Michael W. Graf (CA Bar # 136172)
Law Offices
227 Behrens Street
El Cerrito, California 94530
Tel: (510) 525-7222
Fax: (510) 525-1208

Attorney for Petitioners Sierra Forest Legacy,
the Tahoe Group of the Sierra Club
and the League to Save Lake Tahoe.

BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

Sierra Forest Legacy, Tahoe Group of the Sierra Club and League to Save Lake Tahoe, Petitioners, vs. Lahontan Regional Water Quality Control Board Respondent	)))))))))) /	Petition for Review of Lahontan Regional Water Quality Control Board Action Adopting Resolution R6T- 2008

Introduction and Summary

Pursuant to Water Code § 13320, Petitioners Sierra Forest Legacy, Tahoe Group of the Sierra Club and League to Save Lake Tahoe (Petitioners) hereby petition the State Water Resources Control Board ("State Board") to review the final decision of the Lahontan Regional Water Quality Control Board ("Lahontan") adopting Resolution R6T- 2008 ("Resolution.")

The Resolution waives waste discharge requirements ("Waiver") for vegetation management activities occurring in the Tahoe Basin which are regulated by the Tahoe Regional Planning Agency ("TRPA"). The Resolution also authorizes Lahontan's Executive Officer to enter into a Memorandum of Understanding ("MOU") with TRPA regarding the regulation of such vegetation management activities. Lahontan approved the Waiver and MOU through the adoption of a mitigated negative declaration under the California Environmental Quality Act ("CEQA"). Pub. Res. Code §21000 *et seq.* (The Resolution/Waiver and MOU are attached hereto as Exhibit 1 to this Petition.)

Lahontan's approval of the Waiver and MOU are part of a larger project currently

being implemented in the Tahoe Basin over the next decade to conduct fuel reduction logging on approximately 68,000 acres. The purpose of this larger project is to reduce fire risk while also providing the necessary protection to the environment in the Lake Tahoe Basin.[1/]

Lahontan's previously existing waiver applicable to logging activities within the Basin contained strict monitoring requirements applicable to a number of high risk activities found to have potentially significant impacts on water quality. The new Waiver and MOU transfer primary regulatory authority to protect water quality over this vast scope of future logging activities from Lahontan to TRPA and thereby repeal the conditions of the prior waiver, leaving oversight for monitoring the impacts of these projects to TRPA.

As discussed in detail in Petitioners' comments, the record does not contain evidence of how TRPA intends to require monitoring, or how TRPA's existing code provides monitoring that will be adequate to ensure that fuel reduction activities in sensitive areas avoid significant impacts to water quality and the environment. In sum, Lahontan's process provides no discussion of how monitoring will be conducted on these projects in the future, even though Lahontan's action effectively eliminates the previously existing monitoring requirements.

As a result, the Waiver is in violation of the Porter Cologne Act because 1) it does not include the required monitoring component, 2) does not comply with the Basin Plan and 3) does not contain information as to how waived projects will be regulated, all contrary to the public interest. *See* Water Code § 13269(a)(1).

Further, in approving the Waiver and MOU through a negative declaration with minimal to no analysis regarding the potential water quality impacts of the project, Lahontan violates CEQA in a number of ways, including failing to describe the project and environmental/regulatory setting, unlawfully deferring necessary analysis, failing to prepare an environmental impact report ("EIR"), failing to consider cumulative impacts, failing to consider the larger project at issue regarding fuel reduction in the Basin and failing to consider reasonable alternatives that might avoid or substantially lessen potentially significant impacts to water quality and the riparian environment.

The public is entitled to know how fuel reduction activities will be implemented and monitored to ensure that water quality in the Tahoe Basin is protected. Lake Tahoe has been designated as an Outstanding National Resource Waters ("ONRW") in the Water Quality Control Plan for the Lahontan Region ("Basin Plan"), which means it is automatically subject to the antidegradation requirements under state and federal law that the ONRW's water

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[1/] *See* Lake Tahoe Basin Multi-Jurisdictional Fuel Reduction and Wildfire Prevention Strategy, pp. 5-6, http://www.fs.fed.us/r5/ltbmu/documents/fuel-reduction-projects/10-year-plan/LTB_FUELS_PLAN_12_13_2007.pdf.

quality be maintained and protected.[2] However, Lahontan's action, together with the 68,000 acres of vegetation management activities planned, has the potential to reduce Lake Tahoe's water quality and adversely affect existing instream uses relating to environmental values in the Basin.

Lahontan's waiver presents no discussion of how the intended 68,000 acres of fuel reduction activities planned for Tahoe over the next decade will be implemented, reviewed or monitored, yet concludes nevertheless that the waiver will have no adverse effects on water quality. However, nothing in the record suggests that TRPA intends to conduct such an analysis as part of an open public process nor, as discussed in Section 4 below, may Lahontan avoid its own responsibilities under CEQA to analyze the potential impacts that may occur through inadequate monitoring, and to include conditions in the waiver that such analysis shows are necessary to avoid adverse impacts to water quality.

In sum, Lahontan is waiving its authority over future projects without any understanding or information as to what the future process, standards and evaluation will be. Petitioners strongly believe that the adoption of a waiver without such analysis or necessary information is not in the public interest, contrary to both the Water Code and CEQA. *See e.g. Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 885 ("[T]he CEQA process demands that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena.")

Petitioners thereby request that the State Board grant their Petition and set aside Lahontan's approval of the Waiver and MOU until adequate information can be presented as to how water quality in the Basin will be protected.

Petitioners also request an evidentiary hearing on their Petition based on the arguments summarized below, the evidence submitted to Lahontan, and the additional evidence of further developments among the agencies Lahontan, TRPA, State Board and the Forest Service as to how vegetation management activities will be regulated in the Tahoe Basin. Such evidence was not available at the time that Petitioners commented on the proposed project, nor was such information discussed or addressed by Lahontan in its proceedings, despite inquiries from Petitioners. Petitioners intend to present this information as part of the State Board's review of this Petition.

