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Karuk Tribe

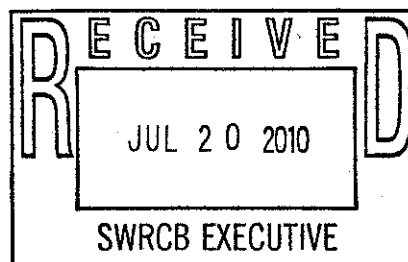


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July 20, 2010

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
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commentletters@waterboards.ca.gov



RE: Comment Letter – Klamath River – TMDLs

Ayukii (Hello) Ms. Townsend,

The Karuk Tribe has been actively involved in Klamath total maximum daily load (TMDL) development for many years. We have presented and testified to the Regional Board, talked and attended meetings with Water Board staff, participated in government to government meetings with tribes and state and federal agencies, and submitted numerous written comments. The technical portion of the Klamath TMDL is solid science and is well done. While we are pleased that the technical portion of the TMDL turned out so well, we have concerns about the implementation plan.

Please accept the following comments on the amendment to the water quality control plan for the North Coast Region (Basin Plan) to establish: (1) site specific water quality objectives for dissolved oxygen in the Klamath River; (2) an action plan for the Klamath River total maximum daily loads (TMDLs) addressing temperature, dissolved oxygen, nutrient, and microcystin impairments in the Klamath River; and (3) and implementation plan for the Klamath and Lost River Basins.

We agree and fully support the staff recommendation to approve the three amendments to the Basin Plan with some adjustments to (3) the implementation plan. The Klamath River is already 303(d) listed for multiple parameters, including a liver toxin. We need to start implementation actions immediately to heal the River and protect human health and welfare including cultural beneficial use.

Our comments on (1) the objective for dissolved oxygen were addressed in Appendix 10: Public Comments and Responses on the Staff Report, Appendices to the Staff Report, and Basin Plan Language for (1) site specific water quality objectives for dissolved

oxygen in the Klamath River; (2) an action plan for the Klamath River total maximum daily loads (TMDLs) addressing temperature, dissolved oxygen, nutrient, and microcystin impairments in the Klamath River; and (3) and implementation plan for the Klamath and Lost River Basins (Public Comments and Responses).

However, we have reviewed the Public Comments and Responses document and found a couple of our key comments were not referenced or specifically addressed in the response to comments that apply to (2) an action plan for the Klamath River TMDL and (3) the implementation plan. The lack of response or acknowledgement makes them inadequate, so we are resubmitting comments on two key issues in the implementation and action plan: the Thermal Refugia Protection Policy and the Agricultural Waiver.

Thermal Refugia Protection Policy

Section 6.5.4.4

According to 6.5.4.4 of the implementation plan for the Klamath TMDL, staff changed the December 2009 draft recommendations for closing suction dredge mining from June 15-September 15 to April 15-September 15. They added "two months on the front end to ensure that the impacts of suction dredge mining during these two months do not compromise the function of the refugia during the critical period". While the increased protection will help protect fisheries, it is not fully protective of the coldwater fisheries beneficial use.

Closing off the refugia for only part of the year (June 15-Sept 15) is not adequate to protect the refugia. With the proposed Action Plan, a miner could be destabilizing, destroying, or altering critical refugia as long as it is not between April 15-September 15. It would still have a negative impact on the refugia even though the fish are not present at that time. Since the habitat defines how effective (size, capacity, etc) the thermal refugia will be, it should not be impacted at all throughout the year. For example, suction dredge mining could occur in the spring in a tributary that is supposed to be protected by the policy. The mining shifts substrates and destabilizes the stream channel. When the rain on snow event occurs in late spring, the channel morphology changes and excessive sediment is washed to the mouth of the creek. This could fill or alter the habitat at the mouth of the creek to eliminate thermal refugia for the following summer. The refugia that was supposed to be protected could essentially be destroyed.

Section 6.5.4.5

The implementation plan and action plan undermines current protections for the Klamath River in regards to sediment discharge.

Pursuant to Section 13243 of the Porter-Cologne Water Quality Control Act, the existing Basin Plan correctly bans waste discharges into the Klamath River in order "to achieve water quality objectives, protect present and future beneficial water uses, protect public health, and prevent nuisance..."¹ In addition, it should be noted that the Klamath River is listed under the Clean Water Act section 303d as impaired by sediment.

¹ Northcoast Regional Water Quality Control Board Basin Plan, 4-1.00.

In recent years, several Tribes and other organizations concerned with Klamath River water quality and fisheries have challenged rules promulgated by the California Department of Fish and Game regarding the recreational practice of suction dredge mining. Suction dredge mining is known to have several negative effects on water quality and fisheries, such as the reintroduction of mercury to the water column², entrainment of fishes and other organisms by the dredge, destabilization of the natural processes that mold stream channels and make for fish spawning habitat, localized reductions in benthic invertebrate populations, spawning in unstable dredge tailings, and more.³

California statutes preclude permitting of suction dredge mining if the activity is found to have a "deleterious effect" on fish⁴. Testimony from fisheries biologists in the Department and in academia assert that dredging indeed has such an effect on fish.^{5,6,7}

In Section 6.5.4.5 of the draft TMDL, Staff essentially postulates that suction dredge miners may be required at a future date to procure NPDES permits in order to comply with the Clean Water Act. Indeed, given the precedents set in other states, this is true. However, then the document goes on to say that if NPDES permits for dredging are issued, dredging will be excluded from thermal refugia but will be allowed in other areas.

