
North Coast Regional Water Quality Control Board

January 28, 2014

Mr. Neal Ewald
Green Diamond Resource Company
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Dear Mr. Ewald:

Subject: Green Diamond Resource Company's November 21, 2013 letter regarding the Total Maximum Daily Load process for the Upper Elk River Watershed

File: Upper Elk River TMDL

The North Coast Regional Water Quality Control Board (Regional Water Board) received your November 21, 2013 letter on behalf of the Green Diamond Resource Company (Green Diamond) regarding the Total Maximum Daily Load (TMDL) for the Upper Elk River watershed. In your letter you raise concerns about some of the basic assumptions, the scientific basis, and the proposed adoption process for the Upper Elk River TMDL. In addition, you express concerns regarding the implications of this project on the working relationship between Green Diamond and the Regional Water Board.

As to the latter concern, the Regional Water Board is committed to continuing to work collaboratively with Green Diamond in our mutual efforts to protect water quality across your entire ownership, including lands in the South Fork Elk River. Your letter appropriately refers to a solid track record of successful coordination between Green Diamond and the Regional Water Board on many regulatory processes, including the development of Green Diamond's ownership-wide Road Management Waste Discharge Requirements (WDRs) and Forest Management WDRs (FMWDR) (Order Numbers R1-2010-0044 and R1-2012-0087, respectively). These permits are models of sound forest management and water quality protection, and it is appropriate to be proud of them. Further, the Regional Water Board applauds Green Diamond's actions to treat identified erosion sites and sediment sources in the South Fork Elk River.

The Regional Water Board has worked with Green Diamond and other landowners in the Elk River watershed for many years in efforts to identify and control on-going sources of sediment discharge, prevent the development of new sources of sediment discharge, and evaluate remediation options to address the instream-stored sediment pollution. As stated above, we view our collaboration with your company as very fruitful. But, as you know, water quality conditions in the Upper Elk River watershed do not yet attain the water quality standards adopted by the Regional Water Board and contained in the *Water Quality Control Plan for the North Coast Region* (Basin Plan). Regional Water Board staff has developed an analysis of the sediment impairments of the Upper Elk River watershed, which is presented in the Peer Review Draft Staff Report, and discussed in more detail below. In accordance with the requirements of Section 303(d) of the Clean Water Act and using the best available science, staff has analyzed and quantified the sources of sediment in the Upper Elk River watershed, calculated the sediment loading capacity of Elk River, and identified the sediment load reductions that are necessary to attain water quality standards.

As discussed in more detail below, our current proposal to the Regional Water Board is that the TMDL be implemented via a consolidated and revised Regional Water Board-approved waste discharge requirements program for timberlands in the Upper Elk River (Upper Elk River WDR). This approach could serve as the process by which potential revisions to Green Diamond's existing South Fork Elk River Management Plan (SFERMP) are identified and incorporated into a revised plan.

Rather than address each individual issue in your letter, let me respond by explaining the current process for Upper Elk River TMDL approval and implementation and then addressing a few key issues to clarify some misconceptions, all of which we hope will address, or lay out the process to address many of your concerns.

Overview and Status of TMDL Development Process

The Upper Elk River TMDL and implementation strategy has not yet gone through a public review and Regional Water Board consideration process. To date, staff of the Regional Water Board have developed a *Peer Review Draft Staff Report to Support the Technical Sediment Total Maximum Daily Load for the Upper Elk River* (Peer Review Draft Staff Report). Working with the CalEPA Scientific Peer Review Program, the Peer Review Draft Staff Report has undergone external scientific peer review of the scientific portions of the assertions, findings, and conclusions, including the soundness of the scientific knowledge, methods, and practices as presented in the Peer Review Draft Staff Report. In July 2013 staff completed a *Staff Response to Peer Review Comments on the Peer Review Draft Staff Report to Support the Technical Total Maximum Daily Load for the Upper Elk River* (Response to Peer Review Comments document). All of these documents and supporting materials are posted at the Elk River TMDL webpage:

http://www.waterboards.ca.gov/northcoast/water_issues/programs/tmdls/elk_river/

As stated on the Elk River TMDL webpage, staff welcomes informal comments, such as yours, on the Peer Review Draft Staff Report and Response to Peer Review Comments document. Staff is in the process of making revisions to the staff report in response to peer review comments, and developing more completely the implementation and monitoring chapters. This spring, staff will release a Public Review Draft TMDL Staff Report with a formal comment solicitation period.