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[2] *See e.g.*, 40 C.F.R. § 131.12(a)(1), (3). *See also* Basin Plan, pp. 3-12 - 3-13.

1. Name, address, telephone number and e-mail address of the petitioners.

Sierra Forest Legacy
1418 20th Street, Suite 100
Sacramento, California 95811
Phone: (916) 442-3155
Fax: (916) 442-3396
Contact: Craig Thomas
craig@sierraforestlegacy.org

Tahoe Group of the Sierra Club
P.O. Box 12308
Zephyr Cove, NV 89448
(775) 588-5466
Contact: Michael Donahoe
donahoe@charter.net

League to Save Lake Tahoe
955 Emerald Bay Rd.
South Lake Tahoe, CA 96150
(530) 541-5388
Contact: Rochelle Nason
rochelle@keeptahoeblue.org

2. The action or inaction of the Regional Water Board being petitioned, including a copy of the action being challenged or any refusal to act, if available.

Lahontan approved Resolution R6T- 2008 on December 11, 2008. A copy of the Resolution is attached hereto as Exhibit 1.

3. The date the Regional Water Board acted, refused to act, or was requested to act.

December 11, 2008

4. Statement of Reasons Why Action Was Inappropriate or Improper.

Prior to Lahontan's action here, vegetation management activities throughout the Basin were subject to Lahontan's region-wide waiver, which contain detailed monitoring requirements for high risk fuel reduction projects, including photo-point monitoring to ensure that mitigation measures have been effectively implemented and are functioning to avoid adverse water quality impacts. As discussed in Petitioners' December 1, 2008 comments (*see* Exhibit 3, attached hereto), these requirements are critical to ensure that projects avoid significant impacts and that the oversight agency retain the ability to corroborate such

compliance.[3]

For timber projects within the Tahoe Basin, the new Waiver and MOU repeal these previous region-wide waiver monitoring requirements and instead turn over authority to TRPA with references to TRPA's code provisions regarding monitoring. As set forth in Petitioners' comments, however, neither TRPA's code nor any other information in the record provides evidence that TRPA's monitoring will meet the requirements of Water Code § 13269 or the standards of Lahontan's region-wide waiver, which previously applied to the Tahoe Basin.[4] *See* Exhibit 3, attached hereto, pp. 6-8. Instead, the Waiver and MOU simply delegate primary regulatory authority to TRPA, without any description of how TRPA proposes to regulate these activities. As a result, Lahontan did not, and could not, make the findings required under Water Code § 13269(a)(2) that the waiver contains monitoring requirements adequate to "verify[] the adequacy and effectiveness of the waiver's conditions." Further, even if there was evidence that TRPA intended to develop a new monitoring protocol to substitute for the provisions of Lahontan's previous waiver, Lahontan may not approve the Waiver/MOU without an investigation and analysis of what types of monitoring are necessary to ensure that the planned logging activities do not have significant impacts on water quality, and inclusion of conditions in the Waiver that TRPA must adopt such measures for the waiver to be valid. *See e.g., Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 141 ("[D]elegation of the council's authority was itself an impermissible attempt to approve the project without prior CEQA review.")[5]

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[3]Lahontan's region-wide waiver monitoring conditions were adopted based on Lahontan's own recognition during the 2007 approval process that "vegetation management activities" such as those at issue in this proceeding have the potential for significant environmental impacts, particularly when conducted in sensitive areas such as steep hillsides or streamzones.

[4]Section 13269(a)(1) requires the waiver to include "performance of individual, group, or watershed-based monitoring," which "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 results shall be made available to the public." (Emphasis added.) Nothing in the record explains how future monitoring will verify the adequacy and effectiveness of the waiver's conditions that water quality be protected.

[5]The Supreme Court cited *Sundstrom v. County of Mendocino* (1988) 202 Cal. App.3d 296, 307 [permit condition requiring applicant to submit environmental study to the planning commission and adopt any mitigation measures formulated by commission staff was an improper delegation of CEQA responsibility to staff and an impermissible postponement of environmental review].) Numerous other cases hold that an agency may not delegate or defer environmental analysis in a CEQA proceeding, particularly when adopting a negative declaration. *See e.g., Endangered Habitats League v. State Water Resources Control Board* (1997) 63 Cal. App. 4th 227, 239; *Dunn-Edwards Corporation v. B.A.A.Q.M.D.* (1992) 9 Cal. App. 4th 644, 658. This is particularly true with respect to the identification of necessary mitigation measures to avoid significant impacts. *See e.g., Gentry v. City of Marietta* (1995) 36 Cal. App. 4th 1359, 1391-1392; *Quail Botanical Gardens Foundation, Inc. v. City of*

Here, Petitioners submitted substantial evidence supporting a fair argument that inadequate monitoring has the potential to lead to significant adverse impacts on water quality in the Basin. *See e.g., County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App.4th 1544, 1597 ("[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'") (citing *Sundstrom v. County of Mendocino*).

In the proceedings below, Lahontan asserted that TRPA's monitoring will avoid significant impacts because that is what the TRPA code states is supposed to happen. This approach is contrary to both the Water Code and CEQA, which require that specific monitoring standards be established to inform the public as to how water quality will be protected. *See* Water Code § 13269(a)(2); *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1117-1118 ("[W]e conclude that here the County has not committed itself to a specific performance standard. Instead, the County has committed itself to a specific mitigation goal."); *Environmental Planning and Information Center v. County of El Dorado* (1982) 131 Cal. App. 3d 350 (CEQA "has clearly expressed concern with the effects of projects on the actual environment upon which the proposal will operate" rather than the legal parameters under which agencies operate.)

The record also contains no discussion about TRPA's existing MOU with the Forest Service, which exempts logging projects under 100 acres in size occurring on Forest Service lands from TRPA oversight, including "substantial tree removal involving the use of heavy equipment" in SEZs or on other sensitive lands. Further, the Forest Service and TRPA are currently negotiating to revise this MOU; this revision will likely determine whether TRPA or the Forest Service will oversee the vast majority – approximately 56,000 out of the 68,000 acre total - of the planned fuel reduction for the Basin. Lahontan's project documents do not discuss this fact or how the Forest Service will regulate projects. However, the record shows that Lahontan has found the Forest Service's self-monitoring program to be inadequate to protect water quality.

