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## State Water Resources Control Board

February 16, 2024

### ***Via Email***

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RE: DECISION ON PETITION FOR RULEMAKING TO SET PERMANENT MINIMUM FLOWS ON THE SHASTA RIVER

Dear Petitioners:

The State Water Resources Control Board (State Water Board or Board) is in receipt of the January 17<sup>th</sup> [petition](#) submitted on behalf of the California Coastkeeper Alliance, Friends of the Shasta River, Mount Shasta Bioregional Ecology Center, Water Climate Trust, Shasta Waterkeeper, Save California Salmon, and Environmental Protection Information Center (collectively, “Petitioners”) for a rulemaking pursuant to Government Code section 11340.6 to set permanent minimum flows in the Shasta River.

The State Water Board respectfully denies the petition. The petition is denied for a number of reasons, but primarily due to ongoing work that addresses Shasta River flows, the need to retain flexibility in how the Board addresses flows, and the feasibility of issuing a rulemaking notice in the timelines provided by the Government Code in light of a recent decision issued by the Office of Administrative Law. The Board recognizes and appreciates the information and references compiled and synthesized in the petition, which will assist the Board in its long-term flow efforts in the watershed. The Board remains committed to ongoing instream flow efforts in the Scott River and Shasta River watersheds, beyond the emergency regulation, as identified through its direction to staff at the August 15, 2023 Board meeting to identify the scientific work needed to develop options for pursuing long-term flows in the Scott River and Shasta River

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

watersheds, and update the Board on that work. Staff plan to update the Board on progress at a public meeting by the end of 2024.

The State Water Board has been undertaking preparatory work towards potentially setting long-term instream flows in the Shasta River watershed for a number of years. The Board's efforts began in earnest with the 2014 California Water Action Plan, when the California Department of Fish and Wildlife and the State Water Board identified the Shasta River as one of five key streams in the state to prioritize flow improvements. The Board currently has a number of ongoing activities addressing Shasta River flows, including: extensive and continuing development of a surface water and groundwater hydrology model that will inform flows requirements and any related temperature decisions; the adoption and implementation of three emergency flow regulations for the Scott River and Shasta River watersheds since 2021 (Cal. Code Regs., title 23, § 875 et seq); close work with interested parties in the basin to develop appropriate implementation mechanisms, including through voluntary efforts and local cooperative solutions; consideration of existing information regarding flow needs in the watershed; and the development of other information necessary to inform appropriate flow-related requirements and implementation measures.

In addition, the State Water Board has not determined that a long-term rulemaking establishing and implementing flows is the appropriate means to address fishery flow constraints in the Shasta River watershed. The Board will continue work towards establishing minimum instream flows in the Shasta River, but the Board has not determined whether a rulemaking proceeding under Part 1, Chapter 3.5 of the Administrative Procedures Act (Government Code 11340 et seq) is the best management mechanism. Other options include a policy for water quality control under Division 7, Chapter 3, Article 3 (Water Code sections 13140 et seq.), a water rights proceeding, collaborative efforts between diverters and regulatory agencies, or through some combination of these or other options. The actions described above will be relevant to establishing instream flows through whichever methods the State Water Board determines to employ.

The Administration has also identified work in the Scott River and Shasta River watersheds as a priority though the recently released the [California Salmon Strategy for a Hotter, Drier Future](#) (Salmon Strategy). The Salmon Strategy identifies that the Board and California Department of Fish and Wildlife “will commence work to establish minimum instream flows in the Scott and Shasta Rivers, working with local partners on locally driven solutions and coordinating on options for incentivizing the reduction of diversions and groundwater pumping.”

The decision to deny the petition is consistent with the Office of Administrative Law's (OAL) December 2022 [decision](#) pursuant to Government Code section 11340.7 regarding implementation of Government Code 11340.7. OAL's decision outlines legal uncertainties in feasibly issuing a formal rulemaking notice in the timeline prescribed by the Government Code.

The State Water Board has submitted this decision on the petition, in accordance with Government Code section 11340.7, subdivision (d), to the Office of Administrative Law for publication in the California Regulatory Notice Register. A copy of the decision is enclosed.

The agency contact person on this matter is Marianna Aue, Staff Counsel IV. She can be reached by phone at (916) 327-4440 or by email to [Marianna.aue@waterboards.ca.gov](mailto:Marianna.aue@waterboards.ca.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Oppenheimer", is placed on a light gray rectangular background.

Eric Oppenheimer  
Executive Director

Enclosure: Decision on Petition for Rulemaking to Set Minimum Flows on the Shasta River.

ebc: Board Members

Eric Oppenheimer, Exec

Erik Ekdahl, Water Rights

Marianna Aue, OCC

Erin Ragazzi, Water Rights

Ailene Voisin, OPA

Jackie Carpenter, OPA

Philip Dutton, Water Rights

Zachary Zwahlen, Water Rights

## DECISION ON PETITION FOR RULEMAKING TO SET MINIMUM FLOWS ON THE SHASTA RIVER

On January 17, 2024, the State Water Resources Control Board (State Water Board or Board) received a Petition to adopt, amend, or repeal a regulation, pursuant to Government Code section 11340.6, from California Coastkeeper Alliance, Friends of the Shasta River, Mount Shasta Bioregional Ecology Center, Water Climate Trust, Shasta Waterkeeper, Save California Salmon, and Environmental Protection Information Center (collectively, “Petitioners”).