The full section reads as follows with bold italic text added for emphasis:

6.5.4.5 Status of Suction Dredging as a Point or Nonpoint Source

The status of a discharge from a suction dredge as a point or nonpoint source is currently undefined in California, but other states have designated it a point source and developed NPDES permits to address these discharges. Should suction dredging discharges be found to be point sources in California, they would be prohibited from discharging in the Klamath Basin by an existing general prohibition against all point source discharges in the Basin Plan (Basin Plan at 4-1.00). The State of California would also be obliged to develop an NPDES permit for suction dredging to regulate it as a point source. To accommodate this

² Mercury Losses and Recovery During a Suction Dredge Test in the South Fork of the American River, California Water Boards, May 2005.

³ Effects of Suction Dredging on Streams: A Review and an Evaluation Strategy, Bret Harvey and Thomas Lisle, Fisheries, v. 23, No. 8, August 1998.

⁴ California Fish and Game Code Section 5653 (b) and 5653.9

⁵ Declaration of Neil Manji, Karuk Tribe and Leaf Hillman v. California Department of Fish and Game and Ryan Broderick, May 6, 2005.

⁶ Declaration of Banky Curtis, Karuk Tribe and Leaf Hillman v. California Department of Fish and Game and Ryan Broderick, May 6, 2005.

⁷ Expert Report of Dr. Peter Moyle, Karuk Tribe and Leaf Hillman v. California Department of Fish and Game and Ryan Broderick, May 6, 2005.

scenario, the Regional Water Board staff propose that the Basin Plan prohibition on point source discharges only apply to discharges associated with suction dredging activities within the buffer areas designated in the Thermal Refugia Protection Policy. *Suction dredging outside of these areas would be permitted by an NPDES permit.*

We fail to understand why the Regional Board feels compelled to "accommodate this scenario" by amending the existing basin plan which already "accommodates this scenario." In other words, our position is that since the Klamath is 303d listed for sediment and in order "to achieve water quality objectives, protect present and future beneficial water uses, protect public health, and prevent nuisance..."⁸ the Regional Board currently prohibits activities that are legally defined as a point source, any activity that may in the future be legally defined by the State Water Board as a point source should be prohibited as well. Certainly, saying that dredging *would* be permitted by an NPDES permit as in the draft section 6.5.4.5 is **predecisional**. Any development of NPDES permits must go through the appropriate rule making procedures and comply with existing environmental laws as applicable before any regulatory body can determine where and when dredging may occur.

An example of this may be seen with suction dredge mining and freshwater mussels. Washington has decided to ban suction dredge mining within 200' of freshwater mussels⁹ due to negative impacts on mussels. In the Klamath River, mussels are considered a bioindicator and a Karuk subsistence food. Mussel beds would not be protected under the proposed thermal refugia protection policy. Suction dredge mining should not be given blanket approval in areas other than those specified in the policy. Therefore, changes need to be made to the implementation plan and action plan to not be predecisional and make general statements on where suction dredge mining should be allowed.

Recommendations:

- To adequately protect thermal refugia, close all areas listed in the policy for the entire year, not just 3 months.
- Strike section 6.5.4.5 from the public review draft.
Alternate: strike text in section 6.5.4.5 from "To accommodate" to the end.
- Strike #5 from p. 11 of the TMDL Action Plan, Thermal Refugia Protection Policy, Policy Directives and Recommendations.
 5. In the event that suction dredge mining is determined to be a point source discharge to the Klamath River shall not apply to suction dredge activities except within the instream buffer lengths designated by this policy.

⁸ Northcoast Regional Water Quality Control Board Basin Plan, 4-1.00.

⁹ Washington Department of Fish and Wildlife. Freshwater Mussels of Similkameen. 2005.

- When the Department of Fish and Game (DFG) starts the CEQA process in California for suction dredge mining, we request that SWRCB be an active participant in that process to ensure that water quality issues are adequately addressed and beneficial uses are fully protected.

Agricultural Waiver

The Karuk Tribe is very concerned about the proposed Agricultural (Ag) Waiver and lack of interim requirements for agriculture. If all goes well, the waiver will be ready the end of 2012. The process could easily get delayed, taking over three years for any action to occur. Therefore, interim measures need to be implemented until the Ag Waiver is in effect. A minimum level of restoration needs to occur in the mid-Klamath Basin in the next three years.

The language for the agricultural waiver has been weakened. An earlier version had more requirements for ag, including requirements for a management plan. Those requirements should be put back into the implementation plan. Requirements for ag in the TMDL have been weakened due to political pressure from the ag industry. It is time to right that wrong and have ag requirements that will noticeably improve water quality in the Klamath Basin.

