

Jodi Frediani  
Citizens for Responsible Forest Management  
1015 Smith Grade  
Santa Cruz, CA 95060  
Ph/Fax (831) 426-1697

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SAN LUIS OBISPO, CA 95021

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

Citizens for Responsible Forest Management, Lompico  
Watershed Conservancy and Sierra Club,  
  
Petitioners,

**PETITION FOR REVIEW AND  
REQUEST FOR EVIDENTIARY  
HEARING**

In the Matter of General Conditional Waiver of Waste  
Discharge Requirements - Timber Harvest Activities in  
the Central Coast Region, California Regional Water  
Quality Control Board – Central Coast Region ORDER  
NO. R3-2005-0066

Citizens for Responsible Forest Management (CRFM), the Lompico Watershed Conservancy and Sierra Club (collectively “CRFM”) hereby petition the State Water Resources Control Board (“State Board”) pursuant to § 13320 of the California Water Code and § 2050 of Title 23 of the California Code of Regulations (“CCR”) to hold an evidentiary hearing and review the Central Coast Regional Water Quality Control Board’s (“Regional Board’s”) final decision to adopt a General Conditional Waiver of Waste Discharge Requirements – Timber Harvest Activities in the Central Coast Region. *See* Order No. R3-2005-0066 (“Order”), Exhibit A. The issues raised herein were raised in a timely manner through written and oral comments to the Regional Board.

The salmonid populations of the Central Coast are in critical need of protection from impacts associated with logging and land development. Timber harvesting activities contribute large amounts of sediment to our streams that, together with other land uses in our region, impairs the natural feeding and reproduction of these fish. The Central Coast region is the southern-most habitat area for the coho salmon, listed as endangered by the state and federally-listed as threatened. The coho salmon population of the San Lorenzo River is understood by NOAA Fisheries to have been extirpated. Steelhead populations in the Santa Cruz region are federally listed as threatened and suffer from the same habitat degradation.

Timber harvesting activities also threaten the drinking water supply of many Santa Cruz county communities. 100% of the drinking water for residents of the Santa Cruz mountains comes from our forested watersheds. The San Lorenzo River and several north coast streams provide the bulk of drinking water for Santa Cruz City residents. San Vicente Creek provides the sole water supply for the town of Davenport. Many county residents rely directly on streams for their drinking water, while others tap springs and wells dependant on groundwater recharge. Timber harvesting adds substantial additional sediment to these streams that clogs filtration systems, forces water districts to halt diversions and has required purveyors to purchase water elsewhere to supply users. The City of Santa Cruz Water Department shuts down its diversion pumps when turbidity in the San Lorenzo River reaches 25 NTUs.<sup>1</sup> The Davenport Sanitation District periodically hauls in water when forced to shut down their system because of high turbidity in San Vicente Creek.

A 1998 study conducted for Santa Cruz County to assess streambed conditions and erosion control efforts for the San Lorenzo River identified the following:

Bed sedimentation impairs water supplies, fish and aquatic habitat, and recreational and aesthetic values fundamental to the lifestyle of Central Coast residents and visitors. Sedimentation causes or aggravates bank stability problems, and induces overtopping or undercutting of streambanks.

Roads were identified as primary contributors of habitat-impairing sediment:

The dominant cause of disturbance remains [since the 1979 watershed plan] the extensive road network. Unpaved and poorly maintained roads that are used for year-round access continue to be the most persistent sources of bed sedimentation... Numerous small-scale failures of cut and fill slopes and culvert blowouts also introduce much debris along roads... Road drainage practices which accelerate flow to and within headwater creeks induce considerable road-related erosion downstream from the right-of-way.... Improved maintenance of existing roads is likely to prove one of the most effective means of reducing sedimentation and persistent turbidity in the San Lorenzo watershed. In this context roads include those maintained by the County, State, road associations, and private owners (including those used for timber harvest and fire control).

New logging projects means more unpaved roads, more logged hillsides, more skid trails, more erosion gullies and drainage channels, all resulting in new discharges of sediment to the region's streams and rivers, including those already identified as impaired by sediment discharges. The waiver is the overarching decision by the Regional Board authorizing all of those new discharges for all new logging projects for the next five years. The fact that specific logging projects, the discharges from which are authorized by the waiver, have not yet been proposed does not render the waiver a mere paper exercise. Sediment discharges and increased runoff from those future logging projects, authorized by the waiver even presumably complying with its conditions, will cause or contribute to the ongoing pollution and degradation of the

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<sup>1</sup> Testimony: Chris Berry, Water Resources Manager, presented at the April 28, 2003 Regional Board field trip

Central Coast's rivers and creeks. None of the waiver's conditions nor the existing Board of Forestry rules, when applied to those new logging projects, will prevent cumulative impacts to water quality and fish habitat. None of the adopted monitoring conditions will help assure project-specific impacts or cumulative impacts will not result from those future logging projects. The lack of information about where, when, by whom, and the size of future logging projects only adds to the Board's inability to assure that its waiver will protect water quality and the uncertainty about whether the waiver's conditions will actually work.

