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Via E-mail



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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Re: Comment Letter—Lake Tahoe 208 Plan

Dear Chair Marcus and members of the State Board,

Thank you for the opportunity to comment on the proposed update to the Lake Tahoe 208 Plan. Our office has been retained by the Tahoe Area Sierra Club ("TASC") and Friends of the West Shore ("FOWS") to review and comment on the proposed plan. Both TASC and FOWS appeared before the California Regional Water Quality Control Board, Lahontan Region and provided comments on the proposed 208 Plan. Those comments included in particular concerns regarding the proposed amendments procedures in Section 10 and concerns that the 208 Plan further destines Lake Tahoe's water quality to continued degradation long into the future. The following provides further details regarding those important concerns.

Initially, TASC and FOWS do not believe that the State Board's reference in the public notice to 40 C.C.R. § 3779(f) is appropriate. That provision only applies to the State Board's consideration of amendments to basin plans or guidelines *adopted* by a regional board. 23 CCR § 3779(f) provides that "[t]he state board, *when considering approval of a regional board's adoption of an amendment to its water quality control plan or guideline*, shall prescribe a comment period of not less than 30 days..." The provision then provides that such comments can be refused if late or were not presented to the Regional Board. Here, as the Lahontan Region's resolution specifies, the 208 Plan amendments have been adopted by the Tahoe Regional Planning Agency ("TRPA"), the designated agency to prepare 208 Plans for Lake Tahoe. *See* Resolution R6T-2013-0010, ¶ 7. *See also* State Board Resolution No. 81-63. Here, although the Regional Board did consider and adopt a resolution supporting the State Board's approval of the TRPA's updated 208 Plan, the Regional Board did not and could not itself *adopt* the Plan. Hence, the comments and procedures referenced by 23 CCR § 3779(f) are inapplicable to the State Board's review of the 208 Plan.

A. The Proposed "Automatic" Amendment Procedures are Contrary to EPA Regulations Requiring State Board and EPA Approval of 208 Plan Updates.

"WQM plans consist of initial plans produced in accordance with sections 208 and 303(e) of the Act and certified and approved updates to those plans." 40 C.F.R. § 130.6(a). All 208 plan

amendments have to be reviewed and certified by the State Board and approved by EPA. 40 C.F.R. § 130.6(f) (“The Governor or the Governor’s designee shall certify by letter to the Regional Administrator for EPA approval that WQM plan updates are consistent with all other parts of the plan”). *See also* Resolution R6T-2013-0010, ¶ 8 (“TRPA’s amended 208 Plan requires certification by the State Water Resources Control Board, the Nevada Division of Environmental Protection, and the United States Environmental Protection Agency to take effect”). Likewise, EPA’s regulations reserve for the EPA Regional Administrator the authority to require updates to a 208 Plan whenever necessary. 40 C.F.R. § 130.6(f) (“Regional Administrators may require that State WQM plans be updated as needed”).

Despite these clear approval requirements, the proposed 208 Plan includes provisions that would first limit and then eliminate review by the State Board and EPA of updates to the Plan. Chapter 10.2 first limits any potential amendments through January 1, 2017, to revisions of five specified portions of TRPA’s Regional Plan. Any Regional Plan changes outside of the five designated sections would automatically amend the 208 Plan unless an objecting person can meet “the burden of providing substantial evidence to the States that the Regional Plan change may reasonably be expected to lead to the degradation of water quality.” 208 Plan, pp. 37-38. And both California and Nevada must unanimously determine that the objecting person has met the burden of proof. *Id.* After January 1, 2017, all changes to the Regional Plan are automatically deemed amendments to the 208 Plan without any further process: “After January 1, 2017, except for amendments concerning subdivisions, relevant amendments made to TRPA’s Regional Plan and/or Code are automatically made to the WQMP.” 208 Plan, ¶ 10.2(E)(4).

In addition to those automatic updates based on changes to TRPA’s Regional Plan, the 208 Plan also provides that any updates or revisions to the long-list of incorporated planning and regulatory documents also will be deemed automatic updates to the 208 Plan. These automatic updates are not restricted by date but apply immediately. The 208 Plan states that:

To ensure timely implementation and, where necessary, timely revision of these components and to improve the functionality and relevance of the WQMP, in lieu of re-adoption of individual components, this WQMP incorporates by reference those documents listed in Table 2. The following components and their subsequent duly adopted and approved revisions and amendments are integral parts of this WQMP. As an example, periodic updates and improvements of the TRPA Best Management Practices Handbook to reflect latest thinking and approaches are automatically incorporated as part of this WQMP and subject to implementation.

