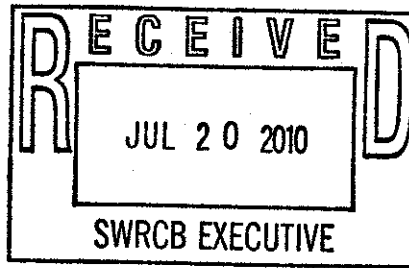


DEPARTMENT OF TRANSPORTATION
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July 20, 2010

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
By e-mail: commentletters@waterboards.ca.gov

ATTN: Ms. Jeanine Townsend

Re: Comment Letter—On the North Coast Board Amendment to the Water Quality Control Plan to Establish Klamath River Total Maximum Daily Loads (TMDLs) and Action Plan Addressing Temperature, Dissolved Oxygen, Nutrient, and Microcystin Impairments in Klamath River

Dear Ms. Townsend:

The California Department of Transportation (Caltrans) appreciates the opportunity to comment on the proposed Basin Plan Amendment (BPA) by North Coast Regional Water Quality Control Board (NCRWQCB) and supporting staff report incorporating a Klamath River Total Maximum Daily Load (TMDL) and Action Plan Addressing Temperature, Dissolved Oxygen, Nutrient and Microcystin Impairments. Caltrans strongly supports efforts to protect human health and achieve the best water quality possible. In addition, Caltrans has been proactive in and committed to meeting TMDL goals within the North Coast Region.

Caltrans submitted comments to the NCRWQCB in August 2009 and still has two main concerns which have not been addressed by the Board. The August 2009 letter is attached for your reference.

FISH PASSAGE:

Caltrans' major concern relates to habitat restoration. Section 303(d)(1)(C) of the Clean Water Act, as described in the State Water Resources Control Board's (SWRCB) water quality control policy, "requires the states to identify impaired waters and to establish the total maximum daily load for certain pollutants impairing those waters". According to the United States Environmental Protection Agency (USEPA), a TMDL is a numerical calculation of the amount of a pollutant that a water body can assimilate and still meet water quality standards. In the immediate case, removal of fish passage barriers has not been shown in the administrative record to improve water quality, increase the number or location of thermal refugia, or set any numerical limits on any pollutant impairing fish migration. Fish passage barriers are neither pollutants nor waste. As previously mentioned in our

Ms. Jeanine Townsend
July 20, 2010
Page 2

August 2009 letter, it is Caltrans' position that the use of a TMDL to restore the habitat is not appropriate unless it establishes numerical limitations on the introduction of pollutants into the waters. The NCRWQCB failed to address this comment and instead responded with the text from SB 857.

FUNDING:

As we also mentioned in our August 2009 letter, Caltrans lacks resources to address the TMDL outside of the funding allocated to applicable highway projects. Unlike local governmental entities, Caltrans does not possess the authority to impose user or utility fees to pay for the TMDL implementation. The NCRWQCB responded with understanding that Caltrans acknowledges its responsibility to comply with state and federal water quality law and regulation, but funding remains an issue. Caltrans requests that the difficulty in funding be acknowledged and that language be added to the TMDL to allow for flexibility in implementation during times of funding challenges.

Caltrans therefore requests that the SWRCB remand back to NCRWQCB the proposed BPA for consideration of our concerns.

Again, thank you for the opportunity to comment. If you have any questions, please contact Joyce Brenner of my staff at (916) 653-2512.

Sincerely,



G. SCOTT MCGOWEN
Chief Environmental Engineer

cc: Joyce Brenner, Office Chief, Program Implementation
Bruce Fujimoto, SWRCB, bfujimoto@waterboards.ca.gov

Attachments:

Caltrans August 27, 2009 Comments letter to NCRWQCB.

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August 27, 2009

North Coast Regional Water Quality Control Board
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403
707-576-2290
707-523-0135 (fax)
By e-mail: kcarier@waterboards.ca.gov

ATTN: Ms. Katharine Carter:

Re: Comments on the Klamath River Total Maximum Daily Loads (TMDLs) and Action Plan Addressing Temperature, Dissolved Oxygen, Nutrient, and Microcystin Impairments in California

Dear Ms. Carter:

The California Department of Transportation (Caltrans) appreciates the opportunity to comment on the proposed Basin Plan Amendment (BPA) by North Coast Regional Water Quality Control Board (NCRWQCB) and supporting staff report incorporating a Klamath River Total Maximum Daily Load (TMDL) and Action Plan Addressing Temperature, Dissolved Oxygen, Nutrient and Microcystin Impairments. Caltrans strongly supports efforts to protect human health and achieve the best water quality possible and offers the following comments to those ends.