The Regional Board originally adopted a categorical waiver for logging operations in 1987. Since that categorical waiver was adopted, over one hundred miles of rivers and stream reaches<sup>2</sup> in Santa Cruz County, where the bulk of timber harvesting in the region occurs, have been formally listed as "impaired" under § 303(d) of the Clean Water Act because excessive amounts of sediment pollution prevent the attainment of their designated beneficial uses. 33 U.S.C. § 1313(d). Most, if not all, are affected by logging operations and "silviculture" is identified as a source of the impairment of many. Residents have suffered from road closures, life-threatening landslides, periodic flooding events, swimming holes have been filled in with sediment, native aquatic species have been extirpated from great portions of their natural range, and recreational fishing opportunities have been severely curtailed.

The 1987 categorical waiver relied almost exclusively on the implementation of the California Forest Practice Rules ("FPRs") by the California Department of Forestry ("CDF") for logging operations on nonfederal land. These rules have been resoundingly criticized due to their significant failure to protect water quality and beneficial uses, both before and since the 1987 waiver was adopted. Indeed, there are few regulatory regimes whose adverse impacts have been more comprehensively documented than the FPRs, with the same fundamental problems being noted by a broad variety of agencies, blue-ribbon panels, scientists, and the courts on a recurring basis throughout the last two decades. Despite this ever-growing body of evidence, vast deficiencies in basic components such as cumulative impact analyses and monitoring persist today.

The Initial Study implies that even-age management is the sole culprit for producing sediment discharges, yet this is not born out by the facts. In the Central Coast region, where even-age management is prohibited, serious slope failures, road failures, culvert failures and sediment discharges have impacted local waterways, both from timber harvest activities in complete compliance with the FPRs and those conducted in violation of the same rules. Roads are a key component of un-evenaged silvicultural practices and are one of the major sources of turbidity and sediment in Central Coast streams.

In the Santa Cruz Mountains, landslides and debris flows may supply nearly as much sediment to watercourses as do roads, but that sediment generally includes both coarse

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<sup>2</sup> 303(d) listed waterbodies in Santa Cruz County include the Pajaro River and the following creeks: Aptos, Bean, Bear, Boulder, Carbonera, Fall, Kings, Lompico, Love, Mountain Charlie Gulch, upper Newell, Shingle Mill Creek and Soquel Creek Lagoon, ...

and fine-grained source materials and, with a few exceptions, is not as detrimental to downstream turbidity as is road and sheet-wash erosion from harvest areas.

and

... the primary literature contributed by both the timber industry and independent researchers support classification of roads as temporary channels that can carry runoff during storm events. March 8, 2005 letter, Robert R. Curry, Watershed Institute, responding to Regional Board staff request for comments on the Proposed Monitoring and Reporting Program.

The Regional Board never initiated a review of its categorical waiver during the fourteen years it was in place. Then, waiting more than three years to take action to review its waiver pursuant to Senate Bill 390, the Regional Board first considered adopting a new general conditional waiver. After hearing oral and written testimony submitted by EPIC, CRFM, The Ocean Conservancy (TOC) and others, the Regional Board decided that it had insufficient staff to prepare an EIR and switched instead to individual waivers after the 2003 expiration date had arrived.

CRFM and TOC, in July 2003, submitted a comprehensive proposal recommending a combination of WDRs and categorical waivers for timber harvest activities. The CRFM proposal included recommendations for an effective monitoring and reporting program. These recommendations were largely ignored by staff. In 2003 the Regional Board began to review and approve individual waivers of waste discharge for timber harvest plans and non-industrial timber management plans (collectively THPs). For the past two years, individual waivers with poorly defined monitoring requirements lacking necessary quality control and quality assurance protocols have been approved by the Board.<sup>3</sup> CRFM continued to submit expert testimony highlighting the inadequacy of the individual waivers and the toothless monitoring requirements. Our investigations of the monitoring "data" collected pursuant to these individual waivers showed a profound lack of quality control/quality assurance protocols and the reported turbidity data was impossible to interpret or compare to any useable standard.

After approval of some dozen or more individual waivers, the Regional Board finally tired of listening to continued testimony on their inadequacy and the inadequacy of the associated monitoring and reporting programs (MRPs) and directed staff to prepare a new general conditional waiver.

The conditional waiver adopted by the Regional Board on July 8, 2005 is not significantly better than the flawed individual waivers it has replaced. It continues to largely rely on the FPRs to protect water quality, despite the wealth of evidence that these rules are inadequate for this purpose. It does nothing to protect sensitive fish species and water supplies from excessive sedimentation related to timber. It does not include monitoring requirements that can verify the effectiveness of the waiver. In sum, the Regional Board has committed serious

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<sup>3</sup> The Monitoring and Reporting Program for the individual waivers and the conditional waiver are very similar.

procedural and substantive violations of the law in adopting its conditional waiver, and the resulting impacts will further degrade the beneficial uses of water in this State.

Accordingly, CRFM requests the State Board's review of this action of the Regional Board, and urges the State Board to vacate the conditional waiver and return to individual waivers until a WDR program or a legally sufficient general waiver can be adopted.