208 Plan, p. 5. These incorporated plans include not only the Lahontan Region Board’s Basin Plan and TMDLs, but also local plans prepared by cities, counties, the Forest Service and Caltrans, as well as other TRPA regulations. 208 Plan, p. 7, Table 2. To the extent TRPA intends to include these in the 208 plan, they all must be provided to the State Board and EPA as part of this review process. And, the notion that future changes of any of those plans or policies will automatically amend the 208 Plan improperly attempts to sidestep the State Board’s and EPA’s approval authority.

By purporting to eliminate the State Board's duty to certify and EPA's authority to approve or order updates to the 208 Plan, the 208 Plan is inconsistent with Section 208, 33 U.S.C. § 1288 and EPA's implementing regulations. The 208 Plan cannot, by its terms, attempt to by-pass the requirement that any updates must be approved by the State Board and EPA.

Relatedly, the 208 Plan also proposes to insulate three "Resort Recreation" (RR) areas from any water quality review through the 208 Plan amendment process. Two of the areas are identified, including about 315-acres of land and a third area of comparable size is unidentified but purportedly included in the 208 Plan provisions. Chapter 10 of the Plan then proceeds to exclude whatever new development takes shape in these three very large areas from any need to amend the 208 Plan and hence, any formal review by the State Board and EPA. 208 Plan, § 10.2.B. Like the other 208 Plan provisions discussed above, this effort to exclude significant changes to the Lake Tahoe water-quality landscape from the 208 planning procedures – particularly formal review of amendments addressing those substantial changes to the Lake's watershed – is inconsistent with both the State Board's and EPA's Section 208 approval authority.

It also must be noted that the 208 Plan includes a substantial, apparently typographical, error on page 36 where it states that:

Amendment of the WQMP before January 1, 2017, is automatic upon amendment of the Regional Plan for five topics as noted below, unless the person objecting to amendment proves based on substantial evidence to the States that the amendment to the Regional Plan is reasonably expected to lead to the degradation of water quality. There is no special amendment provision for subdivisions.

208 Plan, p. 36. This would appear to state the opposite of the subsequent provisions which provide that, for the five topics, amendments to the 208 Plan arising from changes to the Regional Plan will occur and only changes to other topics will be automatic unless successfully challenged by any person.

B. The 208 Plan Misstates or Omits Key Provisions of the TRPA Regional Plan and the Basin Plan and is Inconsistent with the California and Federal Antidegradation Policies.

The State Board cannot certify the 208 Plan's consistency with either the Lahontan Basin Plan or the State and federal Antidegradation Policies.

First, the 208 Plan misstates several key provisions of the recent TMDL and its effect on TRPA's Regional Plan. Of particular concern is the 208 Plan's reconstruction of the Lake Tahoe TMDL for the deep water clarity standard to presumably eliminate the Regional Plan's numeric effluent limitations for storm water discharges to the Lake. The 208 Plan claims that:

TRPA's concentration-based standards are not directly comparable with the more contemporary particle number- and mass-based standards used to assess water quality compliance with the TMDL. They are based on two different approaches to measuring water quality. Hence, when a TMDL load reduction plan and program is

in place for a catchment, the TMDL plan and program supersede the TRPA requirements. Where a TMDL load reduction plan and program are not in place, the TRPA concentration-based standards remain in effect. For project review and conformance review of area plans, TRPA will utilize the pollutant load reduction plan standards for TMDL registered catchments or TRPA default standards for projects and activities outside of registered catchments.

208 Plan, p. 14. Contrary to the 208 Plan, the approved TMDL does not supersede the Regional Plan's numeric limitations. Basin Plan, Ch. 5.18. The Regional Plan's numeric limitations apply to stormwater discharges to the near shore waters of Lake Tahoe. Code of Ordinances, § 60.1.3(A), Table 60.1.3-1. As the TMDL documentation makes clear, the deep water clarity TMDL is not designed to address pollution concerns that currently are growing in Lake Tahoe's near-shore waters. The only standard applicable to the Lake's listing as an impaired water is the deep water transparency standard. As a result, the fact that the numeric stormwater limits are not comparable to the clarity TMDL measures is of no moment given that the limitations also serve to protect the Lake's near shore waters. In the response to comments on the TMDL, the Regional Board emphasized that the deep water transparency standard TMDL does not address compliance with standards on the Lake's near-shore zone:

