

# RESPONSE TO COMMENTS

## Scott and Shasta River TMDL Conditional Waivers of Waste Discharge Requirements Short-Term Renewal (Order No. R1-2023-0005)

The following are summaries or quotes of, and responses to, the comments received on the Short-Term Renewal of the Scott and Shasta River Conditional Waivers of Waste Discharge Requirements (Orders), which are regulatory tools implementing aspects of the Action Plans for the Scott River TMDLs and Shasta River TMDLs, respectively. These Orders have been proposed to be renewed for a time necessary to review their program of implementation, relevant effectiveness data, status and trends data, and update their content as appropriate, as described in Order No. R1-2023-0005 (Proposed Order). Comments of similar content are categorized by topic, summarized as general comments, and followed by a list of commenters that expressed issues related to the comment topic. The commenters are referenced in the general comments using the following numbered list.

### List of Commenters

1. Andrew Marx
2. California Coast Keeper Alliance
3. Environmental Law Foundation, Friends of the Shasta River, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Save California Salmon *submitted jointly*
4. Environmental Protection Information Center and Klamath-Siskiyou Wildlands Center *submitted jointly*
5. Felice Pace
6. Karuk Tribe
7. Lowell L. Novy
8. Mark Mahan
9. Quartz Valley Indian Reservation
10. Scott Valley Agricultural Water Alliance (AgWA)
11. Shasta Watershed Conservation Group
12. Sari Sommarstrom

Comments that were not addressed by the grouped general comments/responses are addressed individually. The individual comments and responses are grouped by commenter. Commenter sections are listed alphabetically. Comments are summarized below and the original comment letters are available upon request from Eli Scott ([elias.scott@waterboards.ca.gov](mailto:elias.scott@waterboards.ca.gov)), the staff responsible for the for the Scott and Shasta TMDL Programs. Several commenters submitted their same comments for the 2018 revised Orders, citing the comment's ongoing relevance. We acknowledge these comments and responded to them substantively during the 2018 comment period and

include these responses below, with some updates. Both the 2018 and 2023 comments and responses are part of the administrative record, which are part of the basis for the development of the orders that will be proposed in the future.

## **General Comments**

### **General Comment 1 (commenters 2, 3, 4, 6, 9, 10, 12) – Short-term Renewal Length**

Multiple commenters described preferences relating to the length of the short-term renewal. Commenters 2, 3, and 5 requested the length be no more than 1 year. Commenters 6 and 9 requested the length be no more than 2 years. Commenters 10 and 12 requested the Orders be adopted as-is for another 5 years.

#### ***Response to General Comment 1***

The draft short-term renewal was for "up to" 5 years. As noted in the Staff Report and public Workshop held on December 8, 2023, significant assessment is needed to consider the implementation to date of the Orders and their role in the larger TMDL Action Plan. Significant amounts of water quality data have been collected, restoration projects have been completed, changes in riparian vegetation have been catalogued, and partner agencies have implemented regulatory and non-regulatory actions that have resulted in changes in these watersheds. Staff need time to develop a comprehensive proposal for the public and Regional Water Board's consideration that represents a responsive next step in nonpoint source regulation of agricultural operations in the Scott and Shasta Watersheds that is adapted to current conditions based on the best available science. In consideration of General Comment 1 and the work that will be required to conduct analyses and develop a comprehensive proposal, staff propose a 2.5-year renewal of the Orders.

### **General Comment 2 (commenters 1, 2, 3, 4, 5, 6, 7, 9, 11) – Suggested Permit Provisions and/or Perceived Order Deficiencies**

Multiple commenters provided feedback on what provisions they would like to see in the next iteration of the Orders or provided feedback on why certain areas of the existing Orders do not comply with various state policies (Non-Point Source Policy, Water Code Section 13269, etc.).

#### ***Response to General Comment 2***

The Regional Water Board disagrees that the existing Orders do not implement required state policy or necessary sections of the California Water Code, as described in our response to comments from the 2018 renewal. These responses are restated below, with updates where appropriate. However, comments related to perceived deficiencies in implementation or suggestions for future orders will be taken into consideration during the preparation of the future orders. The future orders will be considered under a new public process, including public workshops, a written public comment period, and a public adoption hearing before the Regional Water Board. We appreciate the

suggestions made by all commenters and look forward to continued engagement from all interested parties.

#### Comments related to Water Code section 13369, 13269, and the Basin Plan.

Multiple commenters expressed concerns that the 2018 Orders are inconsistent with Water Code section 13369 (addressing the State of California's Nonpoint Source Pollution Control Program), Water Code section 13269 (addressing Waivers of Waste Discharge Requirements) and the Regional Water Board's Basin Plan. The Karuk Tribe, in particular, asserts that the adoption of the orders was "illegal" because they do not implement precedential court decisions that pertain to non-point source control programs. Commenters are concerned with how the orders comply with the State Water Board's Non-Point Source Control Policy and the achievement of water quality objectives (WQOs). Commenters also expressed concerns regarding timelines and milestones in the orders to measure progress towards achieving WQOs and Total Maximum Daily Loads (TMDLs), and the nature of discretionary monitoring required by Executive Officer (EO). Commenters assert that the orders do not comply with criteria in Water Code section 13269 for the issuance of waivers of waste discharge requirements, including ensuring that the waivers are in the public interest. The general comment also expresses concerns regarding the feedback mechanism that will be used to evaluate the orders' contribution to WQO or TMDL compliance.