### **1. NAME AND ADDRESS OF THE PETITIONERS**

Citizens for Responsible Forest Management  
Attention: Jodi Frediani  
P.O. Box 167  
Boulder Creek, CA 95006  
JodiFred@aol.com

Lompico Watershed Conservancy  
Attention: Kevin Collins  
P.O. Box 99  
Felton, CA 95018

Sierra Club, Santa Cruz Group  
Attention: Aldo Giacchino  
PO Box 604  
Santa Cruz, CA 95061

### **2. THE ACTION BEING PETITIONED**

CRFM seeks State Board review of the Regional Board's approval of Order No.-2005-0066 ("Order"). See Exhibit A. In conducting its review of this Order under the California Environmental Quality Act ("CEQA"), the Regional Board also adopted a Negative Declaration, asserting that the general conditional waiver does not have the potential to cause significant environmental effects. *Id.* This is an erroneous finding, and the Regional Board committed substantive and procedural violations of CEQA for this and other reasons. CRFM brings these issues before the State Board in this petition, but does not waive or otherwise forgo the right to seek review of these issues before the California Superior Court.

### **3. DATE THE REGIONAL BOARD ACTED**

The Regional Board adopted the Order and accompanying Negative Declaration on July 8, 2005.

### **4. STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE AND IMPROPER**

The Regional Board's documentation prepared pursuant to CEQA, Pub. Res. Code § *et seq.*, is fatally deficient, ignoring fundamental legal requirements and copious evidence submitted to the Regional Board over several years. The Initial Study improperly limited the scope of the project, refusing to address the acknowledged impacts of the logging that will be governed by the waiver. The Regional Board's analysis of the public interest pursuant to Water Code § 13269 is similarly arbitrary and devoid of any support in the evidence in the Regional Board's files. Furthermore, the Regional Board's monitoring provisions are inadequate to verify the effectiveness at protecting beneficial uses of the waiver's conditions, and are consequently inconsistent with the legal requirements of Water Code § 13269.

#### **A. The Regional Board Committed Procedural and Substantive Violations of CEQA**

The Regional Board's Initial Study and Negative Declaration claim that the conditional waiver would have no significant impact on the environment. The Regional Board offered no evidence to show that the conditional waiver will prove effective in reducing the environmental impacts of pre-approved new sediment discharges from future logging projects to a level in which there is no potential to degrade the quality of the environment, contribute to cumulative adverse impact, or substantially affect human health.

A Negative Declaration is not appropriate for a general Waiver of Waste Discharge Requirements under the proposed program. A Negative Declaration can only be made if "[t]here is no substantial evidence in light of the whole record before the lead agency" that a significant impact to the environment may occur. Pub. Res. Code § 21080(c)(1). We contend that the program/project under consideration fails to meet this standard.

Over the past three years, CRFM (and others) have submitted substantial evidence into the record demonstrating that significant negative effects to water quality, beneficial uses, and the environment do occur in Region 3 (Central Coast) as a result of timber harvest related activity. This evidence includes, in part, 1) documentation presented in the Santa Cruz County Justification Packet to the Board of Forestry – Proposed Rulemaking, Santa Cruz County Rules, October, 1998, 2) photos submitted with the May 18, 2005 letter of Lompico Watershed Conservancy regarding the General Conditional Waiver of Waste Discharge Requirements – Timber Harvest Activities in the Central Coast Region (Exhibit B), as well as 3) photos submitted by CRFM in several Power Point presentations to the Regional Board.

Further, an EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. A cumulative impact consists of an impact which is created as a result of the combination of the project evaluated and other projects causing related impacts. CEQA Guidelines at § 15130(a)(1). Accordingly, the Regional Board should have evaluated the impacts of the waiver together with other existing and reasonably foreseeable future sediment producing activities. Because it did not do so, its Negative Declaration is flawed.

Further, the Regional Board improperly truncated the scope of its project, purporting to regulate discharges resulting from hundreds of future logging operations but asserting that the logging operations themselves are not within the scope of the waiver project. Actually, the Initial Study, Resolution No. R3-2005-0075, states that the "project is the conditional Waiver, and the Central Coast Water Board has no jurisdiction to issue permits for timber harvest activities, but can only regulate water quality impacts of timber harvest activities that the CDF approves." The Regional Board neglects to include the discharges from the logging operations, and mistakenly confuses "jurisdiction to issue permits" with the ability to impose Best Management Practices as criteria for enrollment in the waiver. The Regional Board also made the obvious mistake of relying on future environmental documents yet to be prepared by CDF and speculation about the effectiveness of those future analyses and accompanying mitigations. The weight of the evidence showing that the project may result in severe impacts triggers the Regional Board's mandatory obligation to prepare a full EIR for its waiver project.<sup>4</sup>

### 1. Under CEQA's Fair Argument Standard, the Board Must Prepare a Full EIR

There is a strong presumption in favor of requiring the preparation of an EIR. Under the fair argument standard, an agency must prepare an EIR whenever substantial evidence in the record supports a 'fair argument' that a project may have a significant effect on the environment. *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003. The fair argument standard creates a low threshold requirement for preparation of an EIR. *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748. A significant effect on the environment is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. CEQA Guidelines § 15382. The agency may only rely upon a Negative Declaration when "there is no substantial evidence in light of the whole record before the agency, that the project may have a significant effect on the environment...." CEQA Guidelines § 15070, Pub. Res. Code § 21080(c).

