

North Coast  
Regional Water Board Staff  
Response to Public Comments  
on the  
Draft  
Shasta River TMDL Conditional Waiver  
of  
Waste Discharge Requirements  
(Order No. R1-2012-0083)

September 5, 2012

## **INTRODUCTION**

During development of the *Shasta River TMDL Conditional Waiver of Waste Discharge Requirements* (Shasta 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 Shasta River TMDL Waiver (Order No. R1-2012-0083). Comments and the associated staff response are presented below.

Attachment 1 contains a copy of the one written comment letter received by Regional Water Board staff during the 31 day public comment period which was open from July 13, 2012 to August 17, 2012. Summaries of verbal comments provided at the August 1, 2012 public workshop are also included in this staff response to public comments document. The August workshop was held in Yreka to facilitate public comment by local landowners and other interested stakeholders residing in and near the Shasta River watershed.

## **WRITTEN PUBLIC COMMENTS**

The issues identified in the comment letter submitted by the Siskiyou County Board of Supervisors August 15, 2012 to the Regional Water Board are presented below as Comment 1 through 4.

### **Comment No. 1:**

Our citizens are being told they will have to expend time and money to comply with a new regulatory program – even if they are already managing their land in a manner that is optimal for water quality – under the larger goal of implementing the TMDL action plans to enhance conditions related to sediment, temperature, and dissolved oxygen. At the same time, the Klamath settlement agreements promise to flood the Klamath River with sediment, increase water temperatures, and deplete dissolved oxygen. The Klamath River temperature TMDL even goes so far as to adopt the current temperature regime in Upper Klamath Lake as a “natural condition,” when in reality it is only a natural consequence of the Klamath Irrigation Project’s infrastructure and operations. No such allowance is made for the much more natural conditions of the Scott and Shasta Rivers. After all of the work that has been done over the past two decades to protect fish and water quality in the Scott and Shasta river systems, the Klamath contradictions make it all the more difficult to accept the cost and burden of chasing incremental water quality benefits under the gun of a stepped-up regulatory program.

### **Staff Response:**

The draft Shasta River TMDL Waiver is based upon the existing Shasta River TMDL Action Plan and waiver program and is not a new regulatory program. The Shasta TMDL Waiver program, in effect since January 2007, was structured to build upon the extensive collaborative work undertaken by landowners and interested parties in the watershed. The proposed draft Waiver includes language revisions that staff has identified as necessary to provide additional clarity, transparency and efficiency in the implementation of the waiver program by both Regional Water Board and responsible parties.

**Comment No.2:**

Condition 3 in the Waiver requires property owners to allow Regional Board staff access to private property “for the purpose of observing, inspecting, and/or collecting samples or other monitoring information to document compliance or non-compliance” with the Waiver. However, we are not aware of any circumstance, up to this point, where Regional Board staff have been refused access to a property and have needed some new authority for access. Amidst the current multitude of lawsuits and other regulatory actions involving the Shasta River, even many landowners who have undertaken voluntary efforts to improve habitat and water quality are increasingly resistant to further dictates and intrusions from state and federal agencies. At the same time, landowners have continued to engage in collaborative and proactive management actions. Under these circumstances, we do not see any rationale for adding an access condition that is perceived by the public with such overwhelming negativity.

If the Board does maintain the access condition in the waiver, it should provide assurance and emphasize that any access obtained through the waiver condition is strictly limited to determining compliance or non-compliance with the Waiver. It should be made clear that Regional Board staff may not invite representatives of other agencies to accompany them onto private property. Using the “voluntary” acceptance of the waiver conditions to extract access to private property threatens to intrude on individual rights, which the Fourth Amendment of the United States Constitution protects from unreasonable and warrantless searches. Access authority under the Waiver should be clear and narrow in order to minimize the degree of that intrusion.

**Staff Response:**

Staff has recommended revision to the draft Waiver to clarify that all access requested by Regional Water Board staff will follow established office procedures, including appropriate notification and obtaining of landowner/responsible party permission prior to entry onto private property. The Waiver was also revised to include a statement that Regional Water Board staff will not bring other agency representatives on inspections without landowner permission.