#### Response to Comments related to Water Code section 13369, 13269, and the Basin Plan.

The 2018 Orders are not intended to implement all aspects of the TMDLs, only those that relate to discharges of waste and controllable water quality factors associated with the activities of the waiver holder. Thus, these orders do not constitute a complete nonpoint source water quality program as described in the state nonpoint source policy. The orders are one component of the non-point source control program, a program that contains multiple other elements including: watershed stewardship (including comprehensive watershed monitoring in both watersheds), coordination with the State Water Board Division of Water Rights (Division of Water Rights) on water diversions and drought response, implementation of additional Regional Board discharge programs (i.e. timber and dairy waivers, 401 certification program), application and enforcement of existing basin plan prohibitions, and the issuance of monitoring and reporting orders. The Shasta and Scott River TMDL Conditional Waivers specifically address discharges of waste and controllable water quality factors associated with grazing, range land activities, and roads not covered by other permitting mechanisms. The orders require implementation of management measures designed to prevent and eliminate discharges consistent with TMDL load allocations and targets (See Provision 5 in both orders). If dischargers do not implement management measures, they will be out of compliance with the orders and subject to further reporting, monitoring, or potential enforcement actions. At the discretion of the Executive Officer, the orders can require development of management plans, as well as monitoring and reporting requirements based on site-specific risks to water quality. These order conditions, combined with the monitoring underway in the Shasta River watershed stewardship

program and the Scott River Biostimulatory Conditions Monitoring Program, is sufficient to provide data for evaluating the effectiveness of the management measures applied. If qualitative and quantitative monitoring results indicate that actions to address thermal, sediment, or nutrient loading are insufficient, then additional actions and measures can be identified to address those discharges and controllable water quality factors. Water Code Section 13269 states that monitoring requirements shall, “be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver’s conditions.” Monitoring requirements as set forth in the orders meet these criteria.

As noted above, though not an official component of the Shasta TMDL Conditional Waiver, the Shasta Watershed Stewardship framework also includes a monitoring program that provides annual feedback on both temperature and dissolved oxygen at specific reaches and tributaries of the Shasta River watershed, information relevant to track TMDL implementation progress. Similarly, the Scott River Biostimulatory Conditions Monitoring Plan and the Scott River Watershed Water Quality Compliance and Trend Monitoring Plan are designed to produce data sufficient to establish current status and ongoing trends in water quality relevant to the Scott River TMDL. Regional Water Board staff expect the Scott River Watershed Water Quality Compliance and Trend Monitoring Plan to be implemented in 2024, adding a new round of sediment data to the historic record.

#### Comments related to the Antidegradation Policy.

Commenters, and specifically the Karuk Tribe, maintain that the Regional Board has not complied with the State Water Board antidegradation policy (State Water Board Resolution No. 68-16) or established court precedent interpreting the policy.

#### Response to Comments related to the Antidegradation Policy

The Regional Water Board has complied with the antidegradation policy and the precedential decision *AGUA v. Central Valley Regional Board* (2012) 210 Cal. App. 4<sup>th</sup> 1255 (AGUA). These orders are the latest in a series of orders that address nonpoint source discharges primarily from agricultural and grazing activities in the Scott and Shasta watersheds. Both watersheds have impairments and water quality does not meet objectives necessary to support all beneficial uses. These orders were designed to reduce and eliminate discharges from these activities within the Scott and Shasta watersheds and result in ongoing improvements over current conditions in the watersheds. Discharger compliance with the orders will result in increased riparian shading, decreased or eliminated tailwater flows into receiving waters, and minimized or prevented discharges of sediment into receiving waters. Discharges that comply with the orders will arrest continued degradation and result in an improvement in water quality conditions. The orders are consistent with Resolution No. 68-16 because they require that dischargers employ the best practicable treatment and control measures in order to minimize degradation, achieve water quality standards, and prevent nuisance. The management measures required by the orders establish an iterative process that includes evaluation and implementation of management practices in a timely manner to minimize, control, and prevent the discharge of waste. These management practices

are enforceable, and the effectiveness of these measures will be verified through monitoring and reporting as required by the Executive Officer. The Regional Water Board anticipates that any changes in water quality that may occur as a result of order implementation will, over time, reflect an improvement in water quality, not degradation. Thus, any change in water quality will be consistent with the maximum benefit to the people of the State and will not unreasonably affect beneficial uses.