The Negative Declaration, Negative Declaration Resolution (Resolution No. R3-2005-0075) and Initial Study approved by the Regional Board are all based, to an overwhelming extent, upon the pretext that the Forest Practice Rules, the Forest Practice Act and the review process for THPs and related permits reduce environmental effects of logging related activity to a level below significance. The "Resolution" states:

The record before the Regional Board contains no substantial evidence that a fair argument has been made that the project may have a significant effect on the environment.

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<sup>4</sup> A mandatory finding of significance applies where the project has the potential to substantially degrade the quality of the environment, substantially reduce the habitat of fish or wildlife species, reduce the number or restrict the range of an endangered, rare, or threatened species, cause possible environmental effects which are individually limited but cumulatively considerable, or cause substantial adverse effects on human beings. CEQA Guidelines § 15065, Pub. Resources Code, § 21083.

This is an astonishing claim considering all the substantial evidence submitted to the Regional Board during the past several years by the public and subject matter experts. This mounting body of evidence began collecting in the Regional Board's correspondence and comment record soon after the voiding of the original categorical waiver placed the Regional Board squarely into the position of responsibility for regulating sediment discharge from timber harvest operations. This evidence includes 1) documentation presented in the Santa Cruz County Justification Packet to the Board of Forestry – Proposed Rulemaking, Santa Cruz County Rules, October, 1998, 2) photos submitted with the May 18, 2005 letter of Lompico Watershed Conservancy regarding the General Conditional Waiver of Waste Discharge Requirements – Timber Harvest Activities in the Central Coast Region (Exhibit B), as well as 3) photos submitted by CRFM in several Power Point presentations to the Regional Board.

Clearly the Regional Board has made an un-substantiated determination that the FPRs are adequate to protect water quality. The fact that in recent years the Central Coast Regional Board has only submitted a single non-concurrence that we are aware of, even though the Department of Fish and Game and the County of Santa Cruz have done so repeatedly, is further indication that the Regional Board finds no fault with CDF approved THPs. The lone non-concurrence submitted by the Regional Board asked for the addition of water quality monitoring for the Lompico THP 1-01-170 SCR, but CDF refused to incorporate the Regional Board's recommendation. It must be noted that the Regional Board did not terminate the waiver of waste discharge requirements in this instance, even though the non-concurrence stood as written without revisions to the plan.

The plan was appealed by the County of Santa Cruz to the Board of Forestry and was overturned on appeal on grounds that it used an incorrect standard for the analysis of cumulative impacts.

The FPRs have never pretended to prohibit sediment discharges, and individual THPs claim only to mitigate impacts to less than significance. The consequence of those impacts cumulatively taken together has never been adequately addressed by the FPRs. The waiver conditions for new logging discharges do not add any conditions that would be any more effective than the FPRs at mitigating cumulative impacts to water quality. In fact, the record is devoid of any effort by the Regional Board to evaluate cumulative water quality impacts from road building and logging activities in the Central Coast, despite the numerous recommendations made by a number of scientific panels pointing out the FPRs and other site-specific logging regulation's inability to address cumulative water quality and habitat impacts.

The failure of CDF to use the proper CEQA based standard for assessment of cumulative watershed impacts is being repeated and duplicated in the Central Coast Regional Board's General Timber Waiver. The initial study, the Order, the Monitoring and Reporting Program and the Negative Declaration fail to address this crucial matter by basing their justifications on the presumed adequacy of the implementation of the Forest Practice Rules to control sediment pollution.



The Report of the "Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat", ("Scientific Review Panel Report" or SRP), June 1999, commissioned by, then, California Governor Wilson, was created under the auspices of the Watershed Protection and Restoration Council, as required by the March 1998 Memorandum of Agreement between the National Marine Fisheries Service and the Resources Agency of California. The SRP states:

The SRP concluded that the FPRs, including their implementation (the "THP" process) do not ensure protection of anadromous salmonids populations. The primary deficiency of the FPRs is the lack of a watershed analysis approach capable of assessing cumulative effects attributable to timber harvesting and other non-forestry activities on a watershed scale.

The more recent "Dunne Report", A Scientific Basis for the Recognition and Prediction of Cumulative Watershed Effects, June, 2001 concurs, and highlights the point that "the THP process" continues to be deficient regarding cumulative impacts:

We emphasize that Cumulative Watershed Effects cannot be predicted through the existing parcel-by-parcel analysis for Timber Harvest Plan applications, even if it were based on the best current understanding. Nor can future effects be predicted on the basis of short-term empirical studies of past events, *although long-term monitoring of post-project effects would gradually build a data base for improving and facilitating modeling efforts.* (emphasis added)

Members of this committee have been told explicitly by some RPFs that, in preparing a THP, they would never conclude that a CWE is likely because of the unnecessary regulatory burden that such an admission would bring. Denials of the likelihood of CWEs are repeated regularly by applicants and reviewers, despite the widespread recognition among environmental scientists that, in the aggregate, timber harvest in coastal California has resulted and continues to result in radical alterations of water quality, habitat conditions, and perhaps flood risk.

