

Basin Plan Amendment to Remove Lake Tahoe Prohibition - No Peer Review Justification

Introduction

Lahontan Regional Water Quality Control Board (Water Board) staff propose to amend the Water Quality Control Plan for the Lahontan Region (Basin Plan) to remove the prohibition against the discharge or threatened discharge attributable to new pier construction of waste to spawning habitat or in areas immediately offshore of stream inlets at Lake Tahoe.

Background

In 1987, the Tahoe Regional Planning Agency (TRPA) adopted its Code of Regulations (Code) to implement land use policies and regulations to protect natural resources in the Lake Tahoe Basin. The Code included ordinances to protect the fisheries habitat by prohibiting the construction of new shoreline structures (i.e., piers, boat ramps, buoys, etc.) in areas considered prime fish habitat. To be consistent with TRPA, the Water Board's Basin Plan incorporated the following prohibition:

“The discharge or threatened discharge attributable to new pier construction of waste to significant spawning habitats or to areas immediately offshore of stream inlets in Lake Tahoe is prohibited.”

The 1987 Code required TRPA to evaluate the impacts associated with the construction and use of structures in fish spawning areas and on tributary mouths, and reconsider its prohibition on constructing new shoreline structures in specific locations. Following the required assessment and after decades of review and evaluation, the TRPA has proposed new shoreline structure standards. Based on previous analysis and partner-agency support, TRPA's proposed shoreline Code amendments will allow new pier development in spawning areas. To remain consistent with TRPA Code, the Water Board proposes to lift the above-referenced prohibition against new pier construction in Lake Tahoe.

Legal Basis for Peer Review

Certain water quality policies adopted pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) are subject to the peer review requirements of Health and Safety Code section 57004 (Health & Saf. Code, § 57004, subd. (a)(1)(B)). Historically, the State Water Resources Control Board (State Water Board), which must approve all water quality control plans revisions, has interpreted Section 57004 to apply to Basin Plan amendments. Health and Safety Code section 57004 requires the scientific portion of Basin Plan amendments to undergo external scientific peer review before the Regional Board takes final action on the amendment. (Id., § 57004, subd. (d).) “Scientific portions of the Basin Plan amendments” mean those parts of the proposed Basin Plan Amendments that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions and that establish a regulatory level, standard, or other requirement for the protection of public health or the environment. (Id., § 57004.)

No Peer Review is required for the proposed Basin Plan Amendment

The proposed Basin Plan amendment to remove the prohibition related to pier construction in fish spawning habitat or in areas offshore of stream inlets does not rely upon any empirical data, scientific findings, conclusions, or assumptions to establish a new regulatory level, standard, or other requirement. Thus, the proposed Basin Plan amendment does not require peer review pursuant to Health and Safety Code section 57004.

The prohibition serves as a land use restriction that is inconsistent with the Water Board's regulatory mandate and is redundant with other Basin Plan prohibitions that protect Stream Environment Zone and surface water resources. The reference to pier development is an artifact of Basin Plan language that incorporated previous provisions of the Lake Tahoe Water Quality Management Plan, adopted pursuant to Clean Water Act Section 208 (208 Plan). Following approval of the Lake Tahoe TMDL and development of an updated regional plan, the TRPA amended the 208 Plan to address inconsistencies between the previous plan and updated policies, rendering the previous plan obsolete. Other Basin Plan amendments have effectively removed outdated 208 Plan references. The prohibition related to new pier development that remained for consistency with TRPA regulations is no longer needed.

De minimis potential affect to spawning habitat and offshore stream inlet areas

Pier piling placement in fish spawning habitat results in a small habitat loss, as the piling directly covers spawning substrates and renders the substrate unusable by fish. Assuming a typical pier requires 20 pilings for support and each piling displaces 0.07 square meters of bottom substrate, an individual pier constructed in spawning habitat has the potential to cover 1.4 square meters (15 square feet) of spawning habitat. Of the estimated 2,041 acres of spawning habitat present in Lake Tahoe, 1,482 acres remain undisturbed. Considering the loss of habitat associated with an individual pier, only 0.0003 acres or 0.00002% of the total undisturbed acres that remain could be impacted by the construction of a single new pier.

Conservatively assuming 100% of the 128 allowable new private piers are located in spawning habitat, up to 179 square meters (1,920 square feet, or 0.04 acres) would be disturbed by new pier construction. This conservative estimate of 0.04 acres of potential spawning habitat disturbance represents approximately 0.003% of the total undisturbed spawning habitat that exists in Lake Tahoe. This estimate represents a worst-case scenario by assuming all of the new piers are located in spawning habitat. In reality, only a fraction of new pier construction would occur in these areas. With regard to percent removal of total habitat, the individual and cumulative impacts to spawning habitat resulting from new pier development are negligible.

Existing regulatory oversight provides adequate protection

New pier development at Lake Tahoe must conform to parcel eligibility and density criteria specified by the TRPA. The only parcels eligible for new piers are littoral parcels (1) where fee titled is owned to at least the high-water mark (6221.9 feet); (2) that can

accommodate a pier outside of specified stream mouth setbacks (ranging between 50 feet-1000 feet); and (3) that are outside of established drinking water intake setbacks unless allowed by permission from the water purveyor. Under TRPA's amended Code, the approval and placement of shoreline structures will be limited by a graduated approval rate of up to 12 new private piers every two years, for a total buildout of no more than 128 private piers along Lake Tahoe's California and Nevada shoreline. Initially, TRPA will permit up to 96 piers over a 16-year period.

The addition of new piers will only be allowed provided the project incorporates all mitigation measures that apply to new pier construction as required by TRPA's proposed shoreline Code amendments and Water Board regulations. Mitigation required by TRPA Code includes complying with design standards, scenic and noise ordinances, designated stream and water intake setbacks, and fisheries habitat restoration requirements. Both TRPA Code and the Water Board Basin Plan require any fish habitat loss (spawning or otherwise) be re-established at a rate of 1.5 to 1. Neither the Water Board nor TRPA will approve new pier projects that fail to incorporate all applicable mitigation measures.

Lastly, new pier construction is subject to stringent Water Board regulatory oversight. The Basin Plan prohibits the discharge of any waste or deleterious material to surface waters, stream environment zones, and to land below the high water rim of Lake Tahoe. Exemptions to these prohibitions require the implementation of appropriate Best Management Practices and the restoration of impacted area in an amount of 1.5 the area disturbed. The Water Board commonly implements these Basin Plan provisions through the Clean Water Act Section 401 Water Quality Certification process, allowing the Water Board the opportunity to review design considerations, assess construction methods, and require needed mitigation of any potential impact.

Conclusion

The proposed Basin Plan amendment do not establish new regulatory levels, standards, or other requirements for the protection of public health or the environment that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions. Therefore, the proposed Basin Plan amendment does not require peer review.