The antidegradation policy does not specify the type of monitoring program that is necessary to address degradation and *AGUA* did not set requirements that must be met to satisfy the antidegradation policy. Rather, the court found that a Regional Water Board must make appropriate findings to support its determination that authorized discharges will comply with the antidegradation policy. The Regional Board has made the necessary findings in these orders and the prior issued versions of the orders. The orders do not allow new discharges that will degrade high quality waters and the Executive Officer will require additional monitoring to assess impacts if it is determined that activities may be leading to exceedances of water quality objectives. If ranch assessments indicate additional monitoring is necessary, the specific monitoring and reporting that may be required by the Executive Officer will be designed to confirm whether degradation is occurring, that the management measures are sufficient to prevent degradation, or in some cases, to support the need for additional management measures to prevent degradation. If a discharger does not comply with the conditions set forth in the orders, including ranch assessment and additional monitoring requirements, they will be out of compliance, and further permitting and enforcement actions would be pursued

**General Comment 3 (commenters 2 and 3). The Regional Water Board should require mandatory enrollment in the Orders before adoption of the new Permit**

Several commenters suggested that the Regional Water Board require all dischargers to enroll in the existing Orders before adoption of the new permits.

***Response to General Comment 3***

The 2018 Orders do not include a system of enrollment. Rather, the orders apply to dischargers that are responsible for discharges of waste into the watersheds and allow certain discharges if the conditions of the orders are met. Properties operating outside of the conditions described in the orders are either in violation of the orders or are not provided regulatory coverage for their discharges of waste. Staff has followed a prioritization scheme in implementing these orders by inspecting certain subsets of dischargers based on the length of stream frontage included in their property holdings (in the Scott), the critical habitat existing on their property, especially cold-water springs (in the Shasta), or as a result of citizen complaints. This method of implementation will be reviewed during the short-term renewal and assessed against alternative approaches.

During the period following renewal of the 2018 Orders but before a new order is proposed, staff will continue active implementation of the orders in both watersheds, as

well as seek improvements in outreach to dischargers whose operations have not yet been inspected.

**General Comment 4 (commenters 3, 5, 6, 7) – No meaningful change in water quality has occurred as a result of the implementation of the Orders**

Several commenters asserted that no improvement in water quality has occurred as a result of the 2018 Orders, citing either a lack of data or studies conducted by other entities.

***Response to General Comment 4***

Regional Water Board staff has presented data in public forums indicating specific improvements in water quality in the Shasta River, including reductions in daily maximum temperatures in Big Springs Creek, reductions in daily maximum temperatures at the watershed scale, and reductions in dissolved oxygen (DO) water quality objective exceedances at specific locations across the Shasta River. Staff acknowledges that since 2020, annual updates have not occurred as staff's attention has turned to supporting the Division of Water Right's efforts responding to the drought emergency in the Scott and Shasta Watersheds as declared in Governor Newsom's May 10, 2021 emergency proclamation. Additionally, due to the nature of continuous temperature and DO data, an acceptable repository for the large Shasta River data set or the growing Scott River data set does not exist for public assessment and download. The California Environmental Data Exchange Network (CEDEN) does not currently have the capabilities to host large amounts of continuous water quality data, nor do any other State-managed databases. However, Regional Water Board staff have provided full copies of their Shasta River database to interested parties upon request and provided funding for the Shasta Valley Resource Conservation District to conduct their own water quality analyses that are publicly available on their website.

In the Scott, staff acknowledges the lack of historic data needed for status and trends analysis. This data gap was one of the impetuses behind the Scott River Biostimulatory Conditions Study staff is engaged in to confirm the 2012 impairment listing of the Scott for biostimulatory substances (e.g., nutrients), low DO, and pH. All nutrient grab sample results from this study are uploaded to CEDEN for the public to review and work is ongoing to ensure data quality of the continuous temperature and DO data. Staff will be reviewing this data during the short-term renewal and hopes to release a report prior to the adoption of the new permit. Staff also acknowledges that a data gap exists regarding sediment conditions in the Scott and is actively developing a plan to update and implement the Scott River Watershed Water Quality Compliance and Trend Monitoring Plan, which will produce an updated sediment data set to assess changes in fine sediment loads, embeddedness, and sediment size distribution across the watershed. Riparian vegetation has shown improvement since the adoption of the TMDL in specific areas, including French Creek, Sugar Creek, the East Fork Scott River, Moffett Creek, and along the mainstem of the Scott River. The Regional Water Board has presented photos at each bridge crossing in public forums and continues to update this dataset and assess trends in riparian vegetation. This improvement in riparian vegetation is due to changes in riparian grazing management, collaborative

efforts by watershed partners, grant-funded projects supported by the Regional Water Board and others, and the efforts of dischargers responsible for riparian areas. More work is required to continue improving riparian conditions to full site potential effective shade, however riparian conditions in the Scott have objectively improved since the adoption of the initial orders establishing waivers of waste discharge requirements.

Data availability and transparency are critical to an open public regulatory process, and staff acknowledge that this is an area needing attention in the subsequent orders. Ongoing analysis and reporting are needed to ensure the effectiveness of the current and future regulatory program and staff will be focusing on the development of data presentation systems during the short-term renewal.

