Law Offices of
THOMAS N. LIPPE, APC

329 Bryant Street
Suite 3D
San Francisco, California 94107

Telephone: 415-777-5600
Facsimile: 415-777-9809
Email:lippelaw@sonic.net

October 20, 2008

Mike Napolitano
Environmental Scientist
San Francisco Bay Regional Water Quality Control Board
1515 Clay St # 1400
Oakland, CA 94612
mnapolitano@waterboards.ca.gov

Re: Proposed Basin Plan Amendment for the Napa River Sediment Total Maximum Daily Load

Dear Mr. Napolitano:

This office represents Living Rivers Council ("LRC"), a non-profit association, with respect to the proposed Basin Plan Amendment for the Napa River Sediment Total Maximum Daily Load ("TMDL"). I am writing to submit comments regarding the proposed TMDL on LRC's behalf. LRC objects to the Regional Board's adoption of the proposed TMDL on grounds that the Board has not complied with California Environmental Quality Act ("CEQA"), the Clean Water Act or the Porter-Cologne Water Quality Act. I attach herewith my May 7, 2008 comment letter to the State Water Resources Control Board and fully incorporate by reference said letter and all of its attachments. If you need a copy of any of the attachments to that letter, please let me know.

LRC also submits herewith letters dated October 19, 2008 from Dr. Robert Curry (Exhibit 9) and October 17, 2008 from Dennis Jackson (Exhibit 10), which are incorporated herein by reference.

Increased Peak Flows

1. LRC appreciates the fact that the revised TMDL includes a performance standard for "attenuating" increases in peak flows resulting from vineyard construction. Nevertheless, the "Actions" portion of Table 4.1 and the Staff Report (at page 80) contains disturbing indications that the Board may be prepared to accept, as criterion for whether peak flow increases are deemed "significant," a 10% to 15% above pre-project rates, a number derived from ongoing discussions within the Fish Friendly Farming Program. LRC objects to the use of this criterion for several reasons.

2. First, this criterion does not account for the changes in the watershed's peak flow response to storm events that result from the cumulative effects of past closely related projects. For example, in watersheds with a number of past projects developed before implementation of this criterion, peak

flows resulting from storm events may be significantly damaging already. In fact, the evidence shows this is true across the entire Napa River basin. Therefore, a 10% to 15% increase over pre-project rates for any given new development will be exacerbating a condition of existing significant effects.

3. Also, this criterion does not take into account the fact that past peak flow impacts have rendered many of the stream beds and banks in the Napa Basin more sensitive to further damage. In other words, even leaving aside the problem described in paragraph 2 above, the assumption must be that only the flood runoff variable is changed. Other variables, such as riparian vegetation, depth of channel incision, and duration of storm flows would have to remain at pre-project levels to allow tolerance for a 15% increase in storm flood runoff without further damage. The problem is that for all of these conditions, the effects are additive and groundwater withdrawal, paving and urbanization, stream incision due to past storm-flow changes and dams on tributaries, loss of riparian protection, etc., etc. all are cumulative. For example, where local groundwater levels are drawn down below the level of the bed of the Napa River, then even a zero percent change in pre-project conditions may be too much to protect the exposed unvegetated channel banks from bank failure. See generally Dr. Curry's comment in Exhibit 1.

4. To the extent the may attempt to justify the 10% to 15% increase over pre-project rates criterion based on the notion that this degree of change is within the natural variability of the watershed response to storm events, this explanation does not account for the fact that you are replacing unknown probability the peak flow response reaching that level in natural condition, with a fair certainty of the peak flow response reaching whatever level is allowed by application of the criterion in a developed condition.

5. The revised Staff Report also references the Napa River Watershed Task Force Report Phase II Final Report. At page 32, this report adopts a "standard of no net increase in post-project peak runoff rates from pre-application conditions" on "sites with high vulnerability." See Exhibit 11.

Project Description

6. The Board apparently plans to grapple with this and similar issues in its development of WDR and WDR waiver guidelines. But this approach violates CEQA because it segments the environmental assessment of the current TMDL, its performance standards, and the measures necessary to meet these performance standards. But all of these components constitute one project. Therefore, at this point, the project description is incomplete.

An EIR Equivalent Analysis of Impacts is Required

7. The updated environmental checklist does not sufficiently respond to the comment I made in my May 7, 2008 comment letter to the State Water Resources Control Board that an EIR equivalent analysis of impacts is required.

8. The revised Staff Report, in Chapter 7, concedes that under CEQA section 21159, the Board must "perform ... an environmental analysis of the reasonably foreseeable methods of compliance" with any performance standards it includes in the TMDL. (Staff Report, p. 108.) The first "performance standard" for vineyards is compliance with the County Conservation Regulations. (Table 4.1.)