Thus, the waiver's approval of new sediment discharges from new roads and logging conditioned on the application of best management practices selected pursuant to the THP process will not prevent cumulative water quality impacts. New discharges of sediment from logging roads and operations have adversely affected water quality in the region in the past, even where there has been substantial compliance with the FPRs, and where Regional Board staff has concurred with CDF's approval of the project conditions. Given the FPRs and waiver condition's failure to address the cumulative impacts of logging activities, future discharges, even in compliance with the FPRs and waver conditions, are likely to have similar impacts.

CEQA's "low threshold" requirement for conducting an EIR and the record of impaired watersheds from sediment loads, temperature changes, and turbidity, induced at least in part by logging in the Central Coast Region precludes a finding by the Regional Board of no significant impact. As the record evidence shows, the conditional waiver may have a significant effect on

water quality, endangered or threatened species and their critical habitat,<sup>5</sup> and human health. Therefore, the Regional Board erred in its failure to prepare and circulate a full EIR.

## **2. The Initial Study Fails To Demonstrate That Cumulatively Significant Impacts Are Either Absent or Mitigated to an Extent That is Less Than Significant.**

The adopted conditional waiver does not include any conditions that address the universally recognized shortcomings of the existing FPRs and, indeed, any site-specific best management approach to address cumulative impacts to water quality that result from logging operations. It might be argued that the monitoring requirements include a risk based tiering of THPs to determine the level of monitoring required, however, the monitoring requirements include no monitoring for watershed-wide cumulative impacts. The Regional Board could have, for instance, limited enrollment in the waiver based on a percentage calculation of watershed acreage allowed to be logged over time in sediment-impaired 303(d) listed watersheds. But nothing of the sort was done.

According to the CEQA Guidelines:

When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. 'Cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

See CEQA guidelines § 15064(i)(1); see also Pub. Res. Code § 21083(b) (mandatory finding of significance for effects that are "cumulatively considerable"). The Initial Study describes the project as follows:

[A]doption and implementation of an Order that sets out eligibility criteria and conditions for a specified set of timber harvest activities to proceed on non-federal lands with a conditional waiver of waste of waste discharge requirements.... Timber harvest activities conducted in compliance with the requirements described in this Order will not adversely affect water quality or beneficial uses of waters of the State and will be in the public interest pursuant to California Water Code Section 13269.

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<sup>5</sup> The discussion on the California Endangered Species Act (CESA) in the Initial Study for the Categorical Waiver is both inaccurate and logically inconsistent. While the first sentence mentions CESA, the following section covers streambed alteration agreements under Fish and Game Code section 1603. This adds to the confusion and lack of clarity in the Initial Study, and fails to provide support for any conclusion that the categorical waiver will not impact species listed under CESA.

The Initial Study also notes that "CEQA and the FPRs both prohibit CDF from approving a project as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental impacts of the project." The Regional Board cannot rely on this determination, however, when it issues a *general* waiver for two basic reasons. First, the individual THP review process does not necessarily adequately address significant effects:

The U.S. EPA (DEIA Comments, November 1998) state, "[We] do not support the assumption that most significant effects of individual Timber Harvest Plans can be expected to be mitigated to a less than significant level through implementation of the [California Forest Practice Rules]."

Additionally, the FPRs have never been certified as Best Management Practices by the U.S. EPA.

The US Environmental Protection Agency and the State Water Resources Control Board are authorized to certify that the California Forest Practice Rules are Best Management Practices for timber operations on non-federal lands. When or if both entities so certify, timber harvest activities on non-federal lands will be exempt from waste discharge requirements pursuant to the Z'berg-Nejedly Forest Practice Act Section 4514.3, except as provided for in Section 4514.3(b)(1)-(3). That has not occurred to date. North Coast RWQCB Timber Waiver

Secondly, even if each individual THP had a less-than-significant environmental impact, the general waiver and therefore the project, would cover them all, and there is substantial data to indicate that the FPRs and CDF's review of THPs do not adequately address cumulative impacts.

Despite the hoops that timber operators must jump through and the barriers erected by the planning process, the environment is not being effectively protected because of the flawed concept that the Timber Harvest Plan process is based on -- namely that ecology can be addressed on a parcel-by-parcel basis. In addition, the State's focus is almost entirely on procedural steps rather than on the eventual outcome. As a result, what occurs in the real world may have very little relationship to what is prescribed in a harvest plan, and there is no mechanism for linking demonstrated effectiveness of mitigation measures to future policy directives. Little Hoover Commission Report, Timber Harvest Plans: A Flawed Effort to Balance Economic and Environmental Needs, 1994

In the "Timber Harvest Planning Process" section of the Initial Study there is the following text:

Pursuant to the Clean Water Act Section 208, the State Water Board has adopted a management agency approach for controlling discharges from timber harvest activities to waters of the State. The Water Board, CDF and the BOF all have direct authority, responsibility, staffing resources and expertise to require that timber harvest activities on plans and notices are implemented, enforced and

evaluated. On January 21 1988, the State Water Board approved a Management Agency Agreement (MAA) that designates the BOF and the CDF as joint management agencies for timber operations within the State.