The draft Lake Tahoe TMDL was developed to meet federal requirements under section 303(d) of the federal Clean Water Act, by addressing Lake Tahoe's deep water transparency. Because the Lake is not meeting the deep water transparency standard, it was listed as impaired on the federal 303(d) list. ***The TMDL was developed to specifically address that impairment.*** Because Lake Tahoe's nearshore environment is not yet listed as impaired on the State Water Board's 303(d) list, ***the draft Lake Tahoe TMDL does not specifically address issues in the nearshore.*** However, actions taken to reduce pollutant loads from the four source categories are expected to result in improved conditions in the nearshore because of the reductions in amount of pollutants entering the lake through stormwater in the nearshore.

Response to Lozeau Drury Comments on TMDL, p. 26 (emphasis added)

(http://www.waterboards.ca.gov/lahontan/water_issues/programs/tmdl/lake_tahoe/docs/comments/responses/letter_6.pdf). Importantly, even assuming the expected "reductions" to near shore pollutants eventually occur, that expectation says nothing about whether the water quality standards or uses applicable to near-shore waters will be achieved by those tangential reductions. Because the clarity TMDL does not supersede the Regional Plan's numeric effluent limitations, those limitations are available to enforce to protect near-shore waters.

Similarly, the 208 Plan also is inconsistent with the Basin Plan because it fails to identify or discuss the Basin Plan's long-standing numeric effluent limitations that apply to storm water discharges to the Lake's near shore waters. Basin Plan, p. 5.6-5, Table 5.6-1. The Basin Plan plainly requires that "These limits shall apply in addition to any more stringent effluent limitations for the constituents below, or to limitations for additional constituents, which are necessary to achieve all applicable water quality objectives for specific receiving waters." *Id.* See also Basin Plan, p. 5.6-1 "The effluent limitations at the top of Table 5.6-1 apply to stormwater discharges to

surface waters, and generally to surface runoff leaving a specific project site.” Hence, these limitations regulate discharges to the Lake’s near-shore waters. Despite the clear applicability of these core limits, the 208 Plan makes no mention of them. Indeed, to the extent the 208 Plan’s effort to claim that the TMDL trumps the Regional Plan’s numerical limitations also extends to the Regional Plan’s stormwater effluent limitations (indeed, 4 out of 5 of the numeric limits are the same), the omission of any discussion of the stormwater limitations appears designed to shunt the numeric limits aside rather than implement them as the Regional Board and State Board are duty-bound to do. *See* Water Code §§ 13247, 13146. This omission renders the 208 Plan inconsistent with the Basin Plan and the State Board should require the Plan to include a clear description of the Basin Plan’s numeric limitations and their ongoing role in protecting near-shore waters.

As the Regional Board and Tahoe Regional Planning Agency already have recognized for several years, the near-shore zone of Lake Tahoe is currently not protecting beneficial uses. *See, e.g.* Taylor, K., *Investigation of Near Shore Turbidity At Lake Tahoe* (March 2002) (http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/laketahoe_turbidity_mar2002.pdf); SNPLMA Proposal for Theme 2c (Near-Shore Water Quality) (2007) (<http://www.fs.fed.us/psw/partnerships/tahoescience/documents/SchladowNearShoreProposal.pdf>); McConnell, Joe; Kendrick Taylor, *Spatial Variability of Near Shore Turbidity at Lake Tahoe* (2001) (synopsis) (http://www.agu.org/meetings/fm01/fm01-pdf/fm01_H42G.pdf). *See also* Basin Plan, pp. 5.7-8 (“Human activities in and near the littoral zone can physically alter fish habitat and contribute nutrients leading to eutrophication and the alteration of food webs . . . ; erosion and sedimentation can degrade habitat quality”); *Id.* (“Increased growth of attached algae and rooted plants in the shorezone is the most visible sign of eutrophication to human recreational users of lakes”). Readily available evidence indicates that “[t]here is a strong correlation between elevated turbidity near the shore and development on the shore.” Taylor 2002. *See also* McConnell & Taylor (2004) (“Perimeter surveys (Taylor et al., 2004) quantified turbidity on a basin-wide scale, finding a distinct association between elevated near-shore turbidity and several developed areas”). “The near shore zone is the portion of the lake first impacted by disturbances on shore because the material causing the adverse impact will have the greatest concentration near the source on shore.” *Id.* As Geoffrey Schladow of the Tahoe Environmental Research Center explains:

Conditions in the near-shore zone have degraded over time. Elements of this degradation include elevated turbidity (Taylor et al. 2004)...and increasing concentrations of periphyton (attached algae) on rocks, piers and other hard substrate (Hackley et al. 2004, 2005, 2006).

