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July 21, 2010

Submitted electronically and by U.S. Mail

California State Water Resources Control Board
c/o Jeanine Townsend, Clerk
1001 "I" Street
Sacramento, California 95814
commentletters@waterboards.ca.gov

Re: Comment Letter – Klamath River – TMDLs

Dear Chairman Hoppin and Members of the Board:

Thank you for the opportunity to comment on the proposed State Water Resources Control Board (State Board) approval of an Amendment to the Water Quality Control Plan for the North Coast Region (Basin Plan Amendment) to establish: (1) Site Specific Objectives for Dissolved Oxygen in the Klamath River (DO Objective); (2) an Action Plan for the Klamath River Total Maximum Daily Loads Addressing Temperature, Dissolved Oxygen, Nutrient, and Microcystin Impairments in California (CA Klamath River TMDL); and (3) an Implementation Plan for the Klamath River and Lost River Basins (Implementation Plan). On behalf of its constituent districts and Klamath Project irrigators, the Klamath Water Users Association appreciates your consideration of these comments. The Tulelake Irrigation District, which is a member of the Klamath Water Users Association with operations within the United States Bureau of Reclamation Klamath Project (Klamath Project) in California, hereby individually joins in these comments. The Klamath Water Users Association and Tulelake Irrigation District are collectively referred to herein as "KWUA."

As discussed with State Board staff, KWUA did not become aware of the pending comment period for the proposed Basin Plan Amendment until two days before the deadline. In the meantime, the proposed Basin Plan is substantial and complex, and of significant importance to KWUA. Especially in light of the numerous activities and challenges currently pending in the Klamath Basin and the resulting demands on KWUA staff and counsel this week, we are disappointed that the State Board rejected our request for a short extension of time to complete comments.

KWUA submitted three separate comment letters during the North Coast Regional Water Quality Control Board's (Regional Board) development and consideration of the proposed Basin Plan Amendment, which are attached and incorporated herein by this reference.¹ The Regional Board has not adequately addressed

¹ These comment letters also attached and incorporated by reference the comments that KWUA submitted to Region 9 of the Environmental Protection Agency (EPA) prior to its adoption of the TMDLs for the Lost

these comments, which still apply to the version of the Basin Plan Amendment and related documents now being considered by the State Board. Consistent with the State Board notice related to its consideration of the Basin Plan Amendment, this letter provides additional comments on KWUA's key concerns with said amendment and explains how the Regional Board Staff Report, Appendix 10 (Responses to Comments) failed to address those concerns.

A. CA Klamath River TMDL and Implementation Plan

1. *Application to Klamath Project*

As explained in detail in the prior KWUA comments to the Regional Board (attached), KWUA's constituent districts and irrigators operate within the Klamath Project in Oregon and California. No land within the Klamath Project discharges to the Klamath River in California. As such, the CA Klamath River TMDL cannot impose requirements on the Klamath Project. Rather, Klamath Project discharges are subject to EPA's previously adopted Lost River, California Total Maximum Daily Loads, Nitrogen and Biochemical Oxygen Demand to address Dissolved Oxygen and pH Impairments (EPA Lost River TMDL). In response to KWUA's request that the Regional Board clarify that the CA Klamath River TMDL does not apply to the Klamath Project, the Regional Board suggests that application of the CA Klamath River TMDL to the Klamath Project is appropriate because there are "pollutant loadings identified in the Lost River TMDL, promulgated by the USEPA in 2008, that contribute to the Klamath River water quality impairments." (Responses to Comments, Response H1.) The response fails to provide any reasonable basis for denying KWUA's request and in fact acknowledges that there is another TMDL in existence to address Klamath Project discharges in California. KWUA urges the State Board to consider KWUA's request that the CA Klamath River TMDL clarify that the CA Klamath River TMDL, including the Stateline load allocation set forth therein, does not apply to the Klamath Project.

Similarly, the final staff report accepted by the Regional Board before taking action on the CA Klamath River TMDL (Staff Report) contains various statements suggesting that the load allocations assigned to "Stateline" are intended to address discharges to the Klamath River in Oregon and to the Lost River in California. As such, the Staff Report encourages the Regional Board and State Board to overstep their

River segment in California, which are included in the attachment hereto. These comments are relevant to the Board's consideration of the proposed Basin Plan Amendment because said amendment purports to "implement" Lost River TMDLs established by EPA (despite no substantial analysis of said TMDLs). In addition, on May 27, 2010, KWUA provided comments to Oregon Department of Environmental Quality on its proposed Total Maximum Daily Loads (TMDLs) for the Klamath River in Oregon. The Regional Board staff report and supporting documents for the proposed Basin Plan Amendment include considerable discussion about activities in Oregon and the anticipated TMDLs to be adopted by Oregon in the future. As such, KWUA's comments thereon are relevant to the State Board's consideration of the proposed Basin Plan Amendment and attached hereto for your information.

authority and create additional and conflicting requirements for Klamath Project irrigators. KWUA continues to strongly object to such action.