Many of your comments address technical/scientific issues, as well as policy considerations associated with the TMDL and implementation strategy. Rather than responding issue by issue in this letter, I suggest that it is more fruitful to have staff-level discussions about these issues as my staff develop the Public Review Draft TMDL Staff Report, the draft Upper Elk River WDR, and work with you and your staff to revise the SFERMP. It is our full intent to continue our collaboration with your company and others so as to thoroughly address issues of concern. Further, it is our hope that these issues can be addressed to our mutual satisfaction in the TMDL review and approval process. The process is designed to gather information, provide for open dialog, and ensure a forum to produce a sound and robust TMDL and WDRs. Ultimately, the Regional Water Board will adopt a TMDL and program of implementation which is designed to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible. The process for bringing issues and concerns forward is already underway and is meant to provide opportunities for comments like those you have provided in your letter. I encourage Green Diamond staff to continue to engage my staff in the process, so that we may find the areas of common understanding and focus on those areas where we need to work together further.

Single Action TMDL Adoption Can Incorporate Existing Green Diamond Permit Structure

Pursuant to the Impaired Waters Policy¹, TMDLs may be adopted by the Regional Water Board in any of the following ways:

- A. The TMDL may be adopted with and reflected in assumptions underlying an amendment to the *Water Quality Control Plan for the North Coast Region* (Basin Plan), or another regulation or policy for water quality control that is designed to guide the Regional Water Board in correcting the impairment;
- B. The TMDL may be adopted with and reflected in assumptions underlying a permitting action, enforcement action, or another single regulatory action that is designed by itself to correct the impairment; and,
- C. The TMDL may be adopted with and reflected in a resolution or order that certifies either that:

¹ http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/iw_policy.pdf.

1. A regulatory program has been adopted and is being implemented by another state, regional, local, or federal agency, and the program will correct the impairment; or
2. A non-regulatory program is being implemented by another entity, and the program will correct the impairment.

The Regional Water Board has historically adopted a TMDL and Action Plan as an amendment to the Basin Plan. This is then followed by the adoption of individual control mechanisms (e.g., WDRs) as necessary. This approach has worked well in watersheds with numerous and diverse sources of impairments (see e.g. Klamath TMDL addressing coordination with upstream state and federal agencies, hydroelectric project, fish hatchery, wastewater treatment plant, stormwater, state and county roads, and numerous nonpoint source land uses including agriculture). In the case of the Upper Elk River, sediment control efforts have been underway for a long time and numerous regulatory control mechanisms already exist. In addition, the sources contributing to the impairment are from the same or similar nonpoint source land use activity. While there are multiple discharges of sediment contributing to the water quality impairment of the Elk River, the management-related sources are within the timberlands of the Upper Elk River watershed and are associated with timber harvesting and associated activities, which has been the primary land use of Upper Elk River for the past 150 years. We see no reason to delay the revision of the existing control mechanisms by first amending the Basin Plan. Accordingly, staff has proposed a "single action" approach where the TMDL and its implementation strategy are adopted in a single action by the Regional Water Board. Water Code section 13263, subdivision (i) provides that the regional board may prescribe WDRs for a category of discharges if discharges are produced by the same or similar operations, involve the same or similar types of waste, and require the same or similar treatment standards.

That said, the Regional Water Board has discretion in developing the Upper Elk River WDR that can allow individual dischargers to tailor its own compliance strategy. As proposed, the Upper Elk River WDR will contain both general provisions applicable to all timberland owners, as well as conditions specific to each of the landowners as necessary to augment individual management strategies. The development and approval of the Upper Elk River WDR and supporting TMDL will be an open and public process, with Regional Water Board workshops and hearing(s), formal and informal comment solicitation, and staff-to-staff information sharing meetings.

In your November 21, 2013 letter you assert that the Upper Elk River TMDL would revoke or undo the South Fork Elk River component of the FMWDR. We disagree. As you quote in your letter, the FMWDR acknowledges the upcoming TMDL and identifies a process for updating the SFERMP and/or the FMWDR, as necessary. Specifically, findings #22, 23, and 24 of the FMWDR state:

22. A TMDL for the Elk River, pursuant to Section 303(d) of the Clean Water Act, is currently under development by the Regional Water Board. The TMDL may contain

timeframes or tasks that differ from those contained in the Elk River component of this Order. At such time as the TMDL is adopted, the provisions of the Elk River component of this Order and/or the South Fork Elk River Management Plan will be reviewed and adjusted, as appropriate, to ensure compliance with the TMDL.

23. The sections of this Order and the attached Monitoring and Reporting Program specific to activities in the Elk River were designed to anticipate requirements of the TMDL currently in development, provide site specific requirements for this uniquely sensitive watershed, and establish a feedback loop to ensure adequate implementation of and maximize effectiveness of management measures.

24. The South Fork Elk River Management Plan may be updated, with approval by the Regional Water Board, due to necessary changes from TMDL adoption, changes to the Basin Plan, or adaptive management.

The proposed TMDL is still undergoing revision by Regional Water Board staff, which will be followed by release of a public review draft, a formal public comment period, and Regional Water Board consideration. That said, the Peer Review Draft Staff Report does provide new and significantly more detailed analysis of the Upper Elk River watershed that was not considered when developing the FMWDR. Further, it is important to recognize that the Peer Review Draft Staff Report did undergo external scientific peer review and by-and-large the peer reviewers supported the scientific portions of the assertions, findings, and conclusions, including the soundness of the scientific knowledge, methods, and practices as presented in the Peer Review Draft Staff Report.