OVERALL COMMENT: The maintenance and preservation of the existing highway system is funded through the State Highway Operations and Protection Program (SHOPP). The SHOPP funds demand does not keep pace with the current need set forth in the plan. Very little funding is available to support stand-alone environmental projects. Therefore, most of the measures discussed below would be implemented in conjunction with highway projects.

IMPLEMENTATION PLAN RECOMMENDATIONS: The proposed BPA in Table 4-17 "Klamath River TMDL Implementation Actions" makes three recommendations concerning Caltrans facilities. The first would address the control of excess sediment, the second would address riparian shade allocations and the third would address barriers to migratory fish passage. The implementation plan recommends the State Water Resources Control Board (SWRCB) incorporate the first two recommendations into any revised Caltrans MS4 NPDES permit (Caltrans permit). Comments regarding each recommendation are as follows:

EXCESS SEDIMENT CONTROLS:

The proposed TMDL recommends the State Resources Control Board (SWRCB) incorporate the following five measures into the Caltrans permit to address sediment sources from road and highway facilities under Caltrans control:

1. **Inventory:** Identify sources of excess sediment discharge or threatened discharge and quantify the discharge or threatened discharge from the source(s).
2. **Prioritize:** Prioritize efforts to control the inventoried sediment sources based on, but not limited to, severity of threat to water quality and beneficial uses, the feasibility of source control, and source site accessibility.
3. **Schedule:** Develop a schedule to implement the cleanup of controllable sediment discharge sites.
4. **Implement:** Develop and implement feasible sediment control practices to prevent, minimize, and control the discharge.
5. **Monitor and Adapt:** Use monitoring results to direct adaptive management in order to refine excess sediment control practices and implementation schedules until discharges are reduced to a level that meets the TMDL load allocations and water quality standards.

Caltrans is currently implementing numerous compliance measures discussed in the staff report. Typically, Caltrans does not consider construction on state highways to be completed until there is 70% vegetation coverage. Prior to the establishment of this vegetation, erosion control practices are used to minimize the amount of sediment released from the construction site.

As a basis for its recommendations, the implementation plan cites eroding shoulders, failed culverts and unstabilized (sic) cut and fill slopes as examples of areas where Caltrans' facilities discharge excess sediments. Caltrans repairs, reconstructs or replaces various highways and the associated drainage facilities on an on-going basis, following maintenance best management practices, as needs arise consistent with the Caltrans permit and the Caltrans Storm Water Management Plan (SWMP).

RIPARIAN SHADE ALLOCATIONS:

Caltrans routinely mitigates for the removal of riparian shade through requirements for such mitigation from biological opinions, streambed alteration permits, Section 401 certifications, and CEQA. The proposal may require increased on-site mitigation and result in significant increases in costs if shade replacement requires natural shade.

FISH PASSAGE:

SB 857, codified at Street and Highways Code § 156, requires Caltrans to prepare an annual report to the Legislature describing the status of Caltrans' progress in locating, assessing and remediating barriers to fish passage. In addition, SB 857 directs Caltrans to complete assessments of potential barriers to anadromous fish prior to commencing any project using

state or federal transportation funds and to submit these assessments to the Department of Fish and Game (DFG) to include in the CALFISH database. SB 857 does not require Caltrans inventory the existing barriers nor does it require Caltrans to establish a remediation priority list and time schedule for modifying the barriers as proposed by the water board in the Implementation Plan for this TMDL. Most importantly, SB 857 ties Caltrans' obligations to projects using state or federal transportation funds and does not require Caltrans to remediate barriers independent of a highway project.

In addition to the legal requirements set out in SB 857, Caltrans recently agreed in a letter to the chairman of the Assembly Committee on Transportation (copy attached) to implement additional measures to address fish passage barriers on the State Highway system. The additional measures agreed to by Caltrans are as follows:

1. To include in its annual report a list of programmed projects between January 1, 2006 and the date covered by the annual report, the location of remediations, and a schedule for the remediation of existing fish barriers to the extent that project programming and funding allows.
2. To more broadly define projects to include "any programmed construction action that is State or federally funded, including new construction, rehabilitation, repairs, retrofits, alterations or maintenance projects programmed for funding through either the State Transportation Improvement Program (STIP) or the State Highway Operation and Protection Program (SHOPP)." The limitations of those two programs were discussed in the Overall Comment above.
3. Agreed in the same letter to define "barrier" to mean a "complete or partial anadromous fish passage barrier to any life stage, as defined in the DFG manual, 'Fish Passage Evaluation at Stream Crossings.'"
4. Assess culverts directly affected by projects for potential fish passage barriers and provide relevant remediation data to project design for any project, when the project directly affects a stream crossing on a stream where anadromous fish are or were historically found.
5. Submit the results of project-related fish passage barrier assessments to DFG so it can enter the data into the Passage Assessment database.
6. Develop remediation plans in consultation with DFG.
7. Design remediation elements during the project design phase.
8. Construct remediation elements.
9. Provide notice to DFG where barriers are remediated.

