

Via Electronic Mail

July 6, 2009

Mike Napolitano
Environmental Scientist
San Francisco Bay Regional Water Quality Control Board
1515 Clay St # 1400
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Re: Proposed Basin Plan Amendment for the Napa River Sediment Total Maximum Daily Load

Dear Mr. Napolitano:

This office represents Living Rivers Council (“LRC”), a non-profit association, with respect to the proposed Basin Plan Amendment for the Napa River Sediment Total Maximum Daily Load (“TMDL”). I am writing to submit comments regarding the proposed TMDL on LRC’s behalf. LRC objects to the Regional Board’s adoption of the proposed TMDL on grounds that the Board has not complied with the California Environmental Quality Act (“CEQA”), the Clean Water Act, or the Porter-Cologne Water Quality Act.

As you know, LRC has previously submitted voluminous comments on this proposal. Consistent with your May 19, 2009 Notice, these previous comments will not be repeated, except as points of departure for additional comments.

LRC submits herewith letters dated July 2, 2009 from Dennis Jackson (Exhibit 9), and Patrick Higgins (Exhibit 10), which are incorporated herein by reference.

Project Description and Segmentation

1. The Implementation Measures for Sediment Discharges Associated with Vineyards set forth in Table 4.1 of the May 2009 proposed Basin Plan Amendment specify the following “Actions” for achieving the identified performance standards:

“Submit a Report of Waste Discharge² (RoWD) to the Water Board that provides, at a minimum, the following: a description of the vineyard; identification of site-specific erosion control measures needed to achieve performance standard(s)

specified in this table; and a schedule for implementation of identified erosion control measures.

Or

Implement farm plan certified under Fish Friendly Farming Environmental Certification Program or other farm plan certification program, as approved as part of a WDR waiver policy. All dischargers applying for coverage under a WDRs waiver policy also will be required to file a notice of intent (NOI) for coverage, and to comply with all conditions of the WDR waiver policy.⁴

LRC previously commented that the Board must evaluate the environmental effects of the TMDL's adoption of Napa County enforcement of its Conservation Regulations as a performance standard for controlling surface erosion. Apparently in response to this comment, the May 2009 Staff Report Environmental Checklist (at page 114) states:

For reasonably foreseeable projects that may adversely effect special-status species, all are subject to discretionary approval by Napa County (Table 11a). In their review, county staff examines and queries a GIS-based biological database (Jones & Stokes, 2005, Chapter 4 Appendices), which includes three layers: a) land-cover; b) special-status species occurrence; and c) special-status species habitat. The land-cover layer identifies potential locations of sensitive natural communities. The land-cover layer, special-status species occurrence layer, and expert input were used to develop the special-status species habitat layer. Using the above described database, county staff examines the location of a proposed project, and if it overlaps with potential habitat for one-or-more special status species, then the county requires a biological resources evaluation and avoidance of impacts to the extent feasible (Policy Con-13, Napa County General Plan, 2008; County Code, Chapter 18.108.100). In cases where full avoidance is not feasible, effective mitigation measures are required to address impacts (Policies CON-16 and CON-17, Napa County General Plan, 2008).

In addition to county review, we also note that it is the Water Board's statutory responsibility to protect water quality and its beneficial uses. In the course of exercising its duties, the Water Board would either: a) not approve compliance actions that could cause significant adverse impacts to any water-dependent special status species either directly or through habitat modification; or b) require avoidance and mitigation measures to reduce impacts to less than significant levels. Considering the above, we conclude that project-specific impacts to all special status species are less than significant with mitigation incorporated.

In sum, for purposes of both ensuring that the TMDL achieves Basin Plan water quality standards and avoiding significant adverse impacts from implementation of the TMDL, the Regional Board is essentially saying "Trust Us" based on the fact that future projects will either undergo project specific review through issuance of Waste Discharge Requirements ("WDRs"), or will have

to meet conditions specified in a future WDR waiver policy to avoid project specific review through issuance of WDRs.

As LRC has previously pointed out, the problem here is that the Board has not published the future WDR waiver policy. Without the waiver policy, the public cannot evaluate whether the conditions that project applicants will be required to meet to avoid project specific review through issuance of WDRs will be stringent enough to ensure that only projects not needing additional analysis or mitigation measures are allowed within the WDR waiver.