Though the specifics have yet to be determined and any revisions will need to be approved by the Regional Water Board, the FMWDR does anticipate updates to the SFERMP, as necessary, pending the approval of the TMDL. It is staff's expectation that these updates to the SFERMP could easily be considered by the Regional Water Board at the same time as the TMDL and Upper Elk River WDR are being considered by the Regional Water Board. This approach would necessitate Green Diamond providing an appropriately revised SFERMP to Regional Water Board staff in a timely manner to remain consistent with the single action approach.

In developing the implementation strategy for the Upper Elk River TMDL, Regional Water Board staff has consistently supported an approach that would utilize Green Diamond's existing management plans and programs as a foundation, and augment them in the Upper Elk River WDR with provisions and conditions necessary to comply with the TMDL. Such an approach has always included the SFERMP contained in the FMWDR. When the FMWDR was developed, it was our mutually desired approach to modify the FMWDR/ SFERMP, as necessary, to address the TMDL when complete. It is a misconception to think we would disregard the SFERMP in developing an implementation strategy under the single action approach. To the contrary, and as per your suggestion, the SFERMP, with any necessary adjustments may be revised as part of the single action adoption framework.

Measures to Address Cumulative Watershed Effects

Your letter contends that there are inconsistencies between findings in the FMWDR and the draft TMDL measures to address cumulative watershed impairments in the Upper Elk River watershed. We do not believe there are inconsistencies. The FMWDR relies on implementation of specific management measures with extensive monitoring to verify water quality beneficial use protection and avoidance of cumulative watershed effects on over 380,000 acres of Green Diamond ownership. The FMWDR further recognized that the uniquely sensitive and significantly adversely cumulatively impacted Upper Elk River watershed may warrant additional protection measures, pending completion of the TMDL, beyond those applied to the rest of Green Diamond's ownership under the FMWDR in order to recover the Upper Elk River from the existing sediment impairments. It is not accurate to say that the Regional Water Board found in its CEQA review and response to public comments on the FMWDR that the SFERMP fully addressed the water quality concerns, including cumulative watershed effects, associated with the South Fork Elk River. Further, it is not accurate to say, as your letter does, that the Regional Water Board found in the documentation associated with the FMWDR that Green Diamond's management measures included in the FMWDR and SFERMP ensure that Green Diamond's operations in South Fork Elk River watershed do not contribute to cumulative effects and that rate of harvest restrictions were not necessary in order for Green Diamond to protect water quality and avoid contributing to cumulative effects in the watershed.

It is true that the Regional Water Board did not include a rate of harvest limit in the FMWDR. However, the SFERMP does include a rate of harvest limit (see page 11), as follows: "Green Diamond will limit the rate of harvest in South Fork Elk River to approximately 75 acres per year, calculated on a 3-year rolling average. The 3-year rolling average provides operational flexibility while maintaining a low annual harvest rate." In response to public comments on the FMWDR, the Regional Water Board did state that the results of the Klein et al. (2012) paper were not sufficient "to modify the way timber harvest activities are regulated in the north coast region." But, as you know, the Regional Water Board has incorporated a rate of harvest limit in at least three forestry permits in watersheds where cumulative watershed effects associated with timber harvesting had been identified, and we do not forego the possibility of proposing such a limit in other settings where it is reasonably appropriate. At this juncture, it is premature to determine how the Regional Water Board will ultimately choose to address cumulative watershed impacts in the Upper Elk River watershed.

While important adjustments to forest management practices have been implemented over time in order to reduce sediment discharges, cumulative impacts have occurred in the Upper Elk River leading to impairment and are ongoing. Accordingly, the Upper Elk River TMDL and implementation program will incorporate adaptive management principles and have a robust monitoring program. This is to ensure that differences in operations in the watershed are recognized and well-accounted for, all of the sources of sediment pollution

are addressed, and the implementation strategy appropriately adapts to new information and findings.

In closing, I believe the process in place for development, adoption, and future implementation of the Upper Elk River TMDL and implementation strategy provides meaningful opportunity for Green Diamond to engage with the Regional Water Board. I recognize that Green Diamond has fundamental and substantive concerns with some of the technical/scientific and policy components of the Peer Review Draft TMDL Staff Report. However, I believe there is both the time and the opportunity for further discussion and resolution of these issues. By having regular dialog and a robust exchange of information and ideas, we can find those areas of agreement and focus on the areas that need further work. We should encourage our staffs to continue to work together cooperatively as we have done in the past and find solutions to the challenging issues before us in developing the Upper Elk River TMDL, its implementation strategy and associated permits, and the recovery of beneficial use impairments in the Upper Elk River watershed.

Sincerely,

Original signed by

Matthias St. John
Executive Officer

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