### **General Comment 5 (commenters 3, 5) – Racial equity resolutions**

Multiple commenters asserted that the short-term renewal violates the spirit and the letter of the State Board's Racial Equity Resolution as it allows continued impacts to species important to Klamath Basin tribes.

#### ***Response to Comment 5***

Staff acknowledges the multigenerational trauma of the colonization, displacement, and systematic genocide of Native American people in California, as well as the ongoing disruption of traditional Native American practices by activities taking place within the Klamath Basin and across the North Coast, including discharges to surface water that imperil the survival of culturally important species like Chinook and Coho Salmon. Staff has focused on building partnerships with tribal technical staff, and commits to working closely with Klamath Basin tribes in the development of the subsequent orders to ensure the Tribes have a meaningful opportunity to participate and that the resulting orders support all beneficial uses, including the Native American Cultural (CUL), Subsistence Fishing (FISH), and Tribal Subsistence Fishing (T-Sub) beneficial uses.

### **General Comment 6 (commenters 10, 12) – No evidence that modifications are needed.**

Multiple commenters asserted that staff offers no evidence that the 2018 Orders need modifications, and that they should be renewed for another 5-year period.

#### ***Response to Comment 6***

Per Water Code section 13269, which describes Waivers of Waste Discharge Requirements and their elements, subdivision (f) describes the process for renewing any existing waiver. This section indicates that prior to renewing any waiver for a specific type of discharge, a public hearing shall take place where the State or Regional Water Board shall determine whether the discharge for which the waiver was established instead should be subject to general or individual waste discharge requirements. In addition, pursuant to Water Code section 13269 subdivision (a), the Regional Water Board must determine that the waiver is consistent with the applicable Basin Plan and is in the public interest. The short-term renewal is intended to provide staff the time to gather and analyze existing data and information in each watershed to

determine if the protection of water quality would be better served by general Waste Discharge Requirements, the existing Conditional Waivers of Waste Discharge Requirements, or modified Conditional Waivers of Waste Discharge Requirements. The result of these analyses will be the subject of a future public process, in which the public provides comment on staff proposals and the Regional Water Board provides direction and considers adoption.

### **General Comment 7 (commenters 10, 12) – Regional Water Board is attempting to assert authority over streamflow levels**

Multiple commenters asserted that the Regional Water Board is attempting to assert authority over streamflow levels via temperature and sediment TMDLs in the Scott and that streamflow is regulated by the Division of Water Rights.

#### ***Response to Comment 7***

The development of Total Maximum Daily Loads (TMDL) and implementation plans that are incorporated into the Regional Water Board's Basin Plan is firmly within the planning authority held by the Regional Water Board as provided by California Water Code section 13240.-13248. Further, as both established TMDLs in the Scott and Shasta watersheds specifically speak to flow as a driver for temperature impairment, there is a stronger justification for actions to be taken related to controllable factors that impact flow in these watersheds as TMDLs are a water-body specific assessments of causes of impairment. The Regional Water Board's planning authority also includes, as outlined in section 13241, the authority to develop water quality objectives that take into account multiple factors, including "water quality conditions that could reasonably be achieved through the coordinated control of all factors that affect water quality in the area."<sup>1</sup> As stated in the Basin Plan,

*Controllable water quality factors shall conform to the water quality objectives contained herein. When other factors result in the degradation of water quality beyond the levels or limits established herein as water quality objectives, then controllable factors shall not cause further degradation of water quality. Controllable water quality factors are those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the state and that may be reasonably controlled.*

Irrigation practices, including groundwater extraction, irrigation water conveyance methods, method of irrigation, and efficiency of application are all controllable factors that can affect water quality and the ability for a basin to meet its water quality objectives. These practices can be reasonably changed in an adaptive and collaborative way by dischargers covered by the current Order or subsequent order to affect water quality conditions. Additionally, California Water Code section 13267 provides the Regional Water Board with authorities related to investigating factors relating to the quality of Waters of the State within its region, including how a particular discharger's

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<sup>1</sup> California Water Code Section 13241(c).



operations may be affecting water quality conditions or resulting in discharges of waste to Waters of the State. With respect to groundwater extraction, the Regional Water Board does not intend to set specific limits; rather, we intend to work with irrigators, Siskiyou County's GSA, and the Division of Water Rights to develop collaborative approaches to minimize or prevent the impact of groundwater extraction on water quality and the ability of the Scott and Shasta watersheds to meet their water quality objectives. To the extent that the Regional Water Board has sufficient evidence showing that certain controllable factors result in an impact to water quality via discharges of waste or affect the ability for water quality objectives to be met, the Regional Water Board is well within its authority to develop plans and permits to address those controllable factors.

**General Comment 8 (commenters 10, 12) – No evidence to show that the Scott River watershed has severe water quality problems that impact fish.**

Multiple commenters asserted that no evidence was presented that water quality in the Scott River watershed impacts fish populations.