<http://www.fs.fed.us/psw/partnerships/tahoescience/documents/SchladowNearShoreProposal.pdf>.

Dr. Schladow also emphasizes that, even assuming any benefits accrue from pollution control measures attempting to address clarity issues in the deep waters of the Lake, those measures cannot be assumed to benefit the near-shore:

Recent optical modeling (Swift et al. 2006) suggests that mid-lake clarity is predominantly controlled by the concentration and size distribution of fine, inorganic particles (< 20 microns). The near-shore zone, by contrast, is more biologically productive suggesting that nutrient fluxes and other factors may play a

much larger role in that zone. It therefore cannot be assumed that the same management strategies will work for both the near-shore and mid-lake.

Id. Kendrick Taylor, in her 2002 study, linked degradation of the near-shore from turbidity to development:

The highest turbidity values were in the lake adjacent to Tahoe Keys and exceeded the TRPA littoral zone turbidity threshold. Areas with persistently high turbidity occurred off South Lake Tahoe and Tahoe City. Areas with occasional high turbidity occurred off Incline Village and Kings Beach.

http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/laketahoe_turbidity_mar2002.pdf. See also http://www.agu.org/meetings/fm01/fm01-pdf/fm01_H42G.pdf. Thus, where the Regional Plan, and the 208 Plan by extension, allows for a concentration of new development, the near shore zone would be the portion of the Lake that realizes pollution increases, including potentially excessive discharges of sediment, turbidity, and nutrients that could impair and further degrade recreational uses and other beneficial uses as well as exceed the applicable standards.

By failing to address the near shore pollution that has long been evident in Lake Tahoe, the 208 Plan fails to achieve the goals and intent of Section 208 and violates the California and federal antidegradation policies. Although the clarity of Lake Tahoe in its deep waters is of course critical, the overwhelmingly vast majority of residents and visitors only experience the water quality of the near shore. By ignoring and misrepresenting the numeric limitations that, if enforced, might be able to restore those near-shore waters to their 1968 and 1975 conditions, as is required by the state and federal antidegradation requirements, the 208 Plan is inconsistent with those critical water quality standard components.

Relatedly, the amendment exemption set forth in Chapter 10 of the 208 Plan also includes language that appears inconsistent with the Antidegradation Policies. Prior to January 1, 2017, for a person to show that an amendment to the 208 Plan is required for Regional Plan changes outside the five listed topics, the person “has the burden of providing substantial evidence to the States that the Regional Plan change may reasonably be expected to lead to the ***degradation of water quality***...” 208 Plan, pp. 37-38 (emphasis added). This vague language appears to require that, in order to trigger a 208 Plan amendment, a person must show that a Regional Plan change degrade water quality from current conditions. However, California’s Antidegradation Policy requires no degradation from the Lake’s best water quality since 1968. The federal Antidegradation Policy requires the Board to prevent any degradation beyond the Lake’s best water quality since 1975. To the extent the 208 Plan anticipates maintaining currently impaired water quality and does not allow updates to the 208 Plan even where Regional Plan changes will maintain current impairment of the Lake’s Outstanding National Resource Waters, the 208 Plan is inconsistent with the Antidegradation Policies because it allows for measures that, although improving water quality, still fall far short of restoring the Lake’s high quality waters.

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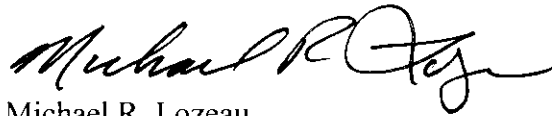
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April 11, 2013
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FOWS and TASC appreciate the State Board's consideration of these comments and look forward to participating at any upcoming public hearing on the Lake Tahoe 208 Plan.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael R. Lozeau". The signature is fluid and cursive, with a large, stylized initial "M" and "L".

Michael R. Lozeau
Lozeau Drury LLP
On behalf of Friends of the West Shore and
Tahoe Area Sierra Club