MEMORANDUM OF AGREEMENT
KLAMATH RIVER/LOST RIVER TMDL IMPLEMENTATION
June 2009

I. Parties to the Agreement

The parties to this Agreement are the Oregon Department of Environmental Quality (ODEQ), the North Coast Regional Water Quality Control Board (NCRWQCB), and Regions 9 and 10 of the U.S. Environmental Protection Agency (USEPA).

II. Stipulations

Whereas,

A. Portions of the Klamath River and Lost River are located in both California and Oregon; and

B. The Klamath River below Upper Klamath Lake to the Pacific Ocean and the Lost River are listed as impaired on both the Oregon and California federal Clean Water Act (CWA) Section 303(d) lists; and

C. The CWA requires the establishment of total maximum daily loads (TMDLs) for water bodies that are listed on the states' CWA Section 303(d) lists; and

D. TMDLs for the Klamath and Lost rivers in Oregon are being developed by ODEQ for approval by USEPA Region 10;

E. The TMDL document to be established by ODEQ will contain a general Water Quality Management Plan (WQMP) identifying point sources, nonpoint sources and sectors, and designated management agencies (DMAs) responsible for certain nonpoint sectors; and

F. TMDLs for the Lost River in California were established by EPA Region 9 on December 30, 2008. The TMDL document for the Lost River in California includes implementation recommendations; however, an implementation plan has not yet been developed. These TMDLs have not been incorporated into the Water Quality Control Plan for the North Coast Region (Basin Plan); and

G. TMDLs for the Klamath River watershed in California are being developed by NCRWQCB for approval by USEPA Region 9 by December 31, 2010; and

H. The TMDL document for the Klamath River watershed in California established by NCRWQCB will contain an implementation plan identifying the responsible parties and enforceable measures to assure attainment of water quality standards and implementation of these TMDLs.

The parties to this Memorandum agree to the following:

III. Roles and Responsibilities

A. ODEQ and NCRWQCB are the lead agencies for implementing TMDLs in their respective jurisdictions and are jointly responsible for:

1. Implementing waste load and load allocations through permits, as appropriate, plans, and other regulatory requirements consistent with the TMDLs, and in accordance with federal and respective state laws and policies;

2. Conducting public awareness or outreach programs as necessary to inform and educate affected stakeholders concerning TMDL implementation;

3. Providing guidance and direction to sources, DMAs and responsible parties regarding implementation of the TMDLs;

4. Enforcing implementation measures and programs, where appropriate, to assure consistent and effective achievement of water quality standards;

5. Coordinating water quality monitoring programs to assess progress towards meeting TMDL allocations, targets and water quality standards;

6. Conducting periodic reviews to evaluate and, where appropriate, revise implementation plans and WQMPs; and

7. Preventing potential conflicts and resolving actual conflicts between Oregon and California implementation measures associated with cross-boundary water bodies.

B. The States will generally use the following frameworks for implementation in their states:

1. California Framework

The State Water Resources Control Board (SWRCB) and the nine Regional Water Quality Control Boards have primary responsibility for the protection and enhancement of water quality in California, including implementation of the federal Clean Water Act. The Regional Water Boards adopt and implement water quality control plans (Basin Plans), which (i) designate beneficial uses for surface and ground waters, (ii) set narrative and numerical objectives that must be attained or maintained to protect beneficial uses, and (iii) define implementation programs that include specific prohibitions, action plans, and policies to achieve the water quality objectives.

The TMDL identifies and assigns allocations to all sources of pollution, including waste load allocations (WLA) for point sources, and load allocations (LA) to nonpoint sources (40 CFR § 130 .2(i)). Pursuant to California Water Code section 13242, a TMDL must be accompanied by an implementation plan, which describes the nature of actions necessary to achieve water quality objectives, a time schedule for the actions to be taken, and monitoring to determine compliance with objectives. The implementation plan may use any combination of existing regulatory tools to restore water quality standards.

Wasteload allocations for point source discharges of pollutants to surface waters require a National Pollutant Discharge Elimination System (NPDES) permit under section 402 of the Clean Water Act. Load allocations for nonpoint sources require the issuance of waste discharge requirements (WDRs) unless otherwise waived (Cal. Wat. Code, §13260). Other existing regulatory tools include individual or general waivers of waste discharge requirements, basin plan prohibitions, cleanup and abatement orders (Cal. Wat. Code, § 13304), cease and desist orders (Cal. Wat. Code, § 13301), and enforcement actions (See e.g. Cal. Wat. Code, §13350). Projects that require federal approval must be accompanied by water quality certification from the State pursuant to Clean Water Act section 401, even in cases where state law is preempted. If the project involves water rights, typically the SWRCB is responsible for issuing the water quality certification.