***Response to comment 8***

Since the adoption of the TMDLs in the Scott River watershed in 2006, additional impairments have been established, including low dissolved oxygen, pH, and, broadly, “biostimulatory conditions,” specifically between Young’s Dam and Boulder Creek downstream of the Fort Jones USGS gage<sup>2</sup>. These additional listings specifically affect salmonids and other aquatic species that rely on sufficiently oxygenated water to survive. Staff is aware of the presence of salmonids in the listed reach based on published reports of spawning activity<sup>3</sup>, anecdotal reports, and personal communications with Scott Valley residents. There is clear potential for these waters to host various life stages including spawning, incubation, early development, and over summer rearing. Staff have also observed deceased fish and crustaceans within the reach listed as impaired for biostimulatory conditions. While recent coho numbers are encouraging, factors including the challenges chinook spawner cohorts face migrating into the Scott Valley due to insufficient fall flows, observed species disease and mortality in areas within the reach listed as impaired for biostimulatory conditions<sup>4</sup>, and consideration of these additional listings from the 2012 integrated report cycle, necessitate additional analysis before deciding if the 2018 Order is sufficient to protect water quality and support beneficial uses. The Final Recovery Plan for the Southern Oregon/Northern California Coast Evolutionary Significant Unit (ESU) of Coho Salmon<sup>5</sup> prepared by NOAA NMFS reports that 6,500 returning adult spawners are required for ESU viability. Based on CDFW records, since 2004, returning adult spawners in the

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<sup>2</sup> See [https://www.waterboards.ca.gov/water\\_issues/programs/tmdl/integrated2012.shtml](https://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2012.shtml) for more information.

<sup>3</sup> Siskiyou Resource Conservation District, 2021. Scott River Coho Salmon Spawning Ground Surveys. 2020-2021 Season. United States Fish and Wildlife Service – Fisheries Program. Agreement # F20AP11407. December 2021.

<sup>4</sup> California Department of Fish and Wildlife, 2023. Influence of Flow and Temperature on Scott River Salmonids as Observed Through Snorkel Surveys. Staff Memo. February 2, 2023.

<sup>5</sup> Available for download here: <https://repository.library.noaa.gov/view/noaa/15985>

Scott River has ranged from 58 (2004) to 2,644 (2010), with 236 returning adults counted through December 26, 2022.

Finally, water quality conditions in the Scott River and Shasta River should not be contextualized simply within the confines of impacts to fish. Both watersheds have specific water quality objectives in the Basin Plan that must be attained and beneficial uses that must be supported. Life cycle-based DO objectives in the basin plan are based on Salmonid DO requirements, while watershed specific objectives for pH, TDS, hardness, boron, and specific conductance listed in Table 3-1 of the Basin Plan are largely based on the available historic record, intended to reflect background conditions for multiple historic uses. The Regional Water Board's Temperature objective applies broadly across the region and is based on natural background conditions, also intended to support multiple historic uses. Finally, the biostimulatory substances objective is a narrative objective meant to apply broadly and relates to protection of multiple uses, as well prevention of nuisance conditions such as algal scums. Both rivers also flow into the Klamath, which has its own water quality impairments and TMDLs, of which the Scott River and the Shasta River are described as source areas for dissolved oxygen impairments via nutrient loading to the Klamath and contribute to the temperature impairment. Any revisions of the 2018 Orders or subsequent permit should necessarily take these downstream impairments into account.

## **Specific Comments**

### **Comment 1 (Commenter 1)**

The proposed renewal should be rejected in favor of implementation of a waste discharge permitting program consistent with approaches implemented in other parts of the state. Further, the Shasta River TMDL Action Plan flow target of 45 cfs minimum cold-water should be pursued by the State Water Board. The commenter suggests that the new permit adopted following the short-term renewal should include a recommendation to the State Water Board that they seek modifications to the 1932 Shasta Decree.

### ***Response to Comment 1***

The intent of the short-term renewal is to provide ongoing permit coverage and enforcement authority over those dischargers that are required to comply with the provisions of the existing Orders, including activities that result in discharges from private land to surface or ground waters in the Scott and Shasta watersheds not covered by other State or Regional Waste Discharge Requirements (WDRs) or other Conditional Waivers of Waste Discharge Requirements (Waivers of WDRs). If the Regional Water Board were to reject this short-term renewal, there would be no existing permit coverage for this class of dischargers and therefore no meaningful pathway to enforcement of water quality protection measures. It would not be possible to immediately transition to a permitting program that has not yet been developed, and the lack of coverage in the interim would not be consistent with TMDLs or the Nonpoint Source Policy by leaving this class of dischargers unregulated.

Staff would also like to clarify that the 45 cfs flow recommendation is a recommendation of an additional 45 cfs of cold water emanating from the Big Springs Complex, not a total flow of 45 cfs of cold water in the Shasta River. This additional flow results in a total flow of, on average, 112 cfs of cold water flowing from the Big Springs Complex into the Shasta River. The emergency drought regulation appears to have resulted in flows approaching those modeled in the Shasta Temperature TMDL as necessary to achieve water quality objectives, the highest cold-water flows since adoption of the TMDL. Regional Water Board and Division of Water Rights staff are actively working to develop an approach to better ensure necessary cold-water flows into the future.