All Regional Water Board regulatory programs are based on the ability of Regional Water Board staff, following appropriate notification procedures, to inspect and otherwise evaluate subject properties to determine compliance with the terms and conditions of any applicable permit, WDR, waiver or other Regional Water Board orders. The ability of Regional Water Board staff to access affected properties is a crucial component in the determination of the effectiveness of individual landowner/responsible party actions as well as the Shasta River TMDL Waiver program in general.

**Comment No. 3:**

Findings 7 and 8 in the Waiver state that staff will focus their regulatory powers on some subset of landowners determined to present the “highest risk to water quality” based on the following factors: 1) type and intensity of land use, 2) proximity to streams, and 3) length of stream

adjacent to such activities. These criteria for targeting particular landowners are vague and lack any quantification. What types of land use? What decrees of intensity? How close in proximity? How long is long? Through what type of equation are all of these variables combined? As presented, these criteria provide landowners with no means of assessing where their operations fall under the Waiver. Even worse, there is no yardstick to evaluate the fairness and reasonableness with which the Waiver is being implemented and no means of holding the Regional Board staff to be accountable for actions, decisions, and prioritization.

**Staff Response:**

Operations that discharge waste are subject to the waiver. In response to the request to clarify the intent of the subject language contained in Findings 7 and 8, Regional Water Board staff have articulated a general implementation approach for the Shasta Wavier which will build upon the actions taken by both Regional Board staff and responsible parties during the past five-year timeframe. Staff will continue their outreach in the watershed while engaging in a more “focused” approach in working with responsible parties with activities that have a higher risk for having water quality impacts, based on geographic location in the watershed and/or active land management activities. Staff will rely on addressing higher risks to water quality impairment recovery including: 1) the quantity, quality and temperature of tailwater return flows, 2) the type and intensity of land use activity, 3) the proximity of land uses to streams, and 4) the length of stream adjacent to land use activities. The geographic focus areas include, in priority: 1) cold water refugia in the Big Springs Complex area downstream of Dwinell Dam, lower Parks Creek and Big Springs Creek, 2) main stem Shasta River between Big Springs Creek and Road A-12, 3) Little Shasta River and Yreka Creek, 4) main stem Shasta River between Road A-12 and Klamath River, and 5) upstream of Lake Shastina. High priority should also be given to complaints that have serious water quality violations regardless of location in the watershed. Also, there are numerous opportunities, ranging from informal discussion with staff’s supervisor(s) to more formal public discussion at Regional Water Board meetings, that allow interested parties to question both Regional Water Board and staff’s actions.

**Comment No. 4:**

The Waiver and the Shasta River TMDL action plan grant broad authority to Regional Board staff to require landowners to perform a number of obligations on a “site-specific” and “as-needed” basis: 1.) Create ranch management plans; 2.) Create tailwater management plans; 3.) Create monitoring and reporting plans; 4.) Conduct photo documentation of management measures; 5.) Evaluate and document instream and near-stream management measures; 6.) Collect tailwater data; 7.) Provide any plans or documentation to the Regional Board upon request; and 8.) Implement any plan at the direction of Regional Board staff.

Simply allowing Regional Board staff to impose these time-consuming and costly requirements at their unilateral discretion creates another gap in anyone’s ability to evaluate objectively the equity, reasonableness, and effectiveness of the program or to ensure accountability on the part of the Regional Board staff who are directing its implementation. Beyond just providing better definition and explanation of “risk criteria” as discussed above, the Waiver should systematically

connect the identification of actual risks with the triggering of commensurate planning, monitoring, and management actions.

**Staff Response:**

The provisions contained in the proposed revised Waiver actually narrow the requirements to submit documentation to the Regional Water Board from all responsible parties seeking coverage (as required in the TMDL Action Plan) to focus initially on those operations with the highest risks impacts to water quality.

