

## **Response to Comments**

### **Proposed Order No. R1-2013-0004**

**Waiver of Waste Discharge Requirements  
and  
General Water Quality Certification  
for  
County Road Management and Activities  
Conducted Under the Five Counties Salmonid Conservation Program  
In the Counties of  
Del Norte, Humboldt, Mendocino, Siskiyou, and Trinity  
In the  
North Coast Region**

### **Background**

On January 24, 2013, the Regional Water Board conducted a public workshop on the draft *Waiver of Waste Discharge Requirements and General Water Quality Certification for County Road Management and Activities Conducted Under the Five Counties Salmonid Conservation Program In the Counties of Del Norte, Humboldt, Mendocino, Siskiyou, and Trinity in the North Coast Region* (Waiver). The draft Waiver was publicly noticed on January 4, 2013 and the comment period ended on February 19, 2013. The Regional Water Board received three comment letters on the draft Waiver during the public comment period. Comments covered a variety of categories including:

- Comments from county representatives and staff of the Five Counties Salmonid Conservation Program (5C Program) requesting clarification on which road management activities in Finding 2 of the Waiver require 401 General Water Quality Certification and which do not;
- Comments from county representatives and staff of the 5C Program requesting clarification on the application and reporting process for activities requiring Waiver coverage and those activities requiring 401 General Water Quality Certification;
- Comments from county representatives and staff of the 5C Program requesting clarification on the notification process for planned management activities; and
- Comments from county representatives regarding how the draft Waiver TMDL implementation requirements will be implemented in areas where there are existing TMDL implementation plans; and
- Comments from county representatives expressing concern about the potential for increased workload and resource requirements for Waiver implementation, as well as the requirement for all counties to obtain permit coverage for road management activities.

Substantive comments received during the comment period are summarized below, followed by Regional Water Board staff response.

**Comments received during the January 4 – February 19, 2013 Comment Period**

Mark Lancaster  
Brian L. Morris  
Howard Dashiell

February 19, 2013  
February 19, 2013  
February 19, 2013

**Comment:**

“The intent and goal of the “waiver” as expressed is positive. However the written document presents some concerns. One concern is how this “waiver” will avoid duplicative implementation of regulatory requirements for reporting purposes. Existing reporting for the Garcia TMDL and NPDES programs consume significant County Resources and it appears to us that the new “waiver” overlaps these two program areas, with each having different reporting requirements.”

**Response:**

The reporting done under the Garcia TMDL may serve as a substitute for the reporting required under the 5C Waiver in that watershed. This approach may apply to watersheds with an already-existing monitoring and reporting program that has been approved by the Regional Water Board’s Executive Officer. Regional Water Board staff encourage discussion on how to utilize existing regulatory requirements to meet the needs of the 5C Waiver in order to avoid duplication and realize regulatory efficiencies.

**Comment:**

The Counties have read the proposed waiver but still do not fully understand which road activities are proposed to be covered under the waiver/certification, which activities require separate 401/WDRs and which are not applicable at all. The waiver references sections of the Roads Manual in order to efficiently include several types of activities within the scope of this waiver. However, how those activities will be viewed and scrutinized by regulatory water board staff is still unclear. Counties believe that several activities (e.g., new paving, chip sealing, or grindings placement; outsloping that restores natural hillslope runoff processes; bridge maintenance not regulated under other provisions of Clean Water Act) do not result in discharges and do not require notification or a waiver/certification. However, there isn’t a clear understanding that water board staff shares that interpretation. Clearly there are activities that the Counties and water board staff agree will require 401 and/or waiver/certification processes such as new road construction, most temporary stream diversions, and currently regulated bridge maintenance.

Presently counties do not get 401 permits for these activities unless they are tied to projects in jurisdiction of the Waters of the U.S. or State, as determined by the Army Corps of Engineers (ACOE), and the 401 is always tied to the ACOE 404. One could interpret the list of activities above to mean that under the “waiver,” counties who volunteer to participate, could be subject to a 5 day prior notice of activities, \$144 reduced fees, and

subsequent monitoring and reporting for each activity. There is no indication as to the determination of “jurisdiction”; however, some activities are obvious. When related to bridges, which generally occur in jurisdiction locations, counties already have to get permits. Furthermore, activities in corporation yards dealing with equipment already have spill prevention and response procedures under existing measures to protect against hazardous material discharges subject to law.

The concern is that the common activities such as shoulder blading, ditch shaping and cleaning, for example, would be subject to notice and reporting. Culvert maintenance, including culvert cleaning, culvert improvement and repair is a mixed issue. Larger culverts (as determined by ACOE, Water Board, or DFW are jurisdictional waters (commonly flowing streams) and get permits. Whereas ditch relief culverts or dry wash gulches high in the watershed do not get permits and are not held to be jurisdictional by ACOE or CDF&W, but counties do sometimes get clarification when in doubt. Based on the “waiver,” it appears that any and all of these activities might be interpreted as subject to notice, reduced fees and reporting/monitoring.”

**Response:**

The proposed Waiver has been revised to clarify which activities are considered to be “Routine Maintenance Activities” and which ones are considered to be “Road Project Activities” (see Covered Activities on page 15 of the revised proposed Waiver).