2. Oregon Framework

ODEQ and its Environmental Quality Commission (EQC) have primary responsibility for protection and enhancement of water

quality in Oregon, including implementation of the CWA for waters within Oregon. The EQC has adopted rules consistent with the CWA and given authority to ODEQ to enforce these rules.

TMDLs are adopted by ODEQ under the CWA, ORS 468B.035 and 468B.110, and Oregon Administrative Rules (OAR) chapter 341, division 42. TMDLs developed by ODEQ include WQMPs that identify the responsible parties required to meet loading allocations established in the TMDLs. These include point sources and sources or sectors of nonpoint source pollution. As is the case in California and other states, point source load allocations are implemented through NPDES permits. For nonpoint sources, federal, state or local government agencies, may be identified as DMAs and assigned the responsibility for developing specific implementation pans for specified nonpoint sectors. Under the rule, the Oregon Department of Forestry is the DMA for the state and private forest sectors and the Oregon Department of Agriculture is the DMA for agricultural lands. In all other cases, the party responsible for nonpoint source or sector may be ordered to develop a specific implementation plan.

Implementation plans developed by a DMA or other responsible party must include management strategies for achieving load allocations, provide a timeline for implementing these strategies, and include performance monitoring and periodic review and revision of the plan. The designation of management agencies and comprehensive implementation of NPDES permits and these plans will result in meeting all allocations in the TMDLs.

C. USEPA Authorities and Responsibilities

1. Pursuant to the federal Clean Water Act, 33 U.S.C. Section 1251, et seq., USEPA is obligated to work with the states to develop and review water quality standards and carry out programs to implement these water quality standards. See generally, Clean Water Act Sections 303 (water quality standards and TMDLs), 319 (nonpoint source programs), and 402 (NPDES program). In addition, Clean Water Act Sections 104(a) and (b) authorize EPA to encourage, cooperate with and render technical services to individuals, including the general public, as well as public and private sector entities to promote the coordination and acceleration of demonstrations, studies and training relating to the causes, effects, prevention and elimination of water pollution.

2. In carrying out its programmatic obligations in the Klamath Basin, USEPA is also charged with complying with other federal statutes and executive orders, including, but not limited to, the federal Endangered Species Act and Executive Order 13175 (November 6, 2000) regarding consultation with tribes.

3. Under federal law, USEPA has obligations to address the impact of discharges in one state that may affect the attainment of water quality standards in another state (CWA Section 401 and 402; see also CWA Section 319(g)).

IV. Points of Agreement

A. All parties agree that coordination of the TMDL implementation measures is crucial in the development of a comprehensive water quality restoration plan for the Klamath River Basin that will lead to these waters meeting their respective state and tribal water quality standards.

B. All parties agree that the following general objectives will guide their processes and resource allocations during implementation of TMDLs in the basin:

1. Maintaining clear communication channels and issue resolution processes;

2. Identifying mutual implementation priorities;

3. Coordinating water quality improvements throughout the basin;

4. Facilitating the targeting of implementation resources to areas of greatest impact or need or both within the basin to promote greater water quality improvements;

5. Providing incentives for innovative and collaborative approaches to improving water quality in the basin;

6. Coordinating planning and implementation of water quality monitoring and assessment efforts;

7. Sharing data and information;

8. Sharing draft work products;

9. Sharing drafts of communication affecting the states' abilities and effectiveness in carrying out the states' responsibilities and fulfilling their commitments;

10. Coordinating stakeholder involvement efforts to the extent feasible;

11. Seeking out opportunities to integrate TMDL implementation with other resource restoration activities in the basin;

12. Seeking to implement opportunities for early pollutant reductions and water quality improvements;

13. Coordinating on implementation activities and TMDL revisions, including jointly considering new and emerging science and accounting for significant physical changes in river conditions; and

14. Meeting water quality standards, water quality objectives, and TMDL allocations and targets in a timely manner.

C. All parties agree to do the following:

1. Identify a representative to work on coordinated Klamath Basin TMDL implementation;

2. Develop a work plan that outlines work products consistent with these TMDLs;

3. Work with the Klamath Basin Water Quality Monitoring Coordination Group and other appropriate entities to develop and implement basinwide monitoring programs designed to track progress, fill in data gaps, and provide a feedback loop for management actions on both sides of the common state border;

4. Work to develop and implement a basinwide water quality accounting and tracking program that would establish a framework to track water quality improvements, facilitate planning and coordinated TMDL implementation, and enable appropriate water quality offsets or trades;

5. Work to develop and implement a joint adaptive management program, including joint time frames for reviewing progress and considering adjustments to TMDLs;