**ORAL PUBLIC COMMENTS**

Comments presented orally at the August 1, 2012 public workshop are summarized below (Comments 5 through 15).

**Comment No. 5:**

Use of the coho refugia appears reasonable. However, there is still a need to identify additional areas of coho refugia, such as canyon locations/Salmon Heaven.

**Staff Response:**

Staff agrees that identification of additional areas that provide coho refugia is an important part of the ongoing work to protect coho in the Shasta River watershed. As described above and in the October 2012 Executive Officers Summary Report for this agenda item, staff resources are being focused initially on the upstream portions of the watershed as a top priority in an effort to ensure that land management activities in areas that could directly affect the identified coho refugia are in compliance with the goals of the Waiver “to employ land stewardship practices and activities that minimize, control, and preferably prevent discharges of fine sediment, nutrients (including animal waste), other oxygen consuming materials, and elevated solar radiation loads (including loss of riparian vegetation) from affecting waters of the Shasta River and tributaries”. Staff will continue to include the protection of identified coho refugia as important criteria in the ongoing implementation of the Waiver.

**Comment No. 6:**

Ability of Regional Water staff to access property has not been a problem in the past. What is reasonable access? Should a time be specified?

**Staff Response:**

Staff does not propose a notification time period be specified in the Waiver. Rather staff will have received landowner/responsible party permission prior to their entry onto private property. See Staff Response to Comment No. 2 above for more discussion.

**Comment No. 7:**

It is important to keep an atmosphere of cooperation to maintain goodwill. Regional Water Board staff should also coordinate with other agencies in complaint investigations.

**Staff Response:**

Staff agrees with the need to build upon the atmosphere of cooperation that has been exhibited in the Shasta River watershed in the past. Both the existing Shasta TMDL Action Plan and the proposed revised Waiver reflect the Regional Water Board's support of the ongoing collaborative programs being developed and implemented in the Shasta River watershed. Staff also agrees that coordination between various agency representatives should be attempted during the scheduling of complaint investigations. However it should be noted that agency staff scheduling conflicts may prevent such a coordinated inspection from occurring in a timely manner. The Siskiyou County Sheriff's Department has requested notification of any complaints we receive, and we will make every effort to notify the Sheriff's Department of any complaints and follow up inspections.

**Comment No. 8:**

Waiver framework appears to be based on a tiered approach, is there precedent? Has voluntary approach not worked? Waiver appears to be structure that if a property is located in the Parks Creek watershed (salmon refugia) and responsible party is not in compliance with the Waiver conditions, the landowner will receive a letter from the Regional Water Board but if property is located in downstream in the canyon reach, staff will not engage with the landowner.

**Staff Response:**

The Shasta River TMDL Waiver is not structured as a "tiered" waiver. However there is a precedent in that the Regional Water Board has recently adopted waivers based on a tiered approach. See the USFS waiver (Order No. R1-2010-0029) for an example.

The voluntary approach was not as effective as the Regional Board and staff had initially anticipated. As stated in the Waiver, of the 150 letters that were sent to landowners/responsible parties in the watershed only 43 responses were returned to staff. Staff does not believe that the evidence supports continuation of a "voluntary" approach to Waiver compliance.

**Comment No. 9:**

Is the waiver vulnerable to lawsuits?

**Staff Response:**

Staff believes the revised Waiver is built upon a strong legal foundation and would survive legal challenge.

**Comment No. 10:**

Will responsible parties be required to submit data, for example tailwater temperature data to the Regional Water Board? Data could lead to lawsuits.

**Staff Response:**

When the development and implementation of a monitoring and reporting plan is required by the Regional Water Board Executive Officer, responsible parties will likely be required to submit monitoring data to the Regional Water Board as a condition of Waiver eligibility. While the collection of data necessary to document compliance with the Waiver may be perceived as increasing the potential for citizen lawsuits, staff believes that in the majority of non-enforcement related cases the submittal of such data can strengthen a landowners legal position.