The potential lack of adequate monitoring on 68,000 acres of logging activities within the Tahoe Basin has the potential for long term adverse impacts to Lake Tahoe's water quality due to sediment, nitrogen and phosphorous discharge. This is a potential cumulatively considerable impact under CEQA, given that the Basin's waters are currently impaired for these pollutants. *See* 14 Cal. Code Regs. § 15355(b); *Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 119 ("Guidelines section 15355 definition of cumulative impacts...turns on the impacts of both the project under review and the relevant past, present and future projects.") *See also Los Angeles Unified School Dist. v.*

Encinitas (1994) 29 Cal. App. 4th 1597, 1606, n. 4 ("[A]ny necessary mitigation measures must be specifically set forth at the time of publication of a mitigated negative declaration in advance of the City's adoption of it.")

City of Los Angeles (1997) 58 Cal. App. 4th 1019, 1026 ("EIR is inadequate for concluding that a project's additional increase in noise level of another 2.8 to 3.3 dBA was insignificant given that the existing noise level of 72 dBA already exceeded the regulatory recommended maximum of 70 dBA.")

The potential that inadequate monitoring will lead to further impairment of Tahoe's waters also violates the Basin Plan's antidegradation provision, which identifies Lake Tahoe as an Outstanding National Resource Water and requires its water quality to be maintained and protected. *See e.g.*, 40 C.F.R. § 131.12(a)(3); Basin Plan, pp. 3-12 - 3-13. Lack of monitoring and review also has the potential for adverse effects on instream beneficial uses within the Basin's many streams and tributaries that may be harmed by stream zone logging with heavy equipment or in particularly sensitive areas. *See e.g.*, 40 C.F.R. § 131.12(a)(1); Basin Plan, pp. 3-12 - 3-13.

Under state law, Lahontan is the agency with oversight authority over activities affecting water quality. State law requires that Lahontan, as one of the Regional Water Quality Control Boards, retain primary responsibility for ensuring that the impacts of logging and clearing of vegetation do not jeopardize the attainment of water quality objectives mandated by the federal Clean Water Act, the state Porter Cologne Act and the Basin Plan. Petitioners are aware there is a policy imperative to reduce fuel loading in the Tahoe Basin and agree that fuel reduction projects are necessary to reduce fire risk. However, Lahontan has historically played a primary and critical role in ensuring that water quality and beneficial uses are protected in the Basin as projects in sensitive areas are implemented.

Lahontan has found that Tahoe's water quality is currently impaired and that discharges from the vegetation management activities proposed under the Waiver have the potential to further this existing significant water quality impact in the Basin. Given Lahontan's continuing primary responsibility over water quality in the Tahoe Basin, Petitioners believe it is highly inappropriate – and contrary to law – for Lahontan to waive its regulatory authority over to TRPA without a full understanding and assurance of how TRPA will ensure that the thousands of acres of vegetation management activities planned for the Tahoe Basin will avoid adverse effects on water quality.

Petitioners allege the following legal violations.

1. Violation of Water Code § 13269 due to:

    a. Inadequate monitoring requirements for projects subject to the Waiver;

    b. Violation of the Basin Plan by conferring primary regulatory authority on TRPA despite lack of any plan by TRPA for addressing water quality impairments and important habitat elements in the Basin that will be adversely affected by the vegetation management activities subject to the Waiver, and by allowing for potential long term adverse effects on Lake Tahoe's water

quality and on instream beneficial uses within the Basin, in violation of Basin Plan Nondegradation Objectives.

c. The Waiver is not in the public interest because it transfers primary regulatory authority over projects to TRPA even though there is no evidence showing how TRPA can oversee these projects to ensure that significant adverse impacts to water quality are avoided.

2. Violation of CEQA due to:

a. Failure to provide adequate information about the existing regulatory setting or the project that is proposed.

b. Failure to consider a reasonable range of alternatives, in particular an alternative that would retain the monitoring requirements of Lahontan's region-wide waiver for vegetation management activities in the Tahoe Basin.

c. Unlawful segmentation of the larger project at issue, which is to respond to the fire commission recommendations and to establish streamlined and effective regulatory oversight for fuel reduction projects in the Basin.

d. Unlawful deferral of formulation of mitigation necessary to meet Basin Plan requirements and avoid significant impacts under CEQA, including establishment of monitoring requirements that will ensure water quality and habitat are protected.

e. Failure to prepare an EIR for the project despite substantial evidence supporting a fair argument that the repeal of monitoring and other changes instigated by the Waiver/MOU have the potential for significant impacts on water quality and sensitive habitats in the Basin.

f. Failure to assess the cumulative impacts of the Waiver/MOU project in combination with foreseeable future projects in the Tahoe Basin.

See Petitioners' comments to Lahontan dated September 17, 2008 and December 1, 2008, Exhibits 2-3, attached hereto, for more detail on these claims.

5. How the petitioner is aggrieved.

Petitioners are public interest organizations dedicated to ensure that activities with the potential for adverse environmental impacts are regulated according to law. Each Petitioner has participated in numerous public processes for the protection of water quality and sensitive habitats in the Tahoe Basin. Petitioners' members will be adversely affected by the lack of adequate regulation over fuel reduction projects in the Tahoe Basin.

6. The action the petitioner requests the State Water Board to take.

Petitioners request that the State Board grant their Petition and set aside Lahontan's approval of the Waiver and MOU. Petitioners request that the State Board remand the matter back to Lahontan to assess how water quality in the Basin will be protected by TRPA's regulatory program, including any agreements that TRPA has reached or is intending to reach with the U.S. Forest Service regarding regulation of Forest Service projects in the Basin.

7. A statement of points and authorities for any legal issues raised in the petition, including citations to documents or hearing transcripts that are referred to.

