

North Coast
Regional Water Board Staff
Response to Public Comments
on the
Scott River TMDL Conditional Waiver
Of
Waste Discharge Requirements
(Order No. R1-2012-0084)

September 5, 2012

INTRODUCTION

During development of the *Scott River TMDL Conditional Waiver of Waste Discharge Requirements* (Scott River TMDL Waiver or Waiver), comments were received from a number of interested stakeholders. This document presents the North Coast Region Water Quality Control Board (Regional Water Board) staff response to the public comments on the proposed Scott River TMDL Waiver (Order No. R-1-2012-0084). Comments and the associated staff response are presented below.

Attachment 1 contains a copy of the written comment letters received by Regional Water Board staff during the 33 day public comment period which was open from July 12, 2012 to August 13, 2012. Summaries of verbal comments provided at the August 2, 2012 public workshop are also included in this staff response to public comments document. The August workshop was held in Fort Jones to facilitate public comment by local landowners and other interested stakeholders residing in and near the Scott River watershed.

COMMENTS AND RESPONSES

Comment 1:

Regional Water Board staff received comments regarding the efforts that are necessary to comply with the terms of the waiver, including comments that landowners will have to spend time and money to comply with a new program, and that the waiver threatens their livelihood.

Response 1:

The Scott River TMDL and Scott River TMDL waiver program have been in place since 2006. There are no blanket requirements in the program that require the expenditure of time or money, per se. However, some landowners may need to expend time and resources to address water quality concerns related to the management of their operations. In these situations staff attempt to help landowners find assistance. However, all California landowners are responsible for controlling pollutant discharges from their property.

Comment 2:

Regional Water Board received comments regarding the general approach to the waiver, including comments that the waiver doesn't hold anyone accountable, that there is no process to determine who is and isn't complying, and that the waiver process assumes that people are harming water quality without proof to support it.

Response 2:

The approach this waiver process follows assumes that all landowners are doing their part to protect water quality, rather than assuming the opposite. At the same time, it establishes criteria Regional Water Board staff will follow as they systematically verify compliance with water quality regulations. The [*Staff Report for the Action Plan for the Scott River Watershed Sediment and Temperature Total Maximum Daily Loads*](#) identifies the lack of vegetation in Scott Valley riparian zones as a key factor preventing attainment of water quality standards in the Scott River watershed.

Comment 3:

Many of the comments received by Regional Water Board staff relate to the terms of waiver coverage. These comments addressed the provision requiring reasonable access to properties upon Regional Water Board staff request, the absence of groundwater provisions, the reliance on landowners to self-regulate their activities, discharges associated with acts of nature, and riparian buffer requirements.

Response 3:

The provision in the waiver requiring landowners to allow access to Regional Water Board staff upon request (with reasonable notice) is an important element of this waiver program. Without access to properties, Regional Water Board staff would be unable to verify that a given landowner is controlling sediment discharges and sources of elevated water temperature, which are the fundamental requirements of the waiver. This element of the waiver has been in place for the past 6 years and there have been no conflicts resulting from this element of the waiver.

There are no waiver conditions related to groundwater pumping. It has been suggested that the waiver should include a moratorium on the issuance of additional well permits until a groundwater management plan is developed and implemented, but such an action is outside the authority of the Regional Water Board.

Regional Water Board regulatory programs commonly have elements that could be described as self-regulation. The approach taken in this waiver is:

- identify management principles that control sediment discharges and elevated water temperatures,
- extend waiver coverage to those that are controlling sediment discharges and elevated water temperatures,
- systematically meet with landowners, based on impacts on or risk to water quality, and characterize their compliance status,
- require a plan to address water quality concerns in cases that warrant control of sediment discharges and sources of elevated water temperature.

Although this approach relies on landowners to address water quality concerns through their own design, it is still a regulatory program, and is consistent with the approach taken by the Regional Water Board in addressing a wide range of responsible parties. Regional Water Board staff believes the approach is a sound approach for attaining water quality goals, while recognizing the strong desire for independence expressed by the community.

This program addresses discharges of waste to waters of the state and other controllable factors impacting water quality, consistent with state law. It does not attempt to regulate or hold landowners accountable for acts of nature.

A program that prescribes a buffer area between managed areas and waters of the state would not allow for management in that buffer area. While a buffer area would likely

satisfy water quality concerns, depending on the configuration, it is not the only means of controlling sediment discharges and sources of elevated water temperature.

Comment 4:

Concerns and questions regarding the risk criteria and how they will be incorporated into the program, have been expressed.

Response 4:

A discussion of how Regional Water Board staff will use criteria to characterize risk is presented in the Executive Officer's Summary Report that accompanies this document and proposed waiver.

Comment 5:

Regional Water Board staff received comments expressing concerns that the program doesn't hold staff accountable for their decisions that require a landowner to address identified water quality concerns, and whether staff will administer the program fairly.

Response 5:

Any decision by Regional Water Board staff can be elevated to their supervisor, the Executive Officer, and Regional Water Board. Actions by the Regional Water Board can be appealed to the State Water Resources Control Board.

Comment 6:

One commenter requested clarification regarding the USFS lands in the Scott River watershed and whether they fall in the category of "timberlands managed for timber production."

Response 6:

All of the USFS lands in the North Coast Region are subject to the *Waiver of Waste Discharge Requirements for Nonpoint Source Discharges Related to Certain Federal Land Management Activities on National Forest System Lands in the North Coast Region*. Activities covered under this waiver include timber production and related activities.

