act establishes a comprehensive statewide program to ensure that "the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state." Water Code § 13000. The Porter-Cologne Act further declares that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." *Id.*

84. The Porter-Cologne Act requires Respondents to adopt and update Basin Plans for all hydrologic areas within their region, consisting of beneficial uses to be protected, water quality objectives, and a program of implementation needed for achieving such objectives. *Id*. at §§ 13050(j), 13240.

85. Respondents have "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *National Audubon Soc'y*, 33 Cal.3d at 446.

86. Any member of the general public has standing to raise a claim of harm to the public trust. *Id*. at 431 n.11. More specifically, the public has the right to bring actions to enforce the public trust when public agencies fail to discharge their duties to protect public trust resources.

87. The rivers and streams in the North Coast Region contain navigable water bodies with a wide variety of beneficial uses, including cold freshwater habitat; rare, threatened, and endangered species; migration of aquatic organisms; spawning, reproduction, and/or early development of fish; commercial and sport fishing; municipal and domestic water supply; contact and non-contact water recreation; Native American cultural use; and subsistence fishing use. Protection of these values are among the purposes of the public trust doctrine.

88. Respondents' failure to develop a program of implementation for EPA approved or established TMDLs, and its failure to incorporate these TMDLs or implementation measures into the North Coast Basin Plan, has left many navigable rivers and streams impaired by pollutants such as sediment, temperature, and turbidity. These impaired water bodies do not meet applicable water quality objectives or support their designated beneficial uses for fisheries, recreation, or ecological purposes. Respondents' continuing failure to protect these uses constitutes a violation of the public trust doctrine.

FOURTH CAUSE OF ACTION

(Declaratory Relief)

89. Petitioners re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

90. An actual controversy exists between the parties. Petitioners contend that Respondents have acted in violation of law and that the Court must require Respondents to develop a program of implementation for EPA approved or established TMDLs, and incorporate these TMDLs and implementation measures into the North Coast Basin Plan. Respondents dispute these contentions.

91. Petitioners request a judicial determination that Respondents have a mandatory, non-discretionary duty to develop a program of implementation for EPA approved or established TMDLs, and incorporate these TMDLs and implementation measures into the North Coast Basin Plan.

REQUEST FOR RELIEF

Wherefore, Petitioners respectfully request that the Court grant relief as follows:

1. A peremptory writ of mandate directing Respondents to exercise their ministerial duty without further delay:
   - (a) to develop a program of implementation for TMDLs approved and/or established by EPA for impaired water bodies in the North Coast Region;
   - (b) to incorporate EPA approved and/or established TMDLs and implementation measures into the North Coast Basin Plan;
   - (c) to establish a priority ranking and a time schedule for completing such actions;
2. Petitioners' costs of suit;
3. An award of reasonable attorneys' fees; and
4. Such other equitable or legal relief that the Court considers just and proper.

DATED: February ____, 2009

Respectfully submitted,

_____
MICHAEL R. SHERWOOD
GEORGE M. TORGUN

Attorneys for Petitioners

VERIFICATION

I, Daniel Myers, hereby declare:

I am the Finance Committee Chair of the Redwood Chapter of the Sierra Club. The facts alleged in the above petition are true to my personal knowledge, except as to those matters therein stated on information and belief, and, as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this ____ day of January, 2009 at Philo, California.

_____
Daniel Myers