Petitioners attach their two principal comment letters submitted to Lahontan during the public review process. (*See* Exhibits 2-3, attached to this Petition.) These comments contain citations and references to exhibits that were also submitted and are part of the record.

8. A statement that copies of the petition have been sent to the Regional Water Board and to the discharger, if different from the petitioner.

A true and correct copy of this petition was mailed via First Class mail on January 9, 2009 to Lahontan.

9. A statement that the issues raised in the petition were presented to the regional board before the regional board acted, or an explanation of why the petitioner could not raise those objections before the regional board.

The substantive issues or objections raised in this Petition were presented to the Lahontan during the period for public comment on the proposed Waiver and/or prior to Lahontan's approval of the Waiver and MOU. Petitioners submitted three sets of comments on the project and also testified before the Lahontan Board at the December 11, 2008 public hearing on this matter.

10. Petitioners request a hearing on their Petition

Petitioners request an evidentiary hearing on their Petition. Petitioners intend to make the arguments set forth in Section 4 above at the hearing. Petitioners also intend to submit evidence regarding potential further developments among the agencies Lahontan, TRPA, State Board and the Forest Service regarding how vegetation management activities will be regulated in the Tahoe Basin. Such evidence was not available at the time that Petitioners commented on the proposed project and Lahontan did not present any information or discussion of these issues. Petitioners commented below that Lahontan had a duty under CEQA to investigate and obtain this information regarding how vegetation management activities will be foreseeably regulated under the new Waiver and MOU but did not do so. Petitioners intend to present this information as part of the State Board's review of this Petition.

Respectfully submitted via electronic and U.S. mail.

DATED: January 9. 2009

By: _____
Michael W. Graf
Attorney for Petitioners

Attachments:

Exhibit 1:	Waiver and MOU Adopted on December 11, 2009
Exhibit 2:	Petitioners' Comments on Waiver/MOU dated September 17, 2008
Exhibit 3:	Petitioners' Comments on Waiver/MOU dated December 1, 2008

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION

RESOLUTION NO. R6T-2008-(**PROPOSED**)

WAIVER OF FILING A REPORT OF WASTE DISCHARGE AND WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR VEGETATION MANAGEMENT ACTIVITIES REGULATED BY THE TAHOE REGIONAL PLANNING AGENCY AND AUTHORIZING THE LAHONTAN WATER BOARD'S EXECUTIVE OFFICER TO ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE TRPA

INTRODUCTION

This resolution waives the need for proponents of vegetation management activities in the Lake Tahoe Basin to apply for or receive timber harvest or vegetation management permits from the California Regional Water Quality Control Board, Lahontan Region, (Water Board), before initiating work on their project. In order to take advantage of this waiver of filing a report of waste discharge (i.e., project application) with the Water Board or receiving waste discharge requirements (i.e., permit) from the Water Board, the project must be regulated by the Tahoe Regional Planning Agency (see Waiver and Conditions, paragraph 1, of this Resolution) under any of its authorizations (e.g., exempt, qualified exempt, or tree removal permits) and the project must not cause a significant adverse effect to the environment that cannot be mitigated to a level of insignificance (see Waiver and Conditions, paragraph 2, of this Resolution).

This waiver applies to the California portion of the Lake Tahoe Basin under mutual jurisdiction of the Water Board and the TRPA. The Lake Tahoe Basin includes lands in El Dorado and Placer Counties, California, which are tributary to Lake Tahoe. The California portion under the jurisdiction of both the TRPA and the Water Board does not include the Alpine County portion of the Lake Tahoe watershed, but does include part of the Truckee River Hydrologic Unit, between the Lake Tahoe outlet dam and the Bear Creek confluence.

FINDINGS

WHEREAS, the California Regional Water Quality Control Board, Lahontan Region, (Water Board) finds:

A. California Governor Arnold Schwarzenegger issued a Proclamation strongly encouraging the Lahontan Water Board and the TRPA to take expedited action to implement the recommendations of the California-Nevada Tahoe Basin Fire Commission that relate to the Lahontan Water Board and the TRPA.

B. The California-Nevada Tahoe Basin Fire Commission Report of May 2008 recommended the Governor of the state of California direct, within the framework of his legal authority, the Water Board to transfer to TRPA no later than October 1, 2008, by a suitable Memorandum of Understanding (MOU), all responsibility of the Water Board relating to fuel reduction projects performed within the Lake Tahoe Basin. The intent is to have an expedited single permitting process, eliminating the need for the Water Board to issue a second permit, and to achieve consistency in the application of environmental laws as it relates to these kinds of projects in the Lake Tahoe Basin.

C. The Water Board and TRPA recognize that areas of overlapping authority and regulatory effort exist in the operations of the two agencies, and that it will be mutually beneficial to the Water Board, TRPA, and the regulated community to avoid unnecessary duplicative regulation.

D. The Water Board and TRPA have developed a streamlined, cooperative approach toward effective regulation of vegetation management activities in the Lake Tahoe Basin by entering into a MOU designating the TRPA as the agency responsible for review and permitting vegetation management projects.

E. Lake Tahoe is a designated Outstanding National Resource Water whose quality and beneficial uses are threatened by sediment, nutrient, and other pollutant loading from a variety of sources. Control of these sources is of major interest to the States of California and Nevada and the federal government.

F. The Water Board is an agency of the state of California, empowered by the federal Clean Water Act, the Porter-Cologne Water Quality Control Act, and other federal and state laws to set water quality standards and to regulate activities in the California portion of the Lake Tahoe Basin which may have an adverse effect on water quality.

G. TRPA is required by the Tahoe Regional Planning Compact (P.L. 96-551, 94 Stat. 3233, Cal. Govt. Code 66801; NRS 277.200) to regulate activities within the Lake Tahoe Region, which may have a substantial effect on natural resources of the Region. To protect these resources, the Compact directs TRPA to establish and ensure attainment of environmental standards, including water quality, soil conservation, and fisheries.