Routine Maintenance Activities include activities that are conducted as part of routine annual road maintenance, generally do not take place within the channel of a watercourse, and have a low likelihood of impacts to water quality. Routine maintenance activities rarely, if ever, require an ACOE 404 permit, noticing and fees. Activities conducted as part of routine annual road maintenance include those listed below.

1. Grading practices including shoulder blading and rebuilding, erosion repair, and ditch shaping and cleaning;
2. Road surfacing and dust abatement including road surface repair, water drafting;
3. Vegetation management including mowing and cutting of vegetation, invasive weed abatement, and tree removal;
4. Ditch relief culvert cleaning, ditch relief culvert location selection and installation;
5. Winterizing roads;
6. Soil disposal including disposal site maintenance, disposal site closure, and stockpile maintenance;
7. Maintenance yard housekeeping practices including building and yard maintenance, vehicle and equipment maintenance, and material use and storage;
8. Emergency maintenance; and
9. Snow and ice removal including sanding, and use of de-icing and anti-icing chemicals.

Road Project Activities include projects that are generally not considered to be routine annual road maintenance, that may take place within the channel of a watercourse or are directly connected to a watercourse, and that may require a permit from the Army Corps of Engineers pursuant to section 404 of the Clean Water Act (CWA§404 permit). The proposed Waiver provides a streamlined, reduced fee 401 Water Quality Certification permit process when an ACOE 404 permit is required. Regional Water Board staff, as well as the counties participating in the 5C Program, may add or remove additional types of activities to these classifications, subject to approval by the Regional Water Board Executive Officer. Activities conducted as part of Road Projects include those listed below.

1. Channel maintenance;
2. Low water crossing maintenance;
3. Watercourse crossing culvert maintenance including culvert cleaning, culvert improvement and repair, culvert replacement, and temporary stream diversions during in-stream projects;
4. Bridge drift removal; and
5. Treatment of legacy sites involving repair, upgrading, replacement of watercourse crossings, road outsloping and rolling dip installation, hydrologic disconnection of inside ditches and installation of ditch relief culverts, and reshaping cutbanks.

Road Projects may involve several different activities and several different work locations.

**Comment:**

“There is an ever-present concern about the level of monitoring and nonpoint source treatment implementation that the Water Board expects and the Counties can deliver given their ever-dwindling budgets, staff, and resources. Any additional non-maintenance tasks and expenses will impact crew’s abilities to maintain infrastructure and proactively enhance road drainage. Most of the significant pro-active work to improve water quality and fish passage (presented at the recent meeting) has relied on grant funding, which is competitive and cannot be relied upon in order to meet regulatory requirements.”

**Response:**

The Monitoring and Reporting Program (MRP) for the proposed Waiver outlines the types of monitoring required for road management activities. The monitoring requirements are based on the work that counties are already performing as participants in the 5C Program. There are four types of monitoring outlined in the 5C Road Manual: 1) Implementation, 2) Effectiveness, 3) Photopoint, and 4) Project. Monitoring is to be conducted at a minimum level for all projects and activities.

There is an expectation that each 5C County will make reasonable progress towards completing road inventories and remediating legacy sediment delivery sites. Finding 3 of the proposed Waiver acknowledges that economic hardship has beset the counties and requires consideration in the assessment of reasonable progress.

**Comment:**

There is confusion about what, or how extensive, the notification should be and the process to be used. 5C staff's current understanding is that Counties propose submitting a single, county-wide list of "planned" maintenance activities at the beginning of each year. They would then address unplanned maintenance needs via a revised list submitted in July of each year, which would summarize any unplanned maintenance done, changed, or scheduled for the remainder of the year. This would result in a single, or two, notifications per County per year. It is our understanding that this notification would also serve as part of the TMDL Implementation Plan monitoring reporting requirements. Another ambiguous area is when a separate 401 application would be required. Based on our understanding of the order, the only time that the 401 application would be used is when there is a project that requires a 401 but not a 1600. This is anticipated to be the case only in very rare situations."

**Response:**

The proposed Waiver has been revised to provide a clear procedure for counties to enroll routine maintenance activities under the Waiver and to apply for 401 General Water Quality Certification for road project activities (see page 17 of the revised proposed Waiver). To receive Waiver coverage for routine road maintenance, the county shall submit to the Regional Water Board Executive Officer a Notice of Intent (NOI) of proposed Waiver signed by a county roads Superintendent or their authorized representative (Attachment A). The NOI certifies the county's intent to comply with conditions of this Waiver and to implement the 5C Program. Coverage of Routine Road Maintenance Activities will be valid for the life of this Waiver, provided the county continues to meet applicable Waiver conditions, including monitoring and reporting.

For counties seeking coverage for Road Projects, the revised application process has been developed and is as follows:

1. By March 1 each year, counties seeking Waiver coverage for Road Projects shall submit to the Regional Water Board a list of the planned Road Projects for which they are seeking Waiver coverage for the upcoming calendar year.
2. Each project in the list shall, at a minimum, contain the following information:
  - a. The Project Name.
  - b. A description of where the Project is located. Include such features as the watershed, the nearest river or creek, and any useful reference points. A map with sufficient detail so as to easily identify the project's location is acceptable. Maps may contain more than one project, provided each project is clearly labeled.
  - c. An indication of whether the Project will require the General 401 Water Quality Certification contained in this Waiver.