### **Comment 2 (Commenter 3)**

“The Staff Report appears to deflect some responsibility for the Ag Waivers’ failure to achieve WQOs, asserting that both watersheds have critical issues related to instream flows that impact their respective TMDLs, but that the Division of Water Rights has the strongest authority to address flows”

### ***Response to Comment 2***

The inclusion of flows as an element of the TMDL was in no way to deflect responsibility. Rather, it was an acknowledgement that flow is a critical component of the Scott and Shasta TMDLs as described in the original TMDL staff reports, and that attention to elements relating to instream flows must be an important element of a future permit. To that end, staff has been actively engaged in not only advocating for actions related to securing instream flows, but collaborating with agency partners, including the Division of Water Rights, California Department of Fish and Wildlife (CDFW), and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NOAA NMFS) to develop meaningful actions that protect and increase instream flow. Implementation of the Drought Emergency Regulations in the Scott and Shasta have highlighted the role of land use practices and water use on instream flows, with information useful to the development of future regulatory tools. To acknowledge that one permit cannot solve all of a watershed’s impairments is not deflection. Instead, it is consistent with the facts associated with the Regional Water Board’s regulatory authorities. Staff is analyzing evidence of positive water quality outcomes resulting from the Division's implementation of the Drought Emergency Regulations. With this in hand, technical and legal staff will evaluate the full extent of the Regional Water Board's authority to address in the next Scott and Shasta orders such flow-related issues as water conservation, groundwater recharge, flow augmentation, and tailwater management.

### **Comment 3 (Commenter 5)**

Commenter 5 asserts that the Scott River Temperature conditions are not improving because the Scott TMDL Implementation Plan’s call for landowners to allow “natural shade” to grow along all water bodies is not being enforced. Instead, the commenter purports that the Stewardship approach, as implemented by staff, is resulting in “voluntary compliance” and a lack of progressive enforcement. The commenter uses their complaint regarding a landowner on Moffett Creek plowing their field too close to

the break in slope of the stream bank, limiting the natural establishment of riparian vegetation and potentially resulting in a sediment discharge, as an example of this perceived failure.

### ***Response to Comment 3***

Regional Water Board staff disagrees that the Stewardship approach in the Scott and Shasta watersheds has failed or that it equates to voluntary compliance. The Stewardship approach, as implemented in the Scott and Shasta watersheds, is a multifaceted, comprehensive approach to watershed restoration that combines regulatory programs, watershed-scale status and trends monitoring, investment of grant and contract funds, increased coordination between internal and external partners, and enforcement, focused within the lens of the TMDLs for each watershed. This approach has allowed staff to address ongoing water quality impacts through the orders, legacy watershed impacts through grant funded projects, and establish or maintain monitoring programs to continue to assess impairments and progress towards attainment of water quality objectives.

The example provided by the commenter was a complaint that staff addressed where specific allegations were confirmed in the field. Staff has worked with the discharger to assess alternative land practices to prevent impact to riparian vegetation and sediment discharge. The assertion that progressive enforcement has not yet resulted in assessed penalties is true. However, this is because following the progressive enforcement process has resulted in compliance with the orders where dischargers have developed plans that are being actively implemented and have provided their annual reporting deliverables where required. It is important to note that until the adoption of the 2018 Orders, no plans had been required to be submitted to the Regional Water Board. Since 2018, in following the established implementation approach and prioritization system described in the Staff Report, 8 Grazing and Riparian Management Plans have been required in the Scott and 13 Ranch Management Plans have been required in the Shasta. To be clear, these dischargers neither volunteered their properties to be assessed nor are they voluntarily implementing management measures on their property to address water quality concerns noted by staff during ranch assessments. The dischargers implementing their plans are doing so as a condition of compliance with the orders. Staff would not expect significant changes to occur in the 5 years since the systematic implementation of the 2018 Orders began. However, staff acknowledges that a different implementation approach may produce a better outcome. During the short-term renewal, staff will review this implementation approach and assess if a different approach would be more effective at minimizing and controlling discharges of waste, including changes discussed in Finding 18 and the potential move to Waste Discharge Requirements.

With respect to riparian conditions in the Scott and Shasta, areas in both watersheds have seen improvements in effective shade since the adoption of the TMDLs. But staff acknowledges many areas require additional attention, both through improvements in management of the riparian zone via grazing plans and through grant-funded restoration projects.

With respect to voluntary actions, landowners covered by the 2018 Orders have in some cases implemented voluntary conservation actions as part of their own commitment to land and water stewardship. These voluntary efforts, which the Regional Board acknowledges and appreciates, do not replace the need to comply with the requirements of the orders.

**Comment 4 (commenter 5)**

Commenter asserts that, “there is a lack of on-site verification by staff of landowner claims with regard to riparian and water management.”