H. The TRPA is the designated water quality planning agency under Section 208 of the Clean Water Act. The TRPA's "208 Plan" was certified by the states of California and Nevada and the USEPA, and establishes control measures to protect water quality including a tree removal permit system, stream environment zone and wetland protection policies, vegetation protection and management provisions, prohibitions against fill in 100-year floodplains, and use of Best Management Practices (BMPs). The TRPA's Regional Plan also provides for attaining and

maintaining the strictest water quality standards established by federal or state agencies as required by Article 5, section 5(d) P.L. 96-551, and the TRPA Code of Ordinances incorporates water quality standards as equally restrictive as those contained in the Water Quality Control Plan for the Lahontan Region (Lahontan Basin Plan).

I. California Water Code Section 13260(a) requires that any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the State, other than to a community sewer system, shall file with the appropriate Water Board a report of waste discharge (ROWD) containing such information and data as may be required by the Water Board.

J. The Water Board has a statutory obligation to prescribe waste discharge requirements, except where the Water Board determines, after any necessary regional board meeting, that a waiver of waste discharge requirements for a specific type of discharge is consistent with any applicable state or regional water quality control plan and is in the public interest pursuant to California Water Code Section 13269.

K. California Water Code Section 13269 includes the following provisions:

a. A waiver may not exceed five years in duration, but may be renewed by the regional board.
b. The waiver shall be conditional and may be terminated at any time by the regional board.
c. The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring, except the regional board may waive the monitoring requirements described in this subdivision for discharges that it determines do not pose a significant threat to water quality.
d. 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.
e. In establishing monitoring requirements, the regional board may consider the volume, duration, frequency, and constituents of the discharge; the extent and type of existing monitoring activities, including, but not limited to, existing watershed-based, compliance, and effectiveness monitoring efforts; the size of the project area; and other relevant factors.
f. Monitoring results must be made available to the public.
g. The Water Board may include as a condition of a waiver the payment of an annual fee established by the State Water Resources Control Board (State Water Board). At the time of this hearing, the State Water Board has not established annual fee regulations with respect to vegetation management activities.

L. The Water Board finds that waiving the filing of a ROWD and waste discharge requirements for the following types of vegetation management activities within the area of mutual jurisdiction of the TRPA and the Lahontan Water Board is in the public interest when such activities are effectively regulated by the TRPA:

Activities related to the management of vegetation for the purposes of:

a. fuel reduction;
b. forest thinning;
c. environmental improvement (such as forest enhancement, riparian enhancement, and aspen stand enhancement);
d. burned area rehabilitation;
e. hazard tree removal;
f. site preparation that involves disturbance of soil, burning of vegetation, or herbicide/pesticide application; or
g. cutting or removal of trees and vegetation, together with all the work incidental thereto, including, but not limited to, construction, reconstruction, maintenance and decommissioning of roads, fuel breaks, stream crossings, landings, skid trails, or beds for the falling of trees.

Vegetation management activities do not include aquatic vegetation management, preparatory tree marking, surveying, or road flagging.

M. The Water Board finds that waiving the filing of a report of waste discharge and/or waste discharge requirements for the categories of projects listed above would enable Water Board staff to use its resources effectively and to reduce duplicative regulatory requirements.

N. Water Board staff has prepared a Negative Declaration in accordance with the California Environmental Quality Act (Public Resources Code, Section 21000 et seq.) and state guidelines, and the Water Board has considered the Negative Declaration and determined there will be no significant adverse impacts to the environment from the waiver of filing a report of waste discharge and/or waste discharge requirements for the categories of projects specified herein that are regulated by the TRPA.

O. The Water Board held a hearing on December 11, 2008 in South Lake Tahoe and considered all evidence concerning this matter.

THEREFORE BE IT RESOLVED:

WAIVER AND CONDITIONS

1. The Water Board waives the filing of a report of waste discharge and/or waste discharge requirements for all vegetation management activities and discharges (except for those projects identified in paragraph 2 below) in the areas of the mutual

jurisdiction of the TRPA and the Water Board if these activities are regulated by the TRPA.

2. The Water Board does **not** waive the filing of a report of waste discharge and waste discharge requirements for vegetation management activities with impacts that cannot be mitigated to less than significant levels. Such impacts are those identified in a California Environmental Quality Act environmental impact report, or a National Environmental Policy Act or TRPA environmental impact statement. Activities that cause such impacts were not considered in the Negative Declaration that the Water Board prepared as part of this action. Therefore, this waiver is not applicable to these activities unless a regulatory agency imposes conditions or requirements such that the impacts are mitigated to less than significant levels.

3. While very unlikely, some components of projects covered by this waiver of waste discharge requirements may be subject to regulation under Clean Water Act section 404 or any other federal permit or subject to a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act as a silvicultural point source as defined in 40 Code of Federal Regulations (CFR) section 122.27. This waiver is not a substitute for state water quality certification under section 401 of the federal Clean Water Act which is needed if a federal Clean Water Act section 404 is needed. Additionally, this waiver is not a substitute for an NPDES permit, should one be needed.

4. This waiver requires compliance with the Lahontan Basin Plan, TRPA's Regional Plan, and prohibits the creation of a pollution or nuisance.

5. This action waiving the filing of a report of waste discharge and waste discharge requirements is conditional as outlined in paragraphs 1 through 4, above, and the Executive Officer can recommend the Water Board adopt waste discharge requirements for any of the specific types of vegetation management activities or discharges, or any individual vegetation management activity or discharge, identified in Finding L above.

MOU AUTHORIZATION AND NEGATIVE DECLARATION CERTIFICATION

6. The Water Board authorizes and directs the Executive Officer to enter into a Memorandum of Understanding with the TRPA which describes the relationship between the Water Board and TRPA related to regulation projects subject to the waiver in paragraph 1 above. The Executive Officer is authorized to approve non-substantive changes in the MOU.

7. The Water Board certifies the Negative Declaration for this waiver and directs the Executive Officer to file all appropriate notices.

I, Harold J. Singer, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Lahontan Region, on December 11, 2008.