10. Continue assessing nonproject-related culverts through the use of grant funding to assist long-range planning efforts.
11. Work with DFG to jointly identify high-priority, transportation-related fish barriers by July 1, 2010, and annually thereafter.
12. Use available federal funds received pursuant to the American Recovery and Reinvestment Act of 2009 to remediate fish barriers, to the extent permitted under federal law.

The letter also describes difficulties with gaining access to private lands to assess existing fish passage barriers. Unlike DFG, Caltrans does not possess regulatory authority to obtain access to private lands and access is frequently denied. When complete design of a culvert is desired, the assessment of existing culverts is unnecessary because the new culvert will be designed to current standards and will remediate fish passage issues. However, refusal to grant rights of entry restricts Caltrans' ability to completely inventory and assess fish passage barriers, associated with drainage from the state highway system. Despite this hurdle, Caltrans has conducted over 6,000 fish passage assessments and is incorporating remediation measures into project design on projects in the project development phase.

Between the requirements established in SB 857 and the additional measures agreed to by Caltrans in the May 26, 2009 letter, there are sufficient legal and regulatory tools to remedy the fish passage barriers without including a duplicate fish passage barrier requirement in the Basin Plan by means of a TMDL. The SWRCB's Resolution 2005-0050, *Water Quality Control Policy for Addressing Impaired Waters: Regulatory Structure and Options*, page 6 acknowledges the need to avoid redundant regulations where another regulatory agency is adequately addressing a water quality problem. Assuming fish passage barriers present a water quality problem, not evidenced in the administrative record associated with this TMDL, Fish and Game Code § 5901 as amended by SB 857, makes it unlawful in certain DFG districts to construct, or maintain in any stream any device or contrivance that prevents, impedes or tends to prevent or impede, the passing of fish up and down stream. There is sufficient legislative oversight and regulatory authority without including the same requirements in a TMDL.

Even in the absence of fish passage barrier legislation or regulation, the use of a TMDL to facilitate fish passage to thermal refugia is questionable. Section 303(d)(1)(C) of the Clean Water Act, as described in the SWRCB's water quality control policy noted above, "requires the states to identify impaired waters and to establish the total maximum daily load for certain pollutants impairing those waters. According to USEPA, a TMDL is a numerical calculation of the amount of a pollutant that a water body can assimilate and still meet standards." In the immediate case, removal of fish passage barriers has not been shown in the administrative record to improve water quality, increase the number or location of thermal refugia, or set any numerical limits on any pollutant impairing fish migration. Unlike the sediment requirements established by this TMDL, associated with water quality barriers to access to thermal refugia, and not eliminating water quality based barriers to fish migration: fish passage barriers are not pollutants and not waste. Therefore, while Caltrans understands that fish habitat is a beneficial

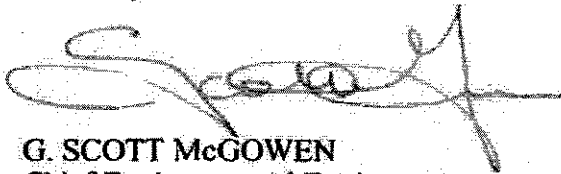
Ms. Katharine Carter
August 27, 2009
Page 5

use of the Klamath River watershed, the use of a TMDL to restore the habitat is improper unless it establishes numerical limitations on the introduction of pollutants into the waters.

Finally, significant resources will be needed to implement the provisions of this TMDL. In the absence of an increase in the state gas tax, subject to legislative and voter approval, Caltrans does not have the resources to address this TMDL outside of the funding allocated to applicable highway projects. Caltrans does not have authority to impose user or utility "fees" to pay for the TMDL implementation.

Thank you for the opportunity to comment. Caltrans strongly supports the goals of the TMDL for the Klamath River Watershed, and we hope that these comments will be addressed before the adoption. If you have any questions, please contact Joyce Brenner of my staff at (916) 653-2512.