***Response to Comment 4***

Staff spends significant time each year in each watershed assessing water quality concerns related to the activities of dischargers. Staff assesses compliance with the conditions of the respective orders through inspections, requires the development of management plans to meet order requirements, and follows up on implementation of approved plans. Staff receive annual monitoring reports from dischargers where they have been required, and these monitoring reports include annual photopoints to monitor the effectiveness of riparian management and document current conditions. Where practices can be viewed from the public right of way, staff conducts nearly monthly observations from their vehicle of areas of concern within the watersheds. At present, staff believes these tools are adequate for tracking the status and trends in riparian management and the resulting riparian conditions.

**Comment 5 (commenter 5)**

Commenter suggests that the Regional Water Board instruct staff to integrate flow into the Scott TMDL Implementation Plan and related permits, including WDRs.

***Response to Comment 5***

Staff acknowledges stream flow, especially cold-water flow, is an integral part of water quality. The Shasta River TMDL analysis pointing to the volume of flow from the Big Springs Complex having impacts to downstream temperatures is a clear example of this. The development of a Narrative Flow Objective and a program of implementation are on the current triennial review list of Regional Board basin planning priorities. Staff implementing the Scott and Shasta TMDL Action Plans will be consulting with the Region's Flow and Riparian Specialist, as well as our Division partners, to explicitly address the controllable water quality factor of flow when proposing new water quality protection requirements in the revised orders. Staff appreciates the information the commenter provided regarding water use in the Scott Valley.

**Comment 6 (commenter 8)**

“Due to the lack of water in California, we should find a more equitable way of sharing the limited resource, not just take it all from agriculture as have been done the last two years.”

### ***Response to Comment 6***

This commenter appears to be commenting on the implementation of the Drought Emergency Regulations for the Scott and Shasta, which resulted in significant curtailments in the Scott and Shasta River watersheds. While staff has been aiding the Division of Water Rights in its implementation of these regulations, the short-term renewal of the 2018 Orders does not pertain to curtailment or any change in water rights.

### **Comment 7 (commenter 10)**

Commenter asserts that the imposition of Waste Discharge Requirements would be unnecessarily burdensome to AgWA's members and that Scott Valley livestock owners are largely compliant with the 2018 Order or are in the process of developing Grazing and Riparian Management Plans.

### ***Response to comment 7***

Staff is pleased to hear that many of AgWA's 40 members may be developing Grazing and Riparian Management Plans. These will greatly augment the 8 plans that have been submitted to date by landowners in the Scott. The Regional Water Board is committed to reviewing submitted plans and working with each landowner to pursue approval under the 2018 Order.

Regarding a potential shift to general Waste Discharge Requirements from Conditional Waivers of Waste Discharge Requirements, landowners who have not focused on compliance with the existing orders may have additional work to do to bring their properties into compliance with potential general Waste Discharge Requirements. Staff is committed to working collaboratively with dischargers if this is the case to find the most efficient and protective changes that result in the least impact to their operations. However, those operating in compliance with plans already approved under the existing orders will be most well situated upon adoption of potential general Waste Discharge Requirements.

### **Comment 8 (commenter 11)**

Commenter indicates that many dischargers in the Shasta Watershed are unclear on how the TMDL, TMDL Waivers, the Basin Plan, and other regulations under the Regional Water Board are managed and implemented and requests additional workshops prior to decisions related to the orders.

### ***Response to comment 8***

Prior to any new or changed orders being adopted, and prior to the end of the short-term renewal period, any proposed orders will be posted online for review and will be subject to their own public comment period. Staff plans to keep critical stakeholders, including dischargers, updated on the progress of the development of the future orders through targeted outreach, including updates to the Scott and Shasta TMDL webpages, updates to the Scott and Shasta TMDL email list serves, and staff-led Regional Water

Board workshops. Staff is committed to being transparent and responsive during the development of the subsequent orders.

### **Comment 9 (commenter 11)**

Commenter describes several details relating to the orders and how the Upper Shasta Valley Safe Harbor Agreement (Upper Shasta SHA) complements the orders. Commenter requests certain provisions that are in harmony with the SHA remain static. Commenter also requests the Regional Water Board allow time for actions to be implemented within the Upper Shasta SHA and for their effectiveness to be shown. Commenter suggests that there would be no scientific support for more stringent actions beyond what was deemed sufficient at the time of the Upper Shasta SHA approval. Commenter also requests a strong statement in favor of the Upper Shasta SHA to encourage other dischargers to consider such agreements.

### **Response to comment 9**

The Regional Water Board appreciates the efforts and goals of the Upper Shasta SHA. After careful review, many of the site plans associated with the Upper Shasta SHA were deemed compliant with the Shasta 2018 Order, as well. However, in some cases more work was required of particular dischargers to ensure a compliant Ranch Management and Monitoring Plan as per requirements of the 2018 Order. The Upper Shasta SHA is at its core a negotiated voluntary process that Regional Water Board was not a party to. Staff expects it to have a positive impact on fish habitat and water quality conditions, however it is not a regulatory program designed to address all identified water quality impairments in the Shasta River nor does it inherently provide reasonable certainty that water quality objectives contained in the Basin Plan will be met. The orders and other water quality permits applicable to dischargers in the Scott and Shasta watersheds are the vehicles to ensure progress is being made towards water quality objectives outlined in the Basin Plan and that discharges from sources identified in the TMDL load allocations for identified pollutants are being sufficiently limited. Staff look forward to continuing to support the goals of the Upper Shasta SHA while simultaneously making progress on the Regional Water Board's own priorities and statutory responsibilities.