_____
HAROLD J. SINGER
EXECUTIVE OFFICER

MEMORANDUM OF UNDERSTANDING BETWEEN THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LAHONTAN REGION, AND THE TAHOE REGIONAL PLANNING AGENCY
for
VEGETATION MANAGEMENT

INTRODUCTION

This Memorandum of Understanding (MOU) describes the roles and relationships between the Tahoe Regional Planning Agency (TRPA) and the California Regional Water Quality Control Board, Lahontan Region (Water Board) in regulating vegetation management activities in the area of the Lake Tahoe Basin under mutual jurisdiction of both agencies. The Water Board also adopted a waiver that exempts project proponents in the Lake Tahoe Basin from the need to apply for or receive timber harvest or vegetation management permits from the Water Board when such projects are regulated by the TRPA under this MOU.

The waiver is a separate document that provides the basis and conditions for the Water Board's reliance on the TRPA for permitting and review of vegetation management activities. Project proponents should review the waiver, titled *Waiver of Filing a Report of Waste Discharge and Waiver of Waste Discharge Requirements for Vegetation Management Activities Regulated by the Tahoe Regional Planning Agency*, available at http://www.waterboards.ca.gov/lahontan/.

The MOU and waiver apply to the California portion of the Lake Tahoe Basin under mutual jurisdiction of the Water Board and the TRPA. The Lake Tahoe Basin includes lands in El Dorado and Placer Counties, California, which are tributary to Lake Tahoe. The California portion under the jurisdiction of both the TRPA and the Water Board does not include the Alpine County portion of the Lake Tahoe watershed, but does include part of the Truckee River Hydrologic Unit, between the Lake Tahoe outlet dam and the Bear Creek confluence.

FINDINGS

WHEREAS, the California Regional Water Quality Control Board, Lahontan Region (Water Board), through direction to the Water Board Executive Officer, and the Tahoe Regional Planning Agency (TRPA) Governing Body, through direction to the TRPA Executive Director, have agreed to enter into this Vegetation Management Memorandum of Understanding (MOU); and

WHEREAS, California Governor Arnold Schwarzenegger issued a Proclamation strongly encouraging the Water Board and the TRPA to take expedited action to implement the recommendations of the California-Nevada Tahoe Basin Fire Commission; and

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WHEREAS, the California-Nevada Tahoe Basin Fire Commission Report of May 2008 recommended the Governor of the State of California direct, within the framework of his legal authority, the Water Board to transfer to TRPA no later than October 1, 2008, by a suitable MOU, all responsibility of the Water Board relating to fuel reduction projects performed within the Lake Tahoe Basin. The intent is to have an expedited single permitting process, eliminating the need for the Water Board to issue a second permit, and to achieve consistency in the application of environmental laws as it relates to these kinds of projects in the Lake Tahoe Basin; and

WHEREAS, Lake Tahoe is a designated Outstanding National Resource Water whose quality and beneficial uses are threatened by sediment, nutrient, and other pollutant loading from a variety of sources. Control of these sources is of major interest to the States of California and Nevada and the federal government; and

WHEREAS, the Water Board is an agency of the State of California, empowered by the federal Clean Water Act, the Porter-Cologne Water Quality Control Act, and other federal and state laws to set water quality standards and to regulate activities in the California portion of the Lake Tahoe Basin which may have an adverse effect on water quality; and

WHEREAS, TRPA is required by the Tahoe Regional Planning Compact (P.L. 96-551, 94 Stat. 3233, Cal. Govt. Code section 66801 et seq.; NRS 277.200 et seq.) to regulate activities within the Lake Tahoe Region, which may have a substantial effect on natural resources of the Region. To protect these resources, the Compact directs TRPA to establish and ensure attainment of environmental standards for water quality, air quality, noise, recreation, soil conservation, wildlife habitat, vegetation preservation, scenic quality, and fisheries. The Compact also directs TRPA to define which activities are exempt from TRPA review and approval. TRPA defines exempt activities in Chapter 4 of its Code of Ordinances; and

WHEREAS, the Water Board and TRPA are both responsible for implementing the bi-state Water Quality Management Plan for the Lake Tahoe Region ("208 Plan") and TRPA is recognized as one of the implementing agencies for certain California Water Quality Control Plan provisions applicable to the Lake Tahoe Basin. These provisions require compliance with water quality standards and the installation of BMPs for the control of erosion and stormwater on all improved properties in the California portion of the Lake Tahoe Basin, and prohibit disturbance of Stream Environment Zones (SEZs), with limited exceptions; and

WHEREAS, the Water Board and TRPA are interested in developing a streamlined, cooperative approach toward regulating vegetation management activities in the Lake Tahoe Basin; and

WHEREAS, the Water Board and TRPA recognize that areas of overlapping authority and regulatory effort exist in the operations of the two agencies, and that it will be mutually beneficial to the Water Board, TRPA, and the regulated community to avoid unnecessary duplicative regulation, and

WHEREAS, "vegetation management activities" include all activities related to the management of vegetation for the purposes of fuel reduction; forest thinning; and/or environmental improvement (such as forest enhancement, riparian enhancement, and aspen stand enhancement); cutting or removal of trees and vegetation, together with all the work incidental thereto, including, but not limited to, construction, reconstruction, maintenance, and decommissioning of roads, fuel breaks, stream crossings, landings, skid trails, or beds for the falling of trees; burned area rehabilitation, hazard tree removal; site preparation that involves disturbance of soil, burning of vegetation, or herbicide/pesticide application. Vegetation management activities do not include aquatic vegetation management, preparatory tree marking, surveying, or road flagging; and

WHEREAS, the Water Board finds that this MOU provides assurance that vegetation management activities conducted in the California portion of the Lake Tahoe Basin will be permitted by the TRPA in a manner that is protective of water quality such that separate permitting by the Water Board will not be necessary. Therefore, this MOU provides the basis for the Water Board to adopt a waiver of the need to file a report of waste discharge and/or receive waste discharge requirements for discharges associated with vegetation management activities regulated by TRPA.