Regional Water Board staff would prefer to work cooperatively with landowners in developing a ranch monitoring plan and possibly include it in their water quality ranch plan rather than require in an Order from the Executive Officer. Ranch plans do not have to be submitted to the Regional Water Board but rather should be kept on the ranch for the landowner's personal use.

**Comment No. 11:**

Who will evaluate the adequacy of land management practices? As it is expressed in the Waiver the process seems subjective.

**Staff Response:**

Regional Water Board staff are responsible for evaluating land management practices and their adequacy in protecting water quality at individual sites. To this end, Regional Water Board staff are provided a number of educational resources to maintain their technical expertise and enhance their best professional judgment. Resource Conservation District staff or other resource professionals may occasionally assist Regional Water Board staff in evaluating management practices. As described in Staff Response to Comment No. 3, responsible parties and other interested stakeholders can request a discussion of any or all of staff's evaluations with informally with staff's supervisors or more formally in at one of the Regional Water Board meetings.

**Comment No. 12:**

What is crosswalk between the Action Plan and Waiver?

**Staff Response:**

The proposed revised Waiver is constructed with the Shasta TMDL Action Plan as its foundation. Some of the tasks identified in Table 4-14 of the Shasta River TMDL Action Plan have already been accomplished (such as development of the waiver for the U.S. Forest Service), some are being implemented through other programs (such as Caltrans and City of Yreka stormwater issues) and others no longer appear warranted (such as requiring development and implementation of a Lake Shastina Water Quality Plan). Revisions to Table 4-14 of the Shasta

River TMDL Action Plan will need to be amended into the *Water Quality Control Plan for the North Coast Region* (Basin Plan) as directed by the Regional Water Board as part of the triennial review process mandated by law. If there is a conflict between the conditions of the revised Waiver and the Action Plan, the Waiver will take precedent.

**Comment No. 13:**

Will there be fees associated with the waiver?

**Staff Response:**

The issue of waiver fees is outside the jurisdictions of the Regional Water Board. Waiver fee schedules are established by the State Water Resources Control Board. At this time there are no fees associated with waivers developed to implement TMDLs.

**Comment No. 14:**

Who is covered by waiver who is not? May need to provide defined criteria. Waiver should be proscriptive rather than prescriptive. It should be assumed that responsible parties are in compliance until shown not to be. Need to preserve ability to restrict specific activity in specific place.

**Staff Response:**

The proposed Waiver is structured such that all landowners/responsible parties employing “land stewardship practices and activities that minimize, control, and preferably prevent discharges of fine sediment, nutrients (including animal waste), other oxygen consuming materials, and elevated solar radiation loads (including loss of riparian vegetation) from affecting waters of the Shasta River and tributaries” will be considered in compliance with the conditions of the Waiver and hence “covered” by the Waiver. This coverage will remain in place until such time as Regional Water Board staff establishes evidence to the contrary. In short everyone employing land stewardship practices and activities that minimize, control, and preferably prevent discharges, are assumed to have coverage until such time as they are formally informed otherwise by Regional Water Board staff.

**Comment No. 15:**

Where does a strategy get vetted and presented? Details of strategy are requested here.

**Staff Response:**

The general implementation approach is outlined in Staff Response to Comment No. 3 above.

**Comment No. 16:**

Will there be a second look at waiver before adoption, another workshop to get the word out about TMDL? Can information about the proposed waiver be disseminated to the local community (local paper, Farm Bureau, Cattlemen’s Association, etc)?

**Staff Response:**

Revisions, based on public input, to the proposed Waiver will be available approximately 14 days prior to the October 4, 2012 Regional Water Board adoption hearing. No additional written comment period or workshop is planned at this time. Oral testimony can be made at the time of the Regional Water Board's consideration of the Waiver. An article about the proposed Shasta River TMDL Waiver was recently included in the Shasta Valley Resource Conservation District's newsletter (August 2012). This publication is designed to reach out to the Shasta River Valley landowners and has been a valuable tool in keeping them apprised of the ongoing development of the TMDL Waiver program. Regional Water Board staff will also continue to conduct periodic workshops to inform stakeholder on TMDL requirements.