9. The Board also concedes that implementation of the TMDL may cause significant effects on biological resources, including sensitive fish and wildlife species. (Staff report 98, 107.) As I argued in my May 7, 2008 letter to the State Board, the Court of Appeal decision in *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422-1423 requires an EIR level analysis where TMDL implementation may cause significant impacts.

10. The new amendments to the Environmental Checklist apparently disclaim any obligation to perform an environmental analysis of the County Conservation Regulations/Erosion Control program ("ECP Program") based on the following assertion:

> although the probability is low, it is possible that some compliance projects could impact rare and endangered biological resources and their habitats. Without the details of specific compliance projects, it is impossible to determine the scope and extent of such impacts. If such impacts exist, however, when reviewing and acting on compliance projects, the Water Board is required to and will protect and minimize impacts to special status species which are beneficial uses of water, as required under the Water Code and the Basin Plan. For impacts to species and habitats not within the Water Board's jurisdiction, other responsible state and federal agencies can and should mitigate the impacts, but until such time as this occurs, such impacts remain significant and unavoidable.

Staff Report, p. 124.

11. The key sentence in that quote is "Without the details of specific compliance projects, it is impossible to determine the scope and extent of such impacts." With this finding, the Board apparently invokes the phrase in section 21159 that states: "the agency shall not be required to engage in speculation or conjecture."

12. I previously submitted Dr. Curry's and Dr. Jackson's comments on numerous Erosion Control Plans ("ECPs") on which EDEN has commented. I submit herewith a number of the actual ECPs on which EDEN has commented. (See exhibits 1 – 8 attached hereto.) These ECPs provide great detail regarding the nature and extent of engineered drainage facilities that are typically used to comply the with the ECP Program, including cross drains, terracing, drop inlets, underground culverts, energy dissipators, etc. Moreover, a day trip to the Napa County Planning Department would provide Board staff with access to files the many hundreds of ECPs approved for vineyard

conversion projects since the program began in 1991. The Board could also access County enforcement records or do its own effectiveness monitoring on past ECPs as part of its EIR level analysis of the environmental effects of the ECP program performance standard.

13. In short, there is a wealth of factual evidence which the Board can use to perform an environmental evaluation of using compliance with the ECP Program as a performance standard for this TMDL. To be sure, the task involves a lot of work, but it is in no way a matter of "speculation or conjecture."

14. Indeed, there are ECP projects in the pipeline at this moment that the Environmental Checklist's cumulative impacts analysis ignores. These include the Rodgers/Upper Range, Stagecoach, Abbot and Abreu ECPs.

15. The Environmental Checklist's cumulative impacts analysis includes only four other projects: "a) The Napa River Flood Control Project; b) The Saint Helena Flood Control Project; c) The Napa Salt Marsh Restoration Project; and d) The Upper York Creek Dam fish passage restoration project." (Revised Staff Report, p. 124.) The omission of the ECP program, which consists of numerous past, present and reasonably foreseeable future projects (including open projects at this time such as Stagecoach, Rodgers, Abbot and Abreu) from the cumulative impacts section is an unfortunate example of trying to ignore the elephant in the room.

16. Moreover, even for the four identified projects, the Environmental Checklist provides no useful information regarding how their effects will combine with the effects of TMDL implementation. All we are told is that "we have considered" the four projects. What information that consideration brought to light is not disclosed. CEQA requires more.

Thank you for your attention to this matter.

Very truly yours,

Thomas N. Lippe

List of Exhibits

1. Erosion Control Plan for the Terra Springs Vineyard Conversion Project.

2. Erosion Control Plan for Atwater Vineyard Conversion Project.

3. Erosion Control Plan for Cort/Goldman Vineyard Conversion Project.

4. Erosion Control Plan for Mondavi Vineyard Conversion Project.

5. Erosion Control Plan for Lewis Vineyard Conversion Project.

6. Erosion Control Plan for Abbot Vineyard Conversion Project.

7. Erosion Control Plan for Stagecoach Vineyard Conversion Project.

8. Erosion Control Plan for Rodgers Vineyard Conversion Project.

9. Comment letter dated October 19, 2008 from Dr. Robert Curry to Thomas Lippe re: Napa River Sediment TMDL.

10. Comment letter dated October 17, 2008 from Dennis Jackson to Thomas Lippe re: Napa River Sediment TMDL.

11. Napa River Watershed Task Force Report Phase II Final Report, pages 30-37.