AGREEMENTS

NOW THEREFORE, the Water Board and TRPA agree as follows:

Review and Permitting

1. TRPA will have responsibility for reviewing vegetation management activity proposals, issuing permits as appropriate, conducting inspections, and taking enforcement action as necessary to ensure compliance with permits and applicable regulations. This includes exempt and qualified exempt activities, as defined in the TRPA Code of Ordinances.

2. TRPA, as the agency responsible for project review and permitting, may request that the Water Board assume responsibility for permitting specific projects or provide assistance to TRPA for any actions described in Paragraph No. 1 above due to staff resource limitations, project complexity or other similar situations. The primary goal of any transfer of responsibility is to ensure timely permitting of projects.

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3. The agency issuing a permit for the vegetation management activity, whether TRPA or the Water Board, will be solely responsible for approval of exemptions to prohibitions related to SEZ disturbance. Granting of such exemptions will not be delegated to an agency not a party to this MOU. Exemptions shall be considered in accordance with the TRPA Code of Ordinances or the Water Quality Control Plan for the Lahontan Region (Basin Plan), depending on the agency issuing the permit.

4. The agency issuing a permit to conduct vegetation management activities will conduct any required pre-project and final inspections, and will be responsible for granting a variance to the October 15 – May 1 soil disturbance prohibition period, if applicable.

5. This MOU does not cover vegetation management projects with impacts that cannot be mitigated to less than significant levels. Such impacts are those identified in a California Environmental Quality Act environmental impact report, or a National Environmental Policy Act or TRPA environmental impact statement. If another regulatory agency imposes conditions or requirements such that the impacts are mitigated to less than significant levels, then the project may proceed under the provisions of this MOU.

Notification and Coordination

6. Consistent with the provisions of Paragraph No. 2 above, TRPA will notify and may consult the Water Board, during the application review period for vegetation management activities that propose any one or more of the following items:

   a) Permanent crossings bridging a perennial reach of a watercourse.
   b) Temporary "wet" crossings (vehicles crossing through a channel when water is present).
   c) Herbicide/pesticide use, excluding use of Borax/Sporax.
   d) New permanent road construction over 3,000 linear feet, temporary road construction that will not be decommissioned prior to October 15 of each year.
   e) Treatment areas of more than five hundred (500) total acres or one hundred (100) acres of verified stream environment zone lands.
   f) Equipment operations on slopes over 30 percent.

   Such consultation may include, but not be limited to, technology sharing, and discussion of Best Management Practices and appropriate control and mitigation measures as represented through the permit conditions. Consultation activities will occur in a manner that does not alter the normal permitting time that the lead permitting agency is committed to follow and

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lack of timely response by the other agency will not delay project permitting.

7. TRPA and the Water Board shall notify each other within five (5) business days of confirming that any person or entity has violated the terms of any permit or project authorization or violated other applicable rules governing vegetation management activities, as covered in the TRPA Code of Ordinances or in the Water Board's Basin Plan.

8. By February 1 of each year, each agency must submit to the other agency a list of all vegetation management activities which that agency authorized to proceed under this MOU during the preceding calendar year (January through December), and provide, as appropriate, activity details including, but not limited to: project proponent, project location, and any compliance issues associated with the project. The list of projects maintained by the Tahoe Fire and Fuels Team can be used to satisfy this provision. TRPA and Lahontan will meet at least semi-annually to review, at a programmatic level, activities and actions taken pursuant to this MOU.

Dispute Resolution Procedures

9. Any dispute between TRPA and the Water Board over the interpretation or implementation of this MOU, including but not limited to implementation of the actions covered by this MOU, shall be resolved expeditiously and at the lowest staff level possible. However, if a dispute cannot be resolved by the Water Board executive officer and the TRPA executive director, each agency is free to proceed with actions it believes are appropriate and legal.

General Provisions

10. Nothing in this MOU shall be construed to limit the authority of either the Water Board or TRPA to ensure compliance with its environmental standards and regulations or to take enforcement action.

11. This MOU is strictly between TRPA and the Water Board for the mutual jurisdictional area in the state of California and cannot be superseded by a different MOU or other agreement with a different person or entity.

12. Staff of the Water Board and TRPA shall cooperatively provide training, technical review, and comments to each other, as appropriate, and shall discuss, on at least a semi-annual basis, any issues, problems, and opportunities encountered during administration and implementation of this MOU.

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13. A staff person and an alternate from each agency shall be designated as the liaison for the implementation of this MOU. Each agency must dedicate staff to adequately implement the provisions of this MOU.

14. This MOU takes effect upon the signature of the Water Board executive officer and the TRPA executive director and remains in effect until terminated. This MOU may be amended upon written request of either the TRPA or Water Board and the subsequent written concurrence of the other. Either the TRPA or Water Board may terminate this MOU with a 60-day written notice to the other. Both TRPA and the Water Board hereby agree to cooperate in good faith to carry out the provisions of this MOU to achieve the objectives set forth herein.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LAHONTAN REGION

Dated: _____ _____

Harold J. Singer
Executive Officer

TAHOE REGIONAL PLANNING AGENCY

Dated: _____ _____

John Singlaub
Executive Director

02-0018

Tahoe Area Sierra Club Group

Sierra Forest Legacy
Protecting Sierra Nevada Forests and Communities

KEEP TAHOE BLUE
League to Save Lake Tahoe

September 17, 2008

Via Email & Regular Mail
California Regional Water Quality Control Board, Lahontan Region
2501 Lake Tahoe Blvd.
South Lake Tahoe, CA 96150
Attn: Anne Holden - aholden@waterboards.ca.gov

Subject: Comments on Proposed Waiver Related to Vegetation Management Activities in the Lake Tahoe Basin and Adoption of a Memorandum of Understanding between TRPA and Lahontan

Dear Ms. Holden:

We submit the following comments on behalf of the Sierra Forest Legacy, the Tahoe Group of the Sierra Club and the League to Save Lake Tahoe. We also incorporate by reference our prior scoping comments on all issues that remain relevant to Lahontan's revised action.