Under the management agency approach, the State and Regional Water Boards have much to gain by obtaining the commitment and cooperation of CDF and the BOF to act as partners in controlling discharges of waste from timber operations that they directly regulate. These benefits include:

1. Streamlining the regulatory process by avoiding duplicative regulatory requirements.
2. Incorporating the programs of CDF and BOF as being part of the State's nonpoint source program for controlling pollution and protecting the quality and beneficial uses of the State's water.
3. Reducing the level of resources needed by State and Regional Water Boards in controlling discharges from timber harvest activities.
4. Minimizing the expense to the public for review of plans and notices.

This "managing agency approach" was codified in the 1988 Management Agency Agreement (MAA). However, the agreement under which the various Regional Boards effectively ceded their responsibility for the protection of THP related water quality to CDF was terminated by the State Legislature on January 1, 2003. The Legislature took this action with the understanding that the categorical waiver was a failure in regard to the protection of the beneficial uses of water under CDF's THP review process. Staff's description of the "managing agency approach", without mention of the multi-agency failure to perform their responsibilities under the law was dishonest.

The record contains extensive evidence of a fair argument of adverse cumulative environmental impacts that will result by applying the waiver's conditions as the basis for approving new logging discharges in the region. The following list of documents was previously submitted to the Regional Board by CRFM and others, and should consequently be part of the record of this action. Some are quoted above. Other supporting comments have been made by a variety of experts at 2004 Regional Board Waiver Workshop held in Santa Cruz, along with letters submitted in March 2005 (Curry, Jackson, and Herbert) at the request of Regional Board staff.

1. DECLARATION OF JOSEPH BLUM, NMFS, 2000, [retyped from faxed copy – 6.24.00], [For Case No.: 00-0713-SC. I/S. District Court, Northern District of California – EPIC et al. v. A. Tuttle et al.]
2. "Dunne Report", A Scientific Basis for the Recognition and Prediction of Cumulative Watershed Effects, June, 2001

3. Little Hoover Commission Report, Timber Harvest Plans: *A Flawed Effort to Balance Economic and Environmental Needs*, 1994
4. LSA Report, Conclusions and Recommendations For Strengthening the Review and Evaluation of Timber Harvest Plans, Prepared for California Department of Forestry and Fire Protection by LSA ASSOCIATES, INC., March, 1990
5. Regulation of Logging on Private Land in California Under Governor Gray Davis, Thomas N. Lippe and Kathy Bailey, Spring, 2001
6. Salmonid Conservation Measures for Forestry Activities, for a Short-Term HCP (Draft), NMFS, 1999
7. Santa Cruz County Justification Packet to the Board of Forestry – Proposed Rulemaking, Santa Cruz County Rules, October, 1998 (previously submitted on or about April 2003, into the record. Excerpts will be re-submitted. (We request that staff confirm that this document is in fact part of the administrative record.)
8. “ Scientific Review Panel Report”, Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat, June 1999
9. US EPA: California Nonpoint Source Program Findings and Conditions, June 1998: <http://www.epa.gov/Region9/water/nonpoint/cal/finding.html>
10. March 8, 2005 letter by Robert Curry, Research Director Watershed Institute, CSUMB to RWQCB staff re Proposed Monitoring and Reporting Program (part of staff report)

These references and documents support a fair argument that significant impacts not only *may* occur but that they *have been* occurring employing conditions similar or identical to those adopted in the waiver and their accumulating negative effects on water quality will continue to mount unless an effective regulatory program with an adequate monitoring and reporting program is implemented.

### **3. The Initial Study Is Wholly Inadequate and Fails to Provide a Legally Defensible Project Description**

The Regional Board is not authorized to adopt a Negative Declaration without an adequate project description. A “project” is defined as comprising “the whole of an action which has a potential for resulting in a physical change in the environment, directly or ultimately....” 14 CCR § 15378(a). The term “project” must be interpreted broadly to maximize protection of the environment and ensure “that environmental considerations do not become submerged....” San Joaquin Raptor, 27 Cal. App. 4<sup>th</sup> 713, 730 (1994). Yet, the Board’s Initial Study provides a mere cursory description of the project, and fails to satisfy the minimum requirements for CEQA review.

The project description does not provide any meaningful information about how many dischargers will be governed, the types of pollutants they are discharging, the volume of their discharges, or where they discharge. While there is an attempt to estimate how many logging plans will be reviewed per year, there is no way to ascertain the total number of plans to be governed by waivers at any given time or the full extent of the impacts that will result. Neither is there any way to assess whether there are sufficient staff resources available to carry out the tasks claimed in the proposal<sup>6</sup>

The vague language of the Initial Study undermines the primary goal of a project description, which is to provide "intelligent evaluation of the potential environmental effects of a proposed activity," and withholds critical information from the public. *San Joaquin Raptor*, 27 Cal. App. 4<sup>th</sup> at 730.