### **Comment 10 (commenter 11)**

Commenter asks for a definition of the term "waste" with respect to tailwater discharges, or for an alternative word to be used. The full comment is quoted below.

*"In the footnote under Item 2 of the same document, the term "discharges of waste" is used. We ask that the term waste be better defined. Throughout (sic) the orders, it appears water, in various states of condition, is considered a waste. This poses the question, if tailwater which meets TMDL requirements is released into the stream, is it waste? If water in some lesser condition than the TMDL standards can be used effectively to meet the needs of other uses, is it waste? We ask for the consideration of another word or phrase to identify such discharges. This is important when the agricultural community sees perfectly useable water for irrigation purposes being shuttled downstream and to the ocean for the benefit of fish without the fish ever being present during such flow."*

### **Response to comment 10**

Waste is defined in the California Water Code, section 13050(d), to include:

*Sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from producing, manufacturing, or processing operations.*

The Regional Water Board's primary regulatory responsibility is to establish the proper limitations to the discharge of waste to surface and groundwater necessary to prevent exceedance of water quality objectives. A Waste Discharge Requirement (WDR) or Waiver of WDRs are regulatory tools that codify the proper limitations to provide certainty to the public that the act of discharging these wastes do not have deleterious effects on the beneficial uses of waters of the State, which include any surface water or groundwater, including saline waters, within the boundaries of the State<sup>6</sup>. If an impact were reasonably expected to result from such a discharge, some level of management or treatment would be required. In the example provided, tailwater discharges may be considered a discharge of waste dependent on water quality characteristics (e.g. pH, suspended sediment, total dissolved solids, organic matter, temperature, pesticide concentration, herbicide concentration, and overall toxicity to aquatic species) and dependent on its potential to cause adverse impacts to surface waters and their ability to support beneficial uses. The discharge of waste to waters of the State must be authorized by a Waste Discharge Requirement or Waivers of Waste Discharge Requirements to ensure compliance with the Basin Plan. The aim of these orders is to provide a single permit for each watershed that covers a range of activities that, when managed according to the conditions of the orders, are not expected to produce a deleterious impact of waters of the State and be protective of beneficial uses, rather than individually permitting each discharger.

With respect to water flowing out of the Shasta Valley into the Klamath and eventually into the ocean for the benefit of fish as being viewed as wasted, this perception of wasted water does not fit the statutory definition of a discharge waste per California Water Code, section 13050(d) and does not acknowledge the benefits of this water to the Klamath River. The Klamath River has its own impairments that affect its beneficial uses including cold freshwater habitat (COLD); rare, threatened, and endangered species (RARE); migration of aquatic organisms (MIGR); spawning, reproduction, and/or early development of fish (SPWN); commercial and sport fishing (COMM); Native American cultural use (CUL); subsistence fishing (FISH); and contact and non-contact water recreation (REC-1 and REC-2). The quality of water exiting the Shasta River watershed directly impacts these beneficial uses and has its role in ensuring water quality objectives downstream of the Shasta River may eventually be met.

### **Comment 11 (commenter 11)**

Commenter requests that those who are already actively engaged with the Regional Water Board in plans that are compliant with the orders have their fees waived under

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<sup>6</sup> California Water Code section 13050(e)



the structure proposed by Finding 18, and that the orders be renewed for 2 years to allow for dischargers not already engaged an opportunity to work with the Regional Water Board on their own plans.

***Response to Comment 11***

Thank you for this comment. The Regional Water Board does not have the authority to set fees. But, staff will be working closely with the fee branch of the State Water Board with the intention of establishing a tiered approach to the fee structure, as possible, which acknowledge progress landowners have already made to support water quality improvements on their properties supportive of the TMDL Action Plans.

**Comment 12 (commenter 12)**

Commenter provides a list of additional information they believe is necessary before the Regional Water Board decides the proposed short-term renewal, including changes to figures, language used in the Staff Report submitted as part of the December Board package, proposed analyses to perform, and suggestions regarding outreach.

***Response to Comment 12***

Thank you for this thorough list of recommendations. Staff will review and consider them when developing the future orders, as appropriate. One of the main reasons for the proposed short-term renewal is to assess available water quality data, perform analyses to understand current status and trends, and identify data gaps that could be filled by existing and future comprehensive water quality monitoring programs. Please note that no changes will be made to the Staff Report as currently published, but when a subsequent order is before the Regional Water Board for consideration a subsequent report may accompany it providing pertinent supporting information.

Staff recognizes that creating a forum to more regularly share updates on watershed conditions and monitoring results would support more robust outreach and dialogue. Staff will investigate tools and approaches to increase transparency during the short-term renewal period.