6. Work jointly with common implementation parties (e.g., the U.S. Bureau of Reclamation (Reclamation), U.S. Forest Service, U.S. Fish and Wildlife Service, U.S. Bureau of Land Management, PacifiCorp, and the Klamath Water Users Association (KWUA)) to develop effective implementation plans and achieve water quality standards;

7. In particular, work jointly with Reclamation, KWUA, and the wildlife refuge managers to develop a cohesive water management system in the Klamath Irrigation Project area (Lost River) that protects water quality, consistent with respective state and federal law and policy;

8. Explore centralized treatment options such as treatment wetlands, algae harvesting, and package wastewater treatment systems to reduce nutrient loads to the Klamath River and encourage implementation of these options where feasible; and

9. Provide each other with copies of draft TMDLs for waters within the basins and the draft plans, permits, certificates, and other orders that may be issued to implement these TMDLs. These draft documents will be provided prior to release for public notice purposes, if required, and before final approval, but each agency retains sole authority over the contents and issuance of the final documents within its jurisdictional boundaries.

D. All parties agree to resolve any conflicts at the lowest possible level within their respective organizations and will elevate unresolved issues within their respective organizations to the signatories to the Agreement as necessary to resolve conflicts. Attachment A to this Agreement identifies the agency personnel responsible for identifying and resolving conflicts, beginning at the staff level. The parties may revise Attachment A at any time.

V. Miscellaneous Provisions

A. Nothing in this Memorandum of Agreement is intended to restrict the authority of any party to act as provided by law, statute or regulation.

B. This Memorandum of Agreement does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against the parties, their officers or employees, or any other person. This

Memorandum of Agreement does not direct or apply to any person other than the parties.

C. This Memorandum of Agreement is to take effect upon the signature of the parties and remain in effect for a period of five years. This Memorandum of Agreement may be extended or modified at any time upon the mutual written consent of the parties. Additionally, a party may terminate its participation in this Memorandum of Agreement at any time by providing written notice to the other parties at least thirty days in advance of the desired termination date.

D. As required by the Antideficiency Act, 31 U.S.C. Sections 1341 and 1342, all commitments made by USEPA in this Memorandum of Agreement are subject to the availability of appropriated funds. Nothing in this Memorandum of Agreement, in and of itself, obligates USEPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with Agency budget priorities. The nonfederal signatories to this Memorandum of Agreement agree not to submit a claim for compensation for services rendered to USEPA in connection with any activities it carries out in furtherance of this Memorandum of Agreement. This Memorandum of Agreement does not exempt the nonfederal parties from USEPA policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this Memorandum of Agreement will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

E. All obligations of ODEQ arising under the Memorandum of Agreement are subject to the adequate funds being appropriated by the Legislative Assembly and made available for use. The obligations under this Memorandum of Agreement of the State of California are subject to the availability of appropriated funds. No liability shall accrue to either the State of Oregon or the State of California for failure to perform any obligation under this Memorandum of Agreement in the event that funds are not appropriated.

VI. Signatures of Parties

D. Mitchell Wolgamott 6/5/09

Mitch Wolgamott Date
Administrator
Eastern Region
Oregon Department of Environmental Quality

Catherine Kuhlman 6-30-09

Catherine Kuhlman Date
Executive Officer
California Regional Water Quality Control Board
North Coast Region

Alexis Strauss 26 June 2009

Alexis Strauss Date
Director
Water Division
Region 9, US EPA

6-16-09

Michael Bussell Date
Director
Office of Water and Watersheds
Region 10, US EPA

Attachment A

The following levels will be followed to resolve conflicts among all parties:

1. Steve Kirk, Senior Water Quality Specialist (ODEQ), Matt St. John, Lead, TMDL Development Unit (NCRWQCB), Gail Louis, Environmental Protection Specialist (EPA Region 9), Mark Filippini, TMDL Coordinator, Watershed Unit, Office of Water and Watersheds (EPA Region 10)

2. Eric Nigg, Manager, Eastern Region, Water Quality Division and Gene Foster, Manager, Watershed Management Division (ODEQ), David Leland, Supervising Water Quality Control Engineer, Watershed Protection Division (NCRWQCB), Sam Ziegler, Chief, Watersheds Office, Water Division (EPA Region 9), David Croxton, Manager, Watershed Unit, Office of Water and Watersheds (EPA Region 10)

3. Mitch Wolgamott, Acting Administrator, Eastern Region (ODEQ), Catherine Kuhlman, Executive Officer (NCRWQCB), Alexis Strauss, Director, Water Division (EPA Region 9), Michael Bussell, Director, Office of Water and Watersheds (EPA Region 10)