As acknowledged by the Regional Board in the Responses to Comments, the two TMDLs apply different water quality standards, address different constituents, and establish different load allocations. For example, the DO objective applicable to the Lost River is not subject to the DO objective amendment for the Klamath River mainstem considered along with the CA Klamath River TMDL. Further, the CA Klamath River TMDL establishes load allocations related to temperature, for which the Lost River system has been delisted. The Responses to Comments suggest that the Lost River temperature delisting is irrelevant since discharges to the Lost River system must still adhere to water quality standards for temperature.² Such response entirely misses the point repeatedly raised by KWUA—that is, the Clean Water Act only authorizes the creation of load allocations for constituents (such as temperature) that have been identified as causing impairment to a given water body on the respective Clean Water Act section 303(d) list of impaired water bodies. Moreover, Regional Board authority to adopt implementation plans for a given impaired water body does not extend beyond measures needed to address the 303(d) listed constituents for said water body.

2. *Implementing Lost River TMDL Without Explanation or Analysis*

The Implementation Plan inappropriately segregates the development and consideration of the EPA Lost River TMDL allocations from the proposed implementation measures. As noted in the attached comments to EPA, EPA's technical TMDL for Lost River has significant shortcomings. Relevant here is the fact that EPA developed that TMDL without any consideration of the requirements of the Porter-Cologne Water Quality Control Act, Water Code section 13000 et seq. (Porter-Cologne). The Implementation Plan, however, attempts to "implement" the EPA Lost River TMDL with only a bare reference to the load allocations set forth therein. In response to KWUA comments to that effect, the Regional Board points to one table in the Implementation Plan that lists the applicable loads set forth in the EPA Lost River TMDL. (Responses to Comments, Response H5; see also *id.*, Responses T15 [relying on table and designation of responsible parties as sufficient to address how implementation plan implements Lost River TMDL], KWUA #4 [including additional discussion of measures identified to address Lost River TMDL without any explanation of the relation of those measures and their anticipated ability to satisfy the EPA Lost River TMDL load allocations to the

² In a related response, the Regional Board appeared to accept KWUA's point that the temperature load allocations cannot apply to the Lost River system since it was delisted for temperature in 2006. (Response to Comments, Response H2.) However, that response refers to general revisions in the Staff Report to that effect without providing any page or section references to facilitate identification of such changes. This response does not satisfy KWUA's concern. KWUA urges the State Board to ensure that any Basin Plan Amendment establishing load allocations for the Klamath River segment in California makes it entirely clear that such load allocations do not apply to the Lost River system in California, which is governed by the EPA Lost River TMDL and subject to a different set of water quality impairments.

technical analysis within said TMDL.]) This mere table cannot replace the requisite analysis and discussion required to explain how a given TMDL will be implemented. (See *id.*; see also Responses to Comments, Response F1 [failing to even acknowledge the EPA Lost River TMDL in response to KWUA comment that the Regional Board did not adequately link the pertinent TMDL analysis to the requirements in the implementation plan].)

In sum, the Regional Board failed to address KWUA's legitimate concern that the Implementation Plan and Staff Report provide no analysis of how the Implementation Plan will actually achieve compliance with the load allocations in the EPA Lost River TMDL in a reasonable manner. The proposed Implementation Plan for the Lost River segment in California remains wholly inadequate and fails to satisfy California Water Code requirements to analyze TMDL allocations, implementation measures, and water quality levels that can be reasonably achieved. (See, e.g., Wat. Code, §§ 13000, 13001, 13241, 13263.) KWUA urges the State Board to consider KWUA's comments and ensure that any Implementation Plan incorporated into the Basin Plan provides substantive analysis, in conformance with Porter-Cologne requirements, of its ability to ensure compliance with the TMDLs it attempts to implement.

