

**Comment of the Klamath Forest Alliance on the
Preliminary Draft
Staff Report & Equivalency Document for the
Proposed Amendment to the Basin Plan establishing
Sediment Waste Discharge Prohibitions and Action Plan**

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I. General Comments

Comment #1: Need for Action: Reasons why current prohibitions are not working.

The proposed Prohibitions and Action Plan are being undertaken for a specific reason. As stated in the Executive Summary (p.ii) “The current prohibitions have not protected water quality nor have they restored impaired waters. Nearly every stream in the North Coast Region is listed as impaired by sediment.” The ES then lists 4 reasons the current prohibitions are supposedly not working.

We concur that the current prohibitions are not working. We also agree that the reasons listed in the Draft are factors. However, we do not believe that they are the key factors that have resulted in the continued degradation of Northcoast waters as a result of anthropogenic sediment. For one thing, the Basin Plan currently contains a general provision applicable to ALL causes of sediment delivery. Page 3-1.00 of the Basin Plan provides that, when past activities have resulted in violation of a Basin Plan standard, new sources of pollution MUST BE FULLY CONTROLLED. If faithfully implemented, this general prohibition amounts to an absolute non-degradation requirement applicable to all sources of impairment, that is to all industries and entities, in all impaired waterbodies. Faithful implementation of this prohibition will prevent further degradation. However, it will not necessarily result in restoration of beneficial uses impaired by sediment.

The main reason the current system has failed is not acknowledged in the Prohibitions and Action Plan. Current prohibitions have failed in the main because the Board (and to some extent the staff) has lacked the political will to use the authorities it (they) already have under the Basin Plan and state and federal antidegradation policies, to effectively regulate what is by far the dominant land-use which is delivering sediment to Northcoast streams, i.e. logging and associated road systems. Unless and until we acknowledge that the #1 problem is lack of regulatory will and provide a quality assurance plan applied to staff implementation of prohibitions in the Basin Plan solutions will not be effective.

Recommendations:

- 1. Acknowledge up front in the Plan that the #1 reason the current prohibitions have not worked is lack of regulatory will to faithfully and completely implement them.**
- 2. Acknowledge up front that the current prohibitions (especially the “no further degradation” prohibition when a standard has been violated) would be effective in preventing further degradation of impaired waterbodies if faithfully implemented.**

3. Include a quality assurance plan in the Prohibitions and Action Plan or – if a new Prohibitions and Action Plan is not adopted – institute a quality assurance plan with respect to staff implementation of the current prohibition on sediment delivery in impaired watersheds (see Basin Plan @

Comment #2: The proposed Prohibitions and Action Plan will prevent further degradation of sediment impaired waterbodies.

We do not believe the Prohibitions and Action Plan as proposed in the Draft will accomplish this goal. The problems that will result in ineffectiveness are detailed in our specific text comments below. In summary these problems are:

- The Prohibitions and Action Plan do not require the use of best available technology to control, eliminate and minimize sediment delivery.
- The Prohibitions and Action Plan allow active, anthropogenic sediment delivery sources to be ignored during project approval. Instead these sites are supposed to be remediated separately under what is essentially an honor system since no plan submittal or monitoring is required.
- The Prohibitions and Action Plan allows project proponents to escape from their obligations to prevent degradation of water quality based on economic factors. Economics is the main feature of the definition of “reasonable” used extensively in the Prohibitions and Action Plan. Furthermore, proponents are allowed to use any method they want to argue that measures which would protect and restore beneficial uses are “cost prohibitive.” The definition and use of “reasonableness” in the Prohibitions and Action Plan amounts to a de facto assertion that project proponents have a right to do projects even if they further degrade impaired and high quality waters. This contradicts Porter-Cologne which makes it clear that discharges are privileges and not rights (CWC s. 132639(g).

Recommendations:

1. Explicitly require project proponents to use the best available scientific methods of assessment and the best available sediment control technologies.

2. Require that existing sources on the same ownership within the 5th field watershed in which a project is proposed be addressed as part of project planning and approval.

3. Require that the best available methods of assessing the economic and social costs and benefits associated with sediment production and delivery associated with projects and with existing anthropogenic sources be utilized as part of the project proposal and approval process.

Comment #3: The Proposed Prohibitions and Action Plan will protect High Quality Waters.

