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May 7, 2008

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: Comment Letter - Napa River Sediment TMDL

Dear Ms. Townsend:

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 State Water Resources Control Board’s adoption of the proposed TMDL on grounds that the Board has not complied with California Environmental Quality Act (“CEQA”), the Clean Water Act or the Porter-Cologne Water Quality Act.

LRC previously submitted the following comments to San Francisco Bay Regional Water Quality Control Board regarding this proposed TMDL:

- August 15, 2006 comment letter from my office including Exhibits 1 through 32.
- Comment letter dated August 11, 2006 from Dr. Robert Curry submitted as Exhibit 1 to my August 15, 2006 comment letter.
- Comment letter dated August 11, 2006 from Dennis Jackson submitted as Exhibit 3 to my August 15, 2006 comment letter.
- Comment letter dated August 12, 2006 from Patrick Higgins submitted as Exhibit 5 to my August 15, 2006 comment letter.

These comments are still applicable and LRC requests that the State Water Resources Control Board (“State Board”) consider them before deciding whether to adopt this proposed TMDL.

In addition, LRC’s comments include:

- Comment letter dated April 24, 2008 from Dennis Jackson regarding the Napa River Sediment TMDL attached hereto as Exhibit 1;

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- Comment letter dated January 28, 2001 from Dennis Jackson regarding the cumulative effects of water diversions in Napa County attached hereto as Exhibit 2;
- Judgement Granting Permanent Injunction entered in the action entitled *People of the State of California v Forni et. al.*, Napa Superior Court No. 31785 attached hereto as Exhibit 3;
- Comment letter dated May 7, 2008 from Patrick Higgins regarding the Napa River Sediment TMDL attached hereto as Exhibit 4;
- Comment letter dated April 2, 2008 from Patrick Higgins regarding the Division of Water Rights' *Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams* attached hereto as Exhibit 5;
- Comment letter dated May 7, 2008 from Dr. Robert Curry regarding the Napa River Sediment TMDL attached hereto as Exhibit 6.

**1. Neither the Regional Board Nor the State Board Has Complied with the California Environmental Quality Act ("CEQA")**

**a. An EIR Equivalent Analysis of Impacts is Required.**

The State Board is required to comply with CEQA in approving the TMDL. Where impacts of TMDL implementation may be significant, this means preparing a document that is equivalent to an Environmental Impact Report ("EIR"). *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal. App. 4th 1392, 1422-1423. Here, the Staff Report includes an environmental checklist that is functionally equivalent to a Negative Declaration. A EIR level analysis is required, however, because implementation of the TMDL may cause significant impacts.

The proposed TMDL implementation program regarding sediment discharges associated with vineyards specifies, in the "actions" section of Table 4.1, the "identification of specific erosion control measures needed to achieve performance standards ..." (See Resolution R2-2007-0011. Exhibit A, p. 1763.) The Staff Report and the "Sources and Performance Standards" section of Table 4.1 makes clear that these "erosion control measures" include the engineered drainage facilities that Napa County requires, pursuant to its Conservation Regulations, on new vineyards on slopes over 5% to reduce surface soil erosion.

These engineered drainage facilities often cause significant unintended adverse consequences to the environment, including concentrating runoff and increasing peak flows, which increase downstream sedimentation by causing channel incision and bank failures. Indeed, both Dr. Curry and Mr. Jackson have consistently found that the Erosion Control Plans and facilities approved for new vineyards by Napa County pursuant to its Conservation Regulations do not accurately evaluate or adequately mitigate potentially significant impacts associated with increases in runoff from

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projects approved pursuant to the Conservation Regulations. *See e.g.*, Exhibits 7 through 16 and 30 through 32 to my comment letter dated August 15, 2006 to the San Francisco Bay Regional Water Quality Control Board regarding this TMDL. As Dr. Curry explained in his overview critique of the Conservation Regulations in 2000:

The approach of the Napa County ordinances is fundamentally incorrect and cannot protect either public health and safety or long-term land productivity. The existing ordinances seem to assume that by attempting to capture sediments from upland vineyard conversion areas, downstream cumulative effects are reduced to insignificance. This is not correct. Increased upland sediment yields, while important, are less hazardous to Napa Valley than are the changes in runoff timing, volumes, and rates. Increased runoff does have cumulative downstream effects through changes in rates of runoff and frequency of runoff events of a given magnitude. These changes are likely to be a significant factor in changing sediment loads in the main Napa River through changes in stability of its side tributaries. Exhibit 7 to Lippe Comment Letter dated August 15, 2006, p. 1.

Indeed, the cumulative contribution to increased runoff from the installation of engineered drainage facilities designed to bring new vineyards into compliance with the Napa County Conservation Regulations is cumulatively significant. As explained by Dr. Curry:

The recommended structural drainage facilities such as culverts, lined ditches, and drainage channels as applied over large areas of Napa Valley will reduce sediment input from uplands but will exacerbate off-site channel and stream-bed erosion through increased yield of runoff. The public and the fish in the Napa River are directly impacted by the cumulative downstream impacts of increased frequency and duration of flood flows in the main river and its primary tributaries. The sediment addressed by the TMDL is also important but cumulative effects analyses must also include the changed flow characteristics. Exhibit 6 attached hereto, p. 3.

The Staff Report entirely fails to assess the impact of increases in peak flow as a result of the installation of these engineered drainage facilities.

The TMDL implementation program also incorporates the Division of Water Rights' appropriative permit program and its *Policy for Maintaining Instream Flows in Northern California Coastal Streams*. (See Table 5.2, Resolution R2-2007-0011. Exhibit A, p. 1768.) As described by Dennis Jackson, the Division of Water Rights' appropriative permit program causes significant adverse impacts to the beneficial uses of water in the Napa River watershed (see Exhibit 2 hereto) and as shown by Patrick Higgins (Exhibits 4 and 5 hereto), this state of affairs is expected to continue into the foreseeable future. For this reason, an EIR level analysis of this mechanism of impact is required.

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**b. The Staff Report Fails to Identify Mitigation Measures to Reduce Significant Impacts, and Fails to Discuss a Reasonable Range of Alternatives as Required by CEQA and Fails to Consider all Relevant Factors.**

The comment letters by Curry, Jackson and Higgins provide detailed analyses of a number of mechanisms by which human activity adversely effects the beneficial uses of water in the Napa River watershed. Many of these mechanisms are directly related to sediment-caused impacts. These include, without limitation, increases in peak flows that increase downstream sedimentation by causing channel incision and bank failures; trapping of coarse sediment behind and passing fine sediments through dams; reductions in stream flow by impoundments and diversions, both legal and illegal; groundwater withdrawals from stream channel underflow, which exacerbates low flow effects of sediment deposition in channels and many others.

Yet, the Staff Report does not include any discussion of alternative regulatory approaches that would address these mechanisms of impact. In light of the substantial evidence presented by these commenters that the failure to include these regulatory approaches in the proposed TMDL will render it ineffective in achieving basin plan water quality standards and objectives, this failure represents a violation of CEQA's mandate that the Board prepare an EIR equivalent document that discusses a reasonable range of project alternatives. This also represents a failure to identify mitigation measures to reduce significant impacts identified by these commenters. In addition, this represents a failure to consider all relevant factors necessary to achieve the Clean Water Act's and Porter-Cologne Water Quality Act's goals of cleaning up the waters of the nation and the state.

Thank you for your attention to these comments.

Very truly yours,

Thomas N. Lippe