Petitioners request that the State Water Board commit to and initiate a rulemaking process to set minimum flows in the Shasta River. They request that such a regulation include: (1) an explicit goal of recovering coho, Chinook, and steelhead in the Shasta River and its tributaries; (2) fishery restoration in the Shasta River; (3) adaptive management and periodic revisiting of the flow requirements established; (4) reporting requirements to better understand surface and groundwater use in the Shasta River watershed; and (5) that the regulation include both temperature and flow requirements at various key locations in the watershed and at various times, including for the Shasta Canyon, Little Shasta River, and Big Springs Complex.

In accordance with Government Code Section 11340.7, subdivision (a), this document serves as the State Water Board’s response to the Petition.

### PROVISIONS OF CALIFORNIA CODE OF REGULATIONS TO BE AFFECTED

The Petition does not identify specific provisions in the California Code of Regulations that Petitioners are requesting to be adopted, amended, or repealed. Petitioners are requesting that the State Water Board adopt permanent flow requirements in the Shasta River watershed. Previous and currently effective emergency regulations setting and implementing emergency drought minimum flows in this watershed are found at California Code of Regulations, title 23, article 23.5, section 875 et seq.

### REFERENCE TO AUTHORITY TO TAKE THE REQUESTED ACTION

The State Water Board’s authority to adopt regulations (Wat. Code, § 1058); broad authority to act regarding the water resources of the state (Wat Code, §§ 174, 186); authorities related to the prohibition and prevention of waste and unreasonable use of water or unreasonable method of diversion (Cal. Const, art. X, § 2; Water Code, § 100, 275, 1050; and the public trust doctrine (*National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419).

### AGENCY DETERMINATION

The Petition is **denied**.

## REASONS SUPPORTING THE AGENCY DETERMINATION

The State Water Board remains committed to addressing fishery flow constraints in the Shasta River watershed. The Shasta River was identified as one of five priority rivers for anadromous fish across California for “the State Water Resources Control Board and the Department of Fish and Wildlife [to] implement a suite of individual and coordinated administrative efforts to enhance flows statewide” under the 2014 California Water Action Plan (Action 4, page 12). In the period before receiving a flow recommendation from the California Department of Fish and Wildlife, the State Water Board has undertaken extensive development of hydrologic characterization models to better understand water supply, water demand, temperature, and instream flow in the Shasta River in support of long-term flow-setting. This work was slowed, but continues, during the State Water Board’s development and implementation of drought emergency regulations setting drought emergency level instream flows in the Scott River and Shasta River watersheds. These models will assist in assessing the consequences of recommended flows and alternatives thereto.

On August 15, 2023, the State Water Board held a public hearing regarding rulemaking in both the Scott River and Shasta River watersheds in response to a petition for long-term rulemaking on the Scott River filed by the Karuk Tribe, the Environmental Law Foundation, the Pacific Coast Federation of Fishermen’s Associations, and the Institute for Fisheries Resources. At the conclusion of the hearing, the State Water Board directed staff in the Division of Water Rights to bring for consideration a proposed emergency regulation regarding flows in both the Scott River and Shasta River watersheds. This proposal was to be informed through redoubled engagement with experts and community members on the basis for and the implementation of a new drought emergency regulation in the region that expired on August 1, 2023. Additionally, the Board directed staff to identify options and initiate scientific work needed to achieve long-term flows in both the watersheds.

Staff conducted a workshop on key areas of the expired drought emergency regulation, held a series of listening sessions and meetings, and prepared a preliminary draft and draft of the proposed emergency regulation for public comment. The Board adopted an emergency regulation setting baseline minimum flow requirements in the Scott and Shasta rivers on December 19, 2023 and it went into effect on February 1, 2024.

The recently released California Salmon Strategy for a Hotter Drier Future identifies work to establish minimum instream flows in the Shasta and Scott rivers as a near-term priority action for both the Board and the California Department of Fish and Wildlife.

While the State Water Board remains committed to addressing flow constraints in the Shasta River Watershed, the Board declines at this point to initiate a formal rulemaking process that sets permanent minimum instream flows appropriate for species restoration in various water year-types. The Board will continue working on flows in the Shasta River, but the Board has not determined whether a rulemaking proceeding under

Part 1, Chapter 3.5 of the Administrative Procedures Act (Government Code 11340 et seq) is the appropriate management mechanism. Other options include a Policy for Water Quality Control under Division 7, Chapter 3, Article 3 (Water Code sections 13140 et seq.), a water rights proceeding, or some combination of these or other options. The Board is continuing to: develop modeling capabilities regarding surface and groundwater interaction that would inform flow requirements and any related temperature decisions; work closely with interested parties in the basin to develop appropriate implementation mechanisms – including voluntary actions and local cooperative solutions; consider existing information regarding flow needs in the watershed; and develop and support the development of other information necessary to inform appropriate flow-related requirements and implementation measures. Such work will be relevant to establishing flow requirements through whichever methods the Board determines to employ.

#### DEPARTMENT CONTACT PERSON

Please direct any inquiries regarding this action to:

Marianna Aue, Staff Counsel IV  
Office of Chief Counsel  
State Water Resources Control Board  
1001 "I" Street, 22<sup>nd</sup> Floor  
Sacramento, CA 94703  
[Marianna.aue@waterboards.ca.gov](mailto:Marianna.aue@waterboards.ca.gov)

#### NOTICE TO INTERESTED PERSONS

A copy of the Petition was posted on the State Water Board's website on January 17, 2024 and sent to the State Water Board's e-mail list for emergency drought actions on the Scott and Shasta on January 26, 2024. Any interested persons have the right to obtain a copy of the Petition that is the subject of this decision by sending a request to the State Water Board contact person listed in this notice.

#### DATE OF DECISION

February 16, 2024