Deferring development of the WDR waiver policy violates CEQA because it segments the environmental assessment of the current TMDL, its performance standards, and the measures necessary to meet these performance standards. All of these components constitute one project. Therefore, at this point, the project description is incomplete.

Increased Peak Flows

2. With respect to the TMDL's inclusion of a performance standard for "attenuating" increases in peak flows resulting from vineyard construction, LRC previously noted its concern that the "'Actions' portion of Table 4.1 and the Staff Report (at page 80) contains disturbing indications that the Board may be prepared to accept, as criterion for whether peak flow increases are deemed 'significant,' a 10% to 15% above pre-project rates, a number derived from ongoing discussions within the Fish Friendly Farming Program."

The Actions portion of Table 4.1 of the May 2009 proposed Basin Plan Amendment deletes the reference to the Fish Friendly Farming Program in footnote 4, but continues to include "farm plan[s] certified under Fish Friendly Farming Environmental Certification Program," and page 80 of the May 2009 Staff Report continues to reference a criterion for whether peak flow increases are deemed "significant" of 10% to 15% above pre-project rates. Therefore, LRC's previous comment remains unresolved.

An EIR Equivalent Analysis of Impacts Is Required

3. By continuing to use the environmental checklist approach, the Board continues to use the equivalent of a Negative Declaration for its compliance with CEQA. Therefore, LRC's previous comment that an EIR equivalent analysis of impacts is required, especially of the impact of the TMDL's adoption of Napa County enforcement of its Conservation Regulations as a performance standard for controlling surface erosion, remains unresolved.

4. In its May 2009 Response to Comments, the Board directly responds to LRC's comment that the Board "must perform an analysis of reasonably foreseeable means of compliance with any TMDL performance standards ... compliance with the County Conservation Regulations (Table 4.1 of the Basin Plan amendment)" stating:

To clarify, we are not requiring the County Conservation Regulations, only acknowledging they are in effect. Please also note that the County Conservation Regulations (Chapter 18.108) do not specify means of compliance, only conditions with regard to effectiveness of erosion control and/or other goals (e.g., protection of drinking water supply, water quality, etc.).

This response defies the language of the TMDL and the facts on the ground in Napa County. The proposed TMDL most assuredly does require compliance with the County Conservation Regulations, stating in Table 4.1: "Surface erosion associated with vineyards: Comply with conservation regulations (County Code, Chapter 18.108)."

Also, the fact that the County Conservation Regulations "do not specify means of compliance" is immaterial. At this point, the "means of compliance" are a matter of readily available historical record. Since the Conservation Regulations took effect in 1991, an entire consulting industry has arisen to enable vineyard owners to comply, and the consultants who populate this industry have standard, indeed routine, methods of trying to achieve compliance. All of this material is public record and available for the Board to review and evaluate.

Submitted herewith are four comment letters (Exhibits 11-14) on the Rodgers/Upper Range Vineyard Conversion project as further examples of readily available information the Regional Board should use to evaluate the environmental impacts of adopting compliance with the Napa County Conservation Regulations as a performance standard.

Thank you for your attention to this matter.

Very truly yours,



Thomas N. Lippe

List of Attached Exhibits

1. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 1. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
2. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 2. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.

3. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 3. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
4. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 4. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
5. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 5. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
6. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 6. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
7. West Yost & Associates, Gerry Nakano, J. J. Westra, October 19, 2005, TECHNICAL MEMORANDUM NO. 7. for Napa County Flood Control and Water Conservation District, <http://www.napawatersheds.org/docs.php?ogid=10610>.
8. Faye, Robert E., November 1973, Ground-Water Hydrology of the Northern Napa Valley, U.S. Geological Survey, Water-Resources Investigations 13-73.
9. Letter dated July 2, 2009 from Dennis Jackson re May 2009 Napa Sediment TMDL BPA.
10. Letter dated July 2, 2009 from Patrick Higgins re May 2009 Napa Sediment TMDL BPA.
11. Letter dated January 21, 2007 from Dennis Jackson re Rodgers/Upper Range Vineyard Conversion Project.
12. Letter dated January 21, 2007 from Dr. Robert Curry re Rodgers/Upper Range Vineyard Conversion Project.
13. Letter dated October 19, 2008 from Dennis Jackson re Rodgers/Upper Range Vineyard Conversion Project.
14. Letter dated October 20, 2008 from Dr. Tom Gaman re Rodgers/Upper Range Vineyard Conversion Project.