Comment 7:

Some of the comments submitted focused on the Scott River TMDL Action Plan's request of Siskiyou County to develop a groundwater study plan, and actions that are identified in the study plan submitted by the County.

Response 7:

This waiver does not address groundwater or other flow issues. The Regional Water Board doesn't have permitting authority over water quantity. The Regional Water Board has authority over water quality, and over discharges of waste to waters of the state and associated controllable factors. The Scott River TMDL Action Plan requests the County to

develop and submit a groundwater study plan, which the County has done. The implementation of the plan is ongoing.

Comment 8:

Many of the comments received in writing by Regional Water Board staff expressed disappointment that waiver coverage is not dependent on submittal of a Notice of Intent (NOI). Commenters stated that lack of internal staff capabilities to review NOI's is not a good reason to not require an NOI and that the Regional Water Board has not conducted studies to justify not including an NOI as part of the waiver process.

Response 8:

Regional Water Board staff has experience with the NOIs from the Shasta TMDL process. That process involved sending out hundreds of letters requesting NOIs from landowners. That experience has informed staff that such a process can be counterproductive when large numbers of NOI letters are not returned. Comments that discuss the time involved with processing NOIs "to determine who is high risk and who is moderate risk and who is low risk", assume that staff will receive responses to the majority of the letters sent to landowners. Regional Water Board staff believe that few responses would be returned, based on our Shasta TMDL experience. In such a case, staff resources would be expended on activities related to persuading landowners to respond to a letter, rather than activities related to identifying water quality concerns and ensuring they are addressed. While submittal of NOIs can be an effective component of a permitting process, Regional Water Board staff believe the approach taken for this waiver is an efficient process for verifying compliance with the TMDL Action Plan.

Comment 9:

Some of the comments received by Regional Water Board staff suggested that guidance regarding appropriate management practices and monitoring is necessary to ensure proper implementation.

Response 9:

The revised waiver includes specific guidance regarding appropriate management measures. In addition, there are many information resources widely available that address all of the topics that are likely to come up during implementation of this waiver. In addition, local expertise is available through the Natural Resource Conservation Service, UC Cooperative Extension, and Siskiyou Resource Conservation District. Regional Water Board staff will direct landowners to these resources, as appropriate.

Comment 10:

Some of the comments received questioned what the Regional Water Board's recourse will be in the event that a landowner doesn't comply with the terms of the waiver. Other commenters submitted that there should be repercussions for those who submit frivolous complaints, and objected to civil code authority bypassing local representatives.

Response 10:

A discussion of how Regional Water Board staff may generally pursue progressive enforcement is presented in the Executive Officer's Summary Report that accompanies this document and proposed waiver. The Regional Water Board has a duty and obligation to respond to all water quality complaints. When we investigate complaints we often find no water quality concerns, however this doesn't mean the complainant's concerns are not sincere.

The Regional Water Board's authority to issue waivers and waste discharge requirements is established in state law, which is not subject to oversight, adjustment, or approval by county officials. However, the Regional Water Board has consistently coordinated with County officials to ensure officials are aware of Regional Water Board activities in their jurisdictions, and to allow officials an opportunity to discuss their concerns directly to Regional Water Board staff.

Comment 11:

Some commenters stated that the proposed waiver is no different from the current waiver, which they assert isn't working to address water quality concerns. The same commenters stated their belief that the proposed waiver does not meet legal requirements.

Response 11:

The proposed waiver provides the necessary elements to ensure that the Regional Water Board can exercise its authority in a straightforward manner to resolve water quality concerns. Regional Water Board staff and counsel disagree with the commenter, and find the waiver meets all legal requirements.

Comment 12:

One commenter requested clarification about the relationship of the Agricultural Lands Discharge Program, currently under development, to the waiver.

Response 12:

The Agricultural Lands Discharge Program may eventually supersede the waiver for the activities that the Agricultural Lands Discharge Program addresses. The Agricultural Lands Discharge Program is scheduled to be presented to the Regional Water Board for consideration of adoption in late 2013.

Comment 13:

Some commenters stated that fencing riparian areas to exclude cattle only creates other problems, such as noxious weeds, or simply favor elk over cattle.

Response 13:

Regional Water Board staff's position on riparian grazing is that it is an activity that needs to be implemented carefully and differently from other less sensitive areas. Riparian fencing is good infrastructure that allows cattle producers to manage those areas

differently (e.g., different timing, duration, and intensity of grazing). Regional Water Board staff are not aware of instances in which elk have negatively impacted riparian areas.

Comment 14:

One commenter asked why the Regional Water Board is creating a new program when existing laws already provide tools to address water quality issues.

Response 14:

The proposed waiver is not a new program, but is simple an update of the current waiver. Also, State law requires that the Regional Water Board have a permitting program in place to address all types of discharges.

Comment 15:

One commenter suggested that stating management actions in the affirmative sense implies that either landowners aren't currently managing consistent with the guidelines, or that additional actions are required of the landowners in order to achieve the principle as stated.

Response 15:

It is important to acknowledge that management implies a range of possible decisions about how to treat a given piece of land, including the decision to passively manage the land (e.g.; prevent livestock access). Thus, the language that states, for instance, "Riparian areas are managed in a manner that allows the natural establishment and persistence of native vegetation," does not imply that the principle isn't already being achieved, nor does it imply that an action on the part of the landowner is necessary to achieve it.