Riparian areas damaged by agricultural use should have been addressed by the Stream and Wetland Riparian Policy. The Karuk Tribe participated in the scoping and development of this policy to see it lay useless by the wayside. There is nothing fixing these key areas to restore shade, improve bank stabilization, decrease water temperatures, provide critical winter habitat for rearing salmonids, etc. Figure 1 shows a streambank on the mid-Klamath River from four years ago. There is no riparian area, because cows are allowed into this area in the winter. Karuk staff drove by this area 1/26/2010 and was going to take an updated picture. However, it looked exactly the same, so there was no need for a new picture. If there are no interim measures, this spot will most likely still be highly impaired for another 3 years. The beneficial uses dependent on a functioning ecosystem cannot afford to wait another 3 years.

The Scott and Shasta ag waivers do not appear to be effective. In 2009, only 9 male coho returned to the Shasta River and only 77 coho returned to the Scott River. The Shasta River coho are now considered to be functionally extinct by DFG.

The development of the agricultural waiver needs to be inclusive and transparent. The details on the development of the ag waiver are not included in either the implementation plan or the action plan. Tribes have been excluded from ag-related processes in the Scott River, so there is great concern that ag interests will dominate and exclude in future processes.

Recommendations:

- Reinstatement of interim measures for all responsible agricultural interests. Require the restoration of riparian areas by fencing, exclusion, etc. Alternate: if interim measures are not reinstated, then step-up the timeline to have the waiver in place by 12/2011.
- Reinstatement of earlier requirements for ag, including a management plan.
- Roll the Scott and Shasta ag waivers into the new Klamath waiver.
- The Regional Board should facilitate the development of the ag waiver. A diverse group of interests should participate in developing the ag waiver including Tribes, local community groups, and NGO's.

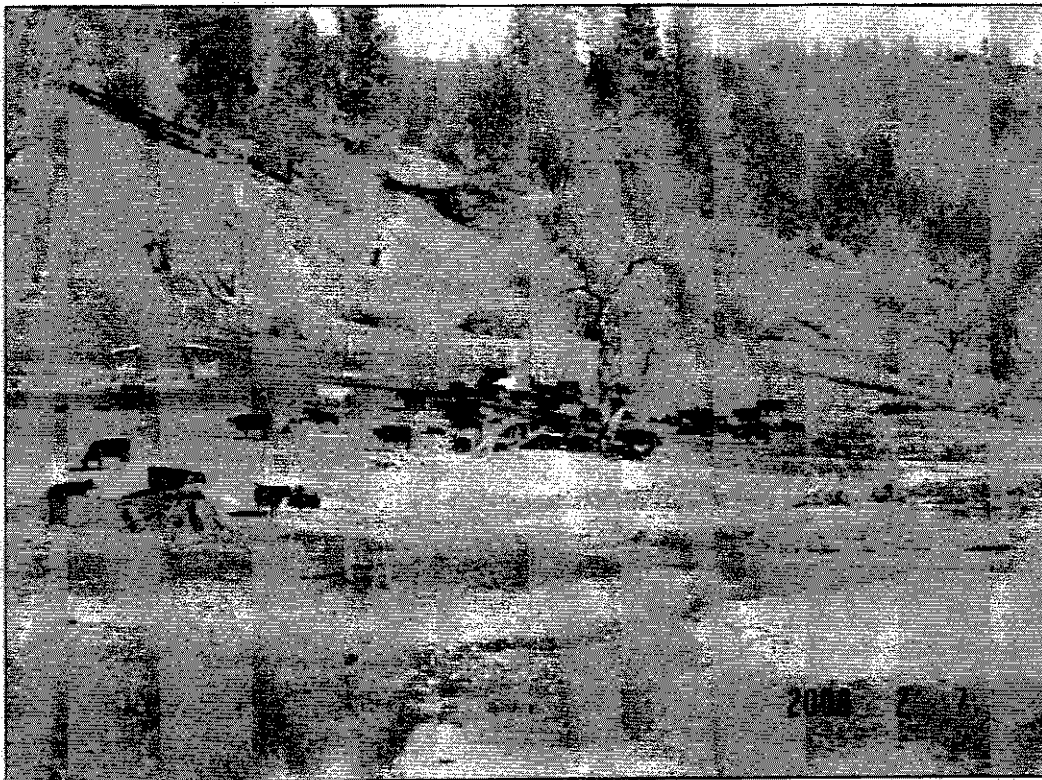


Figure 1. Cows in riparian area on the mid-Klamath River. Photo was taken looking upstream from bridge at Horse Creek by S. Corum, 2/7/2006.

Please contact Susan Corum, scorum@karuk.us (530) 469-3456, Water Quality Coordinator for any questions on the technical comments.

Yootva (Thank You),



Susan Corum
for
Leaf Hillman

Leaf Hillman
Director
Karuk Department of Natural Resources