Sincerely,



G. SCOTT MCGOWEN
Chief Environmental Engineer

Attachment: Caltrans Director Will Kempton May 26, 2009 Letter to the Honorable Mike Eng

c: Joyce Brenner, Chief, Office of Stormwater Policy Implementation
Jagjiwan Grewal, HQ Liaison NCRWQCB

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"Be more power."
"Be more efficient."

May 26, 2009

The Honorable Mike Eng
California State Assembly
State Capitol, Room 4140
Sacramento, CA 95814

Dear Assembly *Mike* Eng:

Thank you for your letter requesting that the California Department of Transportation (Caltrans) administratively adopt the fish barrier remediation requirements presented in Assembly Bill (AB) 1189 (Skinner, 2009). As you are aware, Caltrans bears a serious commitment to integrate transportation responsibilities and the stewardship of California's natural resources, particularly fish resources, which are an important component of California's heritage and economy. To this end, Caltrans has put forth significant effort assessing the remediating migratory fish barriers on the State Highway System. To date, Caltrans has conducted more than 6,000 fish passage assessments, retrofitted 17 culverts, and incorporated remediation into the project design of roughly 40 projects that are in project development. Caltrans continues to work closely with the California Department of Fish and Game (DFG) to locate, prioritize, and remediate critical barriers in an effort to protect and enhance migratory fish populations in California.

Caltrans will adopt the following requirements contained in AB 1189 (Skinner, 2009) and agrees to:

1. Revise Caltrans' annual report provided pursuant to Senate Bill 857 (Kuehl, 2006) to include projects programmed between January 1, 2006, and the date covered by the annual report, the location of remediations, and a schedule for the remediation of existing fish barriers to the extent that project programming and funding allows.
2. Use the definition of a "project," for the purposes of remediating fish passage barriers, to include any programmed construction action that is State or federally funded, including new construction, rehabilitations, repairs, retrofits, alterations, or maintenance projects programmed for funding through either the State Transportation Improvement Program or the State Highway Operation and Protection Program.
3. Use the definition of a "barrier," for the purpose of fish barrier remediation, to mean a complete or partial anadromous fish passage barrier to any life stage, as defined in the DFG manual, "Fish Passage Evaluation at Stream Crossings."

4. Assess culverts directly affected by projects for potential fish passage barriers and provide relevant remediation data to project design for any project, when the project directly affects a stream crossing on a stream where anadromous fish are or were historically found.
5. Submit the results of project-related fish passage barrier assessments to DFG so it can enter the data into the Passage Assessment Database (PAD).
6. Develop remediation plans in consultation with DFG.
7. Design remediation elements during the project design phase.
8. Construct remediation elements.
9. Provide notice to DFG when barriers are remediated.
10. Continue assessing nonproject-related culverts through the use of grant funding to assist long-range planning efforts.
11. Work with DFG to jointly identify high-priority, transportation-related fish barriers by July 1, 2010, and annually thereafter.
12. Use available federal funds received pursuant to the American Recovery and Reinvestment Act of 2009 to remediate fish barriers, to the extent permitted under federal law.

Caltrans conducts fish passage barrier assessments using the DFG assessment protocol with adjustments, as needed, to obtain rights of entry (ROE) on private lands. ROEs typically take significant time to obtain and often delay assessments due to legal requirements needed to secure and adhere to ROE permits. It is not uncommon for ROEs to be denied by the property owner. Where complete redesign of a culvert is desired, detailed assessment of the old culvert is unnecessary, because the new culvert will be designed to current standards. This ensures that it does not present a barrier to fish passage for all relevant species and life stages according to Caltrans' design manual, "Fish Passage Design for Road Crossings." Specific knowledge of the problems created by the removed culvert is then irrelevant.

Caltrans will continue working with DFG to develop administrative procedures to assure that early notification of programmed projects is provided to DFG and reaches relevant DFG fisheries management staff. Caltrans will provide the data to DFG so that DFG can enter the fish passage assessment data into PAD along with fish passage remediation completion data.

The Honorable Mike Eng
May 26, 2009
Page 3

Caltrans appreciates the opportunity to work with you and Assembly Member Skinner on this important issue. If you have any questions, or need additional information, please contact me at (916) 654-5267, or Jay Norvell, Chief, Division of Environmental Analysis at (916) 653-7136.

Sincerely,



WILL KEMPTON
Director

- c. The Honorable Nancy Skinner, Assembly Member, 14th District
Assembly Transportation Committee
Assembly Natural Resources Committee
Don Koch, Director, Department of Fish and Game
Jay Norvell, Chief, Division of Environmental Analysis