- d. A description of the project with enough detail to provide an overview. For projects requiring the General Water Quality Certification, the General Water Quality Certification or LSA 1602 application shall suffice for the project description.
  - e. The anticipated Project start and end date.
  - f. The name, mailing address, email address, and phone number for the Project lead staff.
3. For Road Projects under Order No. R1-2013-0004, requiring the General Water Quality Certification, the County shall submit a completed application for each road project for *General 401 Water Quality Certification and/or Waste Discharge Requirements (Dredge/Fill)* (General Water Quality Certification application; Attachment B) to the Regional Water Board. Road projects may have multiple sites and involve multiple activities.
  4. Only one application is needed for each Road Project. Applications for Road Projects with multiple work sites will need to include information on the work to be done at each site.
  5. If the discharger is required to complete and submit a California Department of Fish and Wildlife *Notification of Lake or Streambed Alternation* application (LSA 1602 application) for the proposed project, the LSA 1602 application may be substituted for the General Water Quality Certification application.
  6. If the General Water Quality Certification application, or LSA 1602 application, is complete the Regional Water Board shall accept or deny it in writing within 30 days from its receipt of the application and application fee. Certified mail may be used to confirm the delivery date of the application and the initiation of the 45-day review period. The county will be notified by mail of receipt of the application and application fee.
  7. The Executive Officer has the discretion to adjust timeframes at the written request of the Discharger or authorized representative.

By utilizing the above process, Counties will have a reduced number of applications to fill out, and have an established timeline for acceptance and approval of applications for Road Projects.

**Comment:**

“Before taking any action that will potentially terminate the 5C program, the Regional Board should develop the mechanism that will be used to address county road department activities outside of the 5C area. That sequence would allow the counties to understand the alternate of not agreeing to work under the 5C waiver.”

**Response:**

The Regional Water Board staff would likely follow the same process, that is, develop a Waiver or Waste Discharge Requirements that rely on well-established BMPs and methodologies to provide the basis for permit coverage.

**Comment:**

“Any future changes in the 5C Memorandum of Agreement, Roads Manual, or other elements of the 5C program would now effectively require approval from the Regional Board. The Regional Board is thereby asserting authority over matters that would be beyond its jurisdiction if not for the counties’ “voluntary” submission to the waiver.”

**Response:**

In the past, the 5C program staff have requested input from the Regional Water Board to determine if the practices, procedures, and BMPs within the 5C Roads Manual would meet the Water Quality Objectives contained within the Basin Plan. Though a county may request that the Regional Water Board review any future modifications to the 5C Roads Manual and/or 5C Program, Regional Water Board approval of any such modifications is not a mandatory condition of the Waiver.

Water Code Section 13260(a) requires that any person discharging waste or proposing to discharge waste that could affect the quality of the waters of the state, other than into a community sewer system, shall file with the appropriate regional water board a Report of Waste Discharge (ROWD) containing such information and data as may be required by the Regional Water Board. Under Water Code Section 13269, the Regional Water Board may waive the requirements of Water Code section 13260 for specific types of discharge if the Waiver is consistent with the Basin Plan and in the public interest. Road maintenance and projects activities that follow the 5C Road Program meet the intent of Section 13269. Participation in the 5C Program and coverage under the 5C Waiver is voluntary. Counties can pursue individual Waste Discharge Requirements (WDRs) for discharges or proposed discharges that could affect the quality of the waters of the state rather than enroll for coverage under the 5C Waiver.

**Comment:**

“The 5C program has made tremendous progress in terms of the data collected through DIRT and the implementation of best management practices and habitat improvements. The Regional Board’s appropriation of the program threatens its continued existence, at least for Siskiyou County.”

**Response:**

The proposed Waiver allows the Counties to continue to utilize an existing, well know program, with well-established methodologies to meet the requirements of State water law and policy.

The proposed Waiver states that Del Norte, Mendocino and Trinity Counties have completed the DIRT inventories on all of their roads. DIRT inventories continue to be performed in Humboldt and Siskiyou counties to identify existing sources of road-related erosion and prioritize treatments. A total of 2,455 miles of county roads have been inventoried, largely with grant assistance. It is envisioned that DIRT inventories within the 5C Counties will continue until all of the counties' roads are complete.

Waiver condition 3 states that, “[e]ach 5C County shall actively address legacy sediment discharges and/or threats to water quality. Sediment delivery sites must be inventoried, prioritized, and scheduled for remediation. There is an expectation that each 5C County will make reasonable progress towards completing road inventories and remediating legacy sediment delivery sites.” This condition meets the requirements of State Nonpoint Source Policy, and the State Water Board Resolution No. 68-16 Statement of Policy with Respect to Maintaining High Quality of Waters in California (Resolution No. 68-16). The Regional Water Board believes that by utilizing the existing 5C Program and Manual, the counties will be spared duplicative and redundant permitting.