#### **4. The Initial Study's Description of the Environmental Setting Is Inaccurate**

The Initial Study's discussion of the environmental setting is entirely deficient. The only reference to the environmental setting states, "Timber harvesting in watersheds supporting multiple land uses can have an influence on water quality and beneficial uses of water in the timber producing areas of the Central Coast Region." This language is inaccurate and does not provide any information relevant to the public or agencies' understanding of the environmental impacts of the project.

Most importantly, the Initial Study avoided any discussion of the current degraded conditions that exist throughout the Central Coast region due to adverse impacts from logging operations and other activities. A significant number of the watersheds in the Santa Cruz mountains, over 100 miles of river and stream reach, are listed as "impaired" under § 303(d) of the Clean Water Act due to excessive temperature and/or sediment pollution. 33 U.S.C. § 1313(d). In making these listing determinations, the EPA named logging as one of the principal reasons for the existing pollution problems. Similarly there is no discussion in the Initial Study of coho and steelhead, which are listed under the federal Endangered Species Act.<sup>7</sup> Coho are also listed by the State of California as endangered.

The Initial Study also failed to discuss the environmental conditions that make this region so susceptible to mass wasting events and erosion problems. The Santa Cruz Mountains include some of the most erosive terrain in California. THPs frequently demarcate high and extreme Erosion Hazard Ratings. Cohesion-less sands and sandy loam are a common soil type even on very steep slopes.

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<sup>6</sup> Since the approval of the conditional waiver, staff has already been unable to participate in three pre-harvest inspections.

<sup>7</sup> It is important to note that these streams were listed as "impaired" by the EPA and these salmon species were listed "threatened" by NMFS since the previous 1987 categorical waiver was established.

Finally, the Initial Study failed to acknowledge that logging alone can result in discharges that negatively impact water quality and beneficial uses protected by the state. Rather, the Initial Study statement that, "[t]imber harvesting in watersheds **supporting multiple land uses** can have an influence on water quality and beneficial uses of water in the timber producing areas of the Central Coast Region," is misleading and inaccurate. (emphasis added) Several Central Coast watersheds including San Vicente Creek, Browns Creek, and tributaries to the San Lorenzo River experience extensive commercial logging, often as the primary landuse and anthropogenic erosion inducing action at either the primary or sub-watershed level.

#### **5. The Initial Study Improperly Truncates the Scope of the Project and Is Otherwise Inconsistent with the Law**

The Regional Board incorrectly identifies the scope of its project as being limited to the waiver itself, rather than including the forestry practices being regulated. The Regional Board thereby separates the waiver from the actual future logging projects and related pollution discharges that the waiver is intended to permit. That argument is entirely inconsistent with the CEQA Guidelines' definition of a "project" as applying to the "whole of an action" which may result in direct or reasonably foreseeable indirect impact. 14 CCR § 15738(a). Hence, when examining the project, the Regional Board must consider the entire activity, including the reasonably foreseeable indirect affects. *Id.*; Pub. Res. Code § 21065. "The term 'project' does not mean each separate governmental approval." 14 CCR § 15378(c). The project is the waiver and the associated timber harvest activities that indirectly affect the waiver.

#### **6. The Initial Study Fails to Include Sufficient Evidence to Substantiate Findings**

CEQA requires that in an Initial Study, lead agencies explain factual data or evidence used to reach any conclusions regarding impact significance. The Initial Study in this instance does not include such data or evidence, but instead consists of a "naked checklist" that lacks anything to substantiate or support the determination to prepare a Negative Declaration. If an agency fails to evaluate a project's environmental consequences, it cannot support a decision to adopt a Negative Declaration by asserting that the record contains no substantial evidence of a significant adverse environmental impact. *See Sundstrom v County of Mendocino*, 203 Cal 3d 296, 311 (1988). Accordingly, the "agency should not be allowed to hide behind its own failure to gather relevant data." *Supra*.

Here, the Initial Study for the categorical waiver states that "[t]imber harvest activities are subject to environmental impact evaluation and mitigation by the established processes used in planning those activities by the CDF." (Initial Study for Conditional Waiver, p.11.) This rationale is used throughout the Initial Study to support a finding of no significant impact. However, this rationale is deficient because it fails to account for the reality that: (1) the FPRs are demonstrably inadequate to protect water quality generally and to protect against cumulative impacts; and (2) the watersheds of Central California have been and continue to be adversely impacted by timber operations despite the purported "protections" afforded by the FPRs. Furthermore, the Regional Board cites to its Managing Agency Agreement ("MAA") with the Department of Forestry and Board of Forestry and to the California Forest Practice Rules as a

rationale for finding that no significant impacts will occur as a result of the categorical waiver.<sup>8</sup> This same "cut and paste" language is used to justify such a finding for every environmental value at risk. Additional findings are equally insufficient and will be addressed below.