The Draft claims that the proposed Amendment and Action Plan are “consistent with” state and federal anti-degradation policies and will result in restoration of beneficial uses currently degraded via sediment throughout the vast majority of Northcoast streams. Our analysis of the Draft, however, indicates that the proposed Amendment and Action Plan on balance will allow those responsible for sediment –related degradation to continue to degrade high quality waters –

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particularly via sediment delivery from existing anthropogenic sites. Essentially the Prohibitions and Action Plan will allow high quality watersheds to be degraded by sediment until a point just short of violation of applicable water quality objectives. This amounts to the most permissive interpretation possible of state and federal antidegradation policies.

Such an approach might be acceptable if the majority of Northcoast streams were high quality waters. However, as the Prohibitions and Action Plan admits, this is not the case. Only a handful of Northcoast streams qualify as high quality waters; the vast majority of streams are impaired by sediment. In this situation it is both reasonable and responsible to interpret state and federal anti-degradation policies in the most strict and protective manner.

Recommendation: Federal and state antidegradation policies should be interpreted as prohibiting any sediment discharge into high quality waters unless the proponent can make a clear and convincing case – using the best available scientific and economic assessment technology - that there is an overriding benefit to the people of the state that substantially exceeds the benefits derived from beneficial uses. The burden of proof in this regard should clearly be placed on project proponents.

Comment #4: The Prohibitions and Action Plan will provide better protection of water quality as compared to current provisions of the Basin Plan.

The Basin Plan currently prohibits any additional sediment delivery when a Basin Plan standard has been violated (see Basin Plan @ page 3-1.00). Because most Northcoast water bodies are listed as impaired for sediment this means a project in an impaired watershed can not result in additional sediment delivery. Staff has interpreted the prohibition to require offset of sediment impacts associated with logging and other activities.

The Prohibitions and Action Plan would change this prohibition. It would provide project proponents with a path to approval of projects which will result in additional sediment delivery in watersheds impaired by sediment. Thus – contrary to claims – the proposed Prohibitions and Action Plan would actually result in less protection as compared to current provisions. In addition, because there are no teeth to the requirement that existing anthropogenic sources be cleaned up (e.g. neither a clean up plan nor monitoring is required), the Prohibitions and Action Plan may actually retard recovery. This is so because under current “no additional pollution” requirements, any expected sediment delivery must be fully off-set by fixing existing anthropogenic sources.

The definitions and extensive use of “feasible and reasonable” throughout the Prohibitions and Action Plan also increases the likelihood that if adopted the Prohibitions and Action Plan will result in less, not more, protection. Currently, economics plays no part in the regulation of discharges in impaired watersheds. The Prohibitions and Action Plan, however, provides a potential economic justification for further degradation of impaired watersheds by defining “reasonable” as “not cost prohibitive, extreme, or excessive on an industry-wide basis” (Prohibitions and Action Plan @ page 29).

The results of introducing economics in this manner into the regulatory scheme are ominous because timber companies – the dominant industry producing sediment in our streams – have for the most part cut themselves into a situation in which continued economic survival likely

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requires operations that will result in further degradation. By introducing economic “reasonableness” into the regulatory system, the Prohibitions and Action Plan essentially accepts that a level of economic activity which has resulted in the current widespread sediment impairments can continue.

Furthermore, because the timber industry must compete in a global marketplace, introducing “industry-wide” economic considerations means a race to the bottom in terms of protection of water quality.

Finally, the Prohibitions and Action Plan’s proposed introduction of economic considerations guts the provision of Porter-Cologne which specifically states that discharges into waters of the state are “privileges” not “vested rights” (see CWC s.13263(g)).

Recommendations:

1. Retain the current Basin Plan prohibition on any/all additional sediment delivery within watersheds that are currently impaired by sediment, require that any/all sediment delivery (including from existing anthropogenic sources) in such watersheds be fully offset, and require implementation and effectiveness monitoring and reporting to determine that there has been no delivery or the effectiveness of off-sets.

2. Require that best available technology be used by project proponents to assess potential for sediment delivery and potential sediment savings from proposed off-sets.

3. Require that project proponents use best available technology to control pre-existing anthropogenic sources in impaired watersheds where new projects are proposed at the time the new project is implemented.

4. Do not introduce economics as a consideration when past activities have resulted in non-attainment of a water quality objective. When a watershed has been impaired as a result of past economic activity, proponents should have no expectation that they can continue such activity because they have built their operations around expectation of being able to continue degrading activities.

II. Comments on Specific Prohibitions and Action Plan Text