3. *"Regulating" in Oregon*

KWUA provided detailed comments to the Regional Board (attached) related to the Klamath River TMDL's inappropriate attempts to regulate in Oregon despite the fact that such authority lies with the Oregon Department of Environmental Quality (ODEQ). In response to these comments, the Regional Board suggests that California must explain in the CA Klamath River TMDL how it "expects" Oregon to ensure compliance with California water quality standards at the Stateline. (Response to Comments, Response G3.) Such a response fails to address KWUA's comments and rather reinforces the false notion that the Regional Board somehow has authority to regulate discharges that occur wholly in Oregon. As noted above, since the Klamath Project does not result in any discharges to the Klamath River in California, the Regional Board has no regulatory authority related to any Klamath Project discharges to the Klamath River.

The primary way in which the Basin Plan Amendment attempts to regulate discharges in Oregon is through the assignment of a load allocation to the Oregon-California Stateline and the identification of implementation measures to achieve that allocation. In response to KWUA's comments that assigning a load allocation to the Stateline is inappropriate, the Regional Board actually acknowledges that the Regional Board does not have authority to regulate a river segment, such as that at the Stateline, like a source. However, the response then goes on to explain that the Regional Board can establish a load allocation at that point and require Oregon "to implement that load allocation in the way it deems appropriate." (Responses to Comments, Response G1.) As such, the Regional Board readily admits that the CA Klamath River TMDL imposes a load allocation on Oregon and "requires" Oregon to find a way to implement that load

allocation. As explained in great detail in the attached KWUA comments, California does not have authority to set load allocations for Oregon segments of the Klamath River. Further, in response to KWUA's related comment requesting that the Regional Board remove the load allocation for the Stateline from the TMDL since it constitutes inappropriate regulation of discharges to Oregon segments of the Klamath River, the Regional Board merely restates the implementation measures associated with the inappropriate load allocation at Stateline. (Responses to Comments, Response G2.) Such response completely fails to address the comment and provides no explanation of how the implementation measures associated with Stateline discharges are relevant to the CA Klamath River TMDL or how they implement the EPA Lost River TMDL. As such, KWUA urges the State Board to consider KWUA's comments and remove the Stateline load allocations and related implementation measures from the CA Klamath River TMDL and the Implementation Plan.

In response to KWUA's comments, the Regional Board also attempts to rely on the Draft Klamath River TMDL for Oregon as support for the Stateline load assumptions in the CA Klamath River TMDL. (See Regional Board Staff Report, Appendix 10, at p. S-27, Response A25.) However, as explained in KWUA's responses to said Draft Klamath River TMDL for Oregon (attached), the Draft Klamath River TMDL for Oregon suffers from its own inconsistencies and shortcomings. It assumes, for example, immediate compliance with the Upper Klamath Lake TMDL in simulating background water quality in the Klamath River. However, the load allocations assigned therein do not use the same assumption in calculating appropriate load allocations for features within the Klamath Project in Oregon. To the extent that quantitative load allocations for these features are adopted, they should be applicable only after Upper Klamath Lake water in fact is compliant with the Upper Klamath Lake TMDL, or they should be adjusted such that allowable loading includes only "additions" to compliant incoming water quality. Particularly since the Draft Klamath River TMDL for Oregon is still subject to public review and ODEQ consideration, it is entirely inappropriate for the California Basin Plan Amendment to assume compliance with draft load allocations discussed therein.

The Staff Report and Responses to Comments suggest that the CA Klamath River TMDL can somehow regulate Oregon discharges since discharges to the Lost River system occur in California and subsequently enter into the Klamath River mainstem in Oregon. This working assumption is illogical and will result in inconsistent and redundant regulation of Lost River discharges, which are subject to the EPA Lost River TMDL for the California reach of the Lost River. As noted above and explained in prior KWUA comments (attached), the subject Implementation Plan attempts to regulate the Lost River discharges without adequately recognizing and considering the controlling TMDL. In so doing, the CA Klamath River TMDL, the Implementation Plan, and the Staff Report fail to provide sufficient evidence to justify implementation measures applicable to the Lost River discharges and inject considerable confusion as to the applicability of the CA Klamath River TMDL to the Lost River segment in California.

4. *Irrigation District Authority*

As expressed in the attached prior comments, KWUA is concerned with the CA Klamath River TMDL and Implementation Plan's assignment of responsibility to irrigation districts. As an irrigation district formed and operating under California Irrigation District Law, Water Code section 20500 et seq., Tulelake Irrigation District has no authority to enforce water quality standards and cannot regulate activities of constituent irrigators. KWUA appreciates the Regional Board's attempt to clarify that irrigation districts are only responsible for actual discharges resulting from district activities unrelated to pollutants originating as a result of farming and land management practices within their district. (See Response to Comment, H7.) However, KWUA urges the State Board to amend the Basin Plan Amendment to ensure that the CA Klamath River TMDL and the Implementation Plan clearly acknowledge the narrow responsibility of districts and clarify any confusion as to the responsibility associated with discharges resulting from farming and land management practices on non-district owned lands.