I. INTRODUCTION

The proposed waiver and Memorandum of Understanding ("MOU") will transfer wholesale regulatory authority over "vegetation management activities" from Lahontan to TRPA. Currently Lahontan has an existing waiver and MOU that provides the conditions applicable to six specific categories of timber activities for which a waiver of waste discharge requirements is possible. Here, in contrast, there are no conditions that accompany the waiver and no discussion of TRPA's regulatory program or, more to the point, how TRPA intends to regulate these activities in the future. As a result, this proposed waiver and MOU violate both the California Water Code and the California Environmental Quality Act ("CEQA"), and should not be adopted by the Board.

By transferring permitting authority to TRPA, the proposed waiver and MOU effectively repeal the conditions of the existing waiver applicable to timber activities in the Tahoe Basin (*See* Attachment A to Resolution R6T-2007-008, "Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest and Vegetation Management Activities", hereinafter referred to as the "2007 Waiver.") These conditions were adopted based on Lahontan's recognition that "vegetation management activities" such as those at issue in this proceeding have the potential for significant environmental impacts, particularly when conducted in sensitive areas such as steep hillsides or streamzones. The proposed action does not replace these conditions with any substantive standards, but instead simply delegates regulatory authority to TRPA, without any description of how TRPA proposes to regulate these activities.

It is our understanding from queries of TRPA staff and recent status review presented by TRPA to its Board (*see* Exhibit 1, attached hereto), that the recently-formed "Tahoe Fire and Fuels Team" (TFFT), which includes representatives from all Fire agencies with jurisdiction in the Basin and TRPA and Lahontan Water Board staff, would determine how TRPA intends to implement permitting for the vegetation management activities subject to the waiver. While we are pleased to learn that projects will undergo a coordinated review by the TFFT, we are concerned that Lahontan did not include or discuss this process information as part of the proposed action to adopt a new waiver and MOU with TRPA. Further, at this time, the TFFT process (including the anticipated fuels-specific checklist) has not yet been fully developed or finalized. TRPA's process (as it relies on the TFFT) should be finalized and adopted (as appropriate) before Lahontan transfers its regulatory role to TRPA, and this process should be included in the public information provided for Lahontan's proposed projects so the public is able to fully understand the proposed project and provide informed feedback.

For these reasons, we have real concerns about Lahontan's apparent abandonment of its regulatory authority to ensure that water quality and beneficial uses are protected in the Basin. The vegetation management activities for which regulatory authority is proposed to be delegated to TRPA have the potential for significant environmental impacts and discharges from such activities pose a substantial threat to water quality. Under state law, Lahontan is the agency with oversight authority over activities affecting water quality. State law requires that Lahontan, as one of the Regional Water Quality Control Boards, retain primary responsibility for ensuring that the impacts of logging and clearing of vegetation do not jeopardize the attainment of water quality objectives mandated by the federal Clean Water Act, the state Porter Cologne Act and the Basin Plan.

We continue to believe that the current pressure to streamline permitting for activities that will aid in fuel reduction need not result in an unregulated environment that will lead to deterioration of water quality objectives and the impairment of beneficial uses. Nothing in the record suggests that the existing terms of the 2007 waiver have somehow "delayed" worthy vegetation management activities from taking place. Instead, the evidence demonstrates numerous examples of Lahontan working in collaboration with other agencies and private stakeholders to ensure that necessary activities be implemented, but in a manner that protects water quality.

As set forth below, the current project as proposed is contrary to applicable Water Code provisions, as well as the California Environmental Quality Act ("CEQA"). For that reason, we ask that the Lahontan Board not approve the proposed waiver and MOU and instead work with staff and TRPA to come up with a more protective – and informed – working arrangement to ensure that the precious environmental values in the Basin are preserved.

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II. BACKGROUND

A. Proposed Action and Negative Declaration

The proposed Resolution and action before the board is for the Board to adopt a waiver of waste discharge requirements for all "vegetation management activities" regulated by TRPA, pursuant to a memorandum of understanding that the Board will also adopt as part of the project. (*See* RESOLUTION NO. R6T-2008-(PROP). Vegetation management activities are defined broadly to include the full spectrum of fuel reduction activities that will occur in Tahoe in the next decade.[1]

The proposed Resolution appears to constitute the waiver: The Resolution states "the Water Board finds that waiving the filing of a ROWD and waste discharge requirements for the following types of vegetation management activities within the area of mutual jurisdiction of the TRPA and the Lahontan Water Board is *in the public interest* when effectively regulated by the TRPA."

To comply with CEQA, Lahontan has proposed to adopt a negative declaration. The proposed Resolution states that the Board has considered the negative declaration and determined there will be no significant adverse impacts to the environment from the waiver of filing a report of waste discharge and/or waste discharge requirements for the categories of projects specified herein that are regulated by the TRPA."

The negative declaration describes the baseline and future activities as follows:

> For this project, baseline conditions are not represented by the statement "no project", since all of the land management and most of the local fire agencies have been actively treating hazardous fuels near communities for many years. The National Fire Plan (2001) identified eight communities in the California portion of the Lake Tahoe Basin as "communities at risk." In response, over 14,000 acres of fuel reduction treatments have been completed in the Lake Tahoe Basin since 2000 (including the Nevada portion of the Lake Tahoe Basin, outside this MOU project area), averaging 1,856 acres annually in 2005–2006. Many urban lots have been treated as well, with the help of 21 local "Fire Safe" chapters formed through the Tahoe Regional Office of the Nevada Fire Safe Council.
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> In addition to the already completed vegetation management projects described above, a large number of fuels treatment and maintenance treatment projects are currently proposed.

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[1]Vegetation management activities include: a) fuel reduction; b) forest thinning; c) environmental improvement (such as forest enhancement, riparian enhancement, and aspen stand enhancement); d) burned area rehabilitation; e) hazard tree removal; f) site preparation that involves disturbance of soil, burning of vegetation, or herbicide/pesticide application; or g. cutting or removal of trees and vegetation, together with all the work incidental thereto, including, but not limited to, construction, reconstruction and maintenance of roads, fuel breaks, stream crossings, landings, skid trails, or beds for the falling of trees.