5. *Unachievable Load Allocations*

The Regional Board's development of the CA Klamath River TMDL and the Implementation Plan must be reasonable and take into consideration economics, water quality levels that can be reasonably achieved, and other public interest factors. (Wat. Code, §§ 13000, 13001, 13241, 13263.) As detailed in prior KWUA comments (attached), the Regional Board's superficial analysis of economic factors does not satisfy this standard and completely fails to acknowledge that the assigned loads are impossible to meet in the reasonably foreseeable future. Bare references to analysis of feasibility and probability of success do not suffice to satisfy the stringent requirements of Porter-Cologne. (See e.g., Responses to Comments, Response O22 [dismissing comments about reasonableness without addressing ability of implementation measures to satisfy water quality standards or load allocations], Response O24 [suggesting without any basis that Regional Board need not consider reasonableness of the costs associated with implementation of the TMDL].) Moreover, the Regional Board's bare conclusions of reasonableness are simply counterintuitive given that the Klamath TMDL establishes *negative* load allocations for a number of sources. In response to KWUA comments in this regard, the Regional Board acknowledges that achievement of the load allocations "will require a great amount of time and a lot of effort" but that they "disagree that achieving the load allocations is impossible." (See e.g., Responses to Comments, Response C49.) However, the Regional Board has provided no justification to explain how these negative load allocations will actually be met, taking into consideration economics, water quality levels that can be reasonably achieved, and other public interest factors. As such, the response is wholly inadequate.

As discussed in prior KWUA comments (attached), the real root of this problem is the fact that the underlying water quality objectives are not attainable. In response to KWUA's comments to this effect, the Regional Board acknowledges that the current

Upper Klamath Lake water quality precludes achieving downstream water quality objectives but then goes on to state that the “water quality objective for temperature refers to natural temperatures, thus natural temperatures are by definition compliant with the objective.” (Responses to Comments, Response C52.) KWUA fails to see how this response addresses the comment and urges the State Board to consider the attainability of the underlying water quality objectives forming the basis for the impossible load allocations in the Klamath River TMDL.

6. *Klamath Project as a “Nutrient Sink”*

KWUA appreciates the Regional Board staff’s attempt to recognize recent studies showing that the Klamath Project is a “nutrient sink.” However, KWUA disagrees with the conclusions and characterization of the concentration levels resulting from the Klamath Project set forth in the Staff Report and Responses to Comments. (See e.g., Responses to Comments, Response C21.) As explained in prior comments, to the extent the analysis relies on surrogate data, the Regional Board must explain the origin of the surrogate numbers, the canals to which the data was applied, and the rationale supporting such use. Further, flow data for one single month (August 2002) does not provide an objective or reasonable estimation of impacts. The Staff Report and Responses to Comments do not provide the requested explanation and rather continue to make conclusions without the requisite support and without providing any justification for use of the surrogate data or reliance solely on 2002 flow data. (See Responses to Comments, Responses C21, KWUA #15, and KWUA #16.) KWUA urges the State Board to ensure that assumptions informing the Basin Plan Amendment are reasonable and based upon credible, objective, and relevant data.

7. *Miscellaneous Issues*

The Responses to Comments also fail to address the following miscellaneous KWUA comments on the CA Klamath River TMDL and Implementation Plan:

- KWUA requested that the Regional Board consider the National Research Council conclusions related to the 2002 fish mortality near the mouth of the Klamath River rather than solely relying on information within the California Department of Fish and Game’s hypotheses related thereto. The Regional Board completely dismissed the comment and suggested that such consideration was unnecessary because of alleged “peer review” of said hypotheses, which review the Regional Board fails to explain or summarize in the document. The existence of peer review is not a legitimate reason to wholly ignore credible evidence within the National Research Council on potential causes for this occurrence. (See Responses to Comments, Response B25.)
- KWUA commented that the Staff Report provided no evidence to support the Regional Board’s inference that the Klamath Straits Drain and Lost

River Diversion Channel (which flow into the Klamath River mainstem in Oregon) increase the temperature in the Klamath mainstem. In response to this comment, the Regional Board restates that Klamath Straits Drain and Lost River Diversion Channel are “upstream sources of heating” but provides no evidence to support that statement. This response is wholly inadequate. To the extent that characterization of Oregon water bodies is deemed necessary in documents related to the CA Klamath River TMDL in California (which KWUA does not believe to be appropriate), such characterizations must be supported by actual evidence. (See Responses to Comments, Response C42 and C98.)

- In response to comments pertaining to the CA Klamath River TMDL’s characterization of the Klamath Straits Drain and Lost River Diversion Channel (which the EPA Lost River TMDL defines as impaired water bodies) as “sources” of pollution, the Regional Board simply dismisses the comment suggesting that KWUA provided no “basis” for these assertions. KWUA disagrees with the response and urges the State Board to consider KWUA’s comments and ensure that any TMDL adopted by the State does not attempt to regulate impaired water bodies as “sources” of pollution. (Response to Comment, Response H-2.)

B. General Prohibition

As explained in the attached prior comments, KWUA is concerned with the proposal to adopt a broad, general prohibition of any “violations” of water quality objectives through the Basin Plan Amendment. The legislature included prohibition provisions in Porter-Cologne to authorize Regional Boards to prohibit discharge of specific types of waste or discharge into certain areas to protect water quality. (See Wat. Code, § 13243.) The legislature has not authorized broad, general prohibitions against any unlawful discharges and should not be used to replace development of regulatory programs to implement water quality objectives or to circumvent notification requirements for bringing enforcement actions against non-compliant individuals. All persons should be afforded appropriate due process rights, including notification regarding non-compliance before being subject to enforcement. As such, KWUA objects to the inclusion of the proposed general prohibition in the Basin Plan Amendment.

In response to KWUA comments to this effect, the Regional Board merely restates the Water Code requirement giving it authority to adopt prohibitions for certain discharges. (Responses to Comments, Response KWUA #17.) KWUA does not object to the notion that the Regional Board has authority to adopt prohibitions; rather, KWUA maintains that the Regional Board has authority to adopt prohibitions as to *specific* types of discharges. (See Wat. Code, § 13243.) Other than to suggest another regional board has attempted to impose the same type of inappropriate prohibition, the Regional Board has provided no support for the use of such prohibition. (Responses to Comments,

Response KWUA #17.). The proposed prohibition is not within the intent of the legislature and does not provide regulated parties any reasonable indication of what types of activities will result in enforcement actions by the Regional Board. KWUA urges the State Board to ensure that any prohibition included within the Basin Plan Amendment relate to *specific* types of discharges that are known to result in violations of water quality standards.


C. CEQA Analysis


KWUA's comments to the Regional Board (attached) raised specific concerns with the Regional Board's CEQA analysis for the Basin Plan Amendment, including the following: (1) the CEQA analysis fails to consider the environmental setting and regulatory setting associated with the Klamath Project; (2) the CEQA analysis does not meaningfully analyze the potential impacts or provide any explanation of how the mitigation measures will actually ensure that no significant impacts occur; (3) the CEQA analysis inappropriately dismisses any likelihood of impacts to agricultural resources resulting from the proposed actions despite its express recognition of likely loss of some prime farmland as a result of the subject actions; (4) the CEQA analysis fails to discuss the possibility of any economic impacts that would ultimately result in the conversion of farmland (or other associated environmental impacts); (5) the CEQA analysis does not consider the potential climate change and greenhouse gas emissions resulting from the cumulative loss of agricultural lands (which offset carbon emissions) resulting from the proposed actions and other reasonably foreseeable projects affecting agricultural resources in the Klamath Basin; (6) the CEQA analysis inappropriately defers analysis of potential impacts and mitigation measures associated with compliance measures (related to TMDLs and the Proposed DO Objective) at Stateline; and (7) the CEQA analysis inappropriately relies on the "short-term" nature of impacts in making significance determinations. The Regional Board wholly ignored these comments and, as such, the CEQA analysis for the proposed actions remains indefensible. (See e.g., Responses to Comments, Responses S16, S19, T15, KWUA # 19, KWUA #20, KWUA #21, Hamstreet-238 [collectively dismissing CEQA comments and deferring actual analysis to a later time suggesting that the Implementation Plan provides flexibility to study alternatives and treatment options and sets up a "process" for future impact evaluation]; cf., e.g., CEQA Guidelines § 15187 [requiring analysis associated with reasonably foreseeable means of compliance associated with a Basin Plan Amendment].) KWUA urges the State Board to consider KWUA's CEQA comments and ensure that appropriate environmental review is circulated for public review prior to adoption of the Basin Plan Amendment.

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Thank you again for your consideration of these comments.

Sincerely,

By: 
for Greg Addington
Executive Director, Klamath Water
Users Association

By: 
for Earl Danosky
Manager, Tulelake Irrigation District

Encls.

cc: Klamath Water Users Association Board of Directors
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