### **7. All of the Evidence in the Administrative Record Demonstrates that the Waiver Will Have a Significant Effect on the Environment**

When determining whether an environmental effect will be adverse or beneficial, a lead agency must consider the public's views in all areas affected by a project as such views are expressed in the whole record before the lead agency. 14 Cal Code Regs § 15064(c). As noted here and elsewhere in this petition, the record contains substantial evidence that the project may have a significant adverse impact on the environment. These findings are bolstered by the existence of public controversy surrounding the project and its potential and future impacts on the environment. Cal Code Regs § 15064(g)(4).

In its Initial Study, the Regional Board concluded there will be "no impact" or that impacts will be "less than significant" to every environmental value at risk. This not only flies in the face of the voluminous evidence to the contrary. CRFM, CRFM's expert Dennis Jackson, and independent experts such as Betsy Herbert, PhD and Robert Curry provided substantial evidence showing that the conditional waiver will have a reasonable potential to create significant environmental impacts, and that indeed, such impacts will be assured. Even CDF submitted comments critical of the lack of scientific accountability in the Eligibility Criteria developed for the conditional waiver.

For example, in its justification for finding that the categorical waiver would not "have impacts that are individually limited, but cumulatively considerable," the Regional Board relied heavily on the FPRs. The findings noted that, "[o]bservation and information in Water Board pre/post harvest inspection reports and discharger data submitted as a condition of previously approved conditional waivers documents the protection of water quality and beneficial uses." However, no data analysis was presented to support such claims. Additionally, CRFM requested such inspection reports and conducted a review of CDF files and Regional Board files, yet was unable to find a single pre- or post-harvest inspection report prepared by Regional Board staff. Furthermore, staff testified at the hearing on July 8, 2005 that they would return in 24 months with a data summary from THPs enrolled under their waivers.

A lead agency may indeed determine that a project's addition to a cumulative effect is not considerable if the project complies with requirements of a previously approved plan or mitigation program. Guidelines § 15064(i)(3). No such plans or mitigation programs are available for most future THPs. In addition, "[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project

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<sup>8</sup> The Initial Study fails to mention that there is a pending petition before the State Water Resources Control Board to revoke the Management Agency Agreement. (p. 4, Initial Study, Conditional Waiver) The petition and its supporting evidence provides evidence to refute the Regional Board's finding that the existence of that Management Agency Agreement can be relied upon as a basis to conclude adoption of the categorical waiver is not against the public interest.



complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.” *Communities for a Better Environment, et. al. v. California Resources Agency* 126 Cal. Rptr. 2d 441; 2002 Cal. App. LEXIS 4867; 2002 (emphasis added). As discussed above, substantial evidence was presented to the Regional Board demonstrating the likelihood of a cumulatively significant negative impact to the environment.

**a. The MAA, Which Has Deficiencies Relating to Cumulative Impacts and Water Quality, Does Not Support a Finding of No Significant Impact**

While the evidence supporting the Regional Board’s findings is scant at best, evidence showing that a conditional waiver may have significant adverse environmental impacts is overwhelming. As noted above, the waiver relies largely on the application of the FPRs to protect water quality. The State and Regional Boards have found serious problems with the Forest Practice Rules since the beginning. When the State Board began the process of developing its water quality management plan pursuant to § 208 of the federal Clean Water Act, substantial deficiencies and problems with the FPRs were noted. In 1980, the EPA notified the Board of Forestry that major reforms were needed before the FPRs could qualify for certification as “best management practices” (“BMPs”). The State Board found these problems had not been remedied by 1987, and made its certification of BMPs and designation of managing agencies on a conditional basis, requiring significant improvements to the FPRs and the process by which logging operations are authorized. Due to the significant deficiencies that remained, the EPA withheld final certification of the FPRs as BMPs when the State Board submitted its MAA and certification to EPA for approval.

The EPA has also voiced concerns with the cumulative effects of logging operations carried out under the FPRs. In a 1997 letter to the Board of Forestry, the EPA wrote “[a]s we have said before, the current Forest Practices Rules (FPRs), and/or the implementation of these rules, does not adequately address cumulative impacts from timber harvesting activities.” Letter dated April 6, 1998. The EPA also stated that it “concur[s] that improved methods for assessing cumulative effects on a watershed basis are necessary. In addition, EPA and NMFS have found that...additional management measures are necessary in order to attain and maintain water quality standards.” Letter dated November 21, 1997.

Due to these impacts, the EPA “conclude[s] that the SWRCB and RWQCBs should not automatically waive direct regulation of silvicultural activities.” *Id.* (emphasis added). Importantly, the EPA has found that significant environmental effects will not be mitigated to a level of insignificance as the Regional Board now claims, stating that “[W]e do not support the assumption that most significant effects of individual Timber Harvest Plans can be expected to be mitigated to a less than significant level through implementation of the [California Forest Practice Rules].” See U.S. EPA DEIS Comments, November 1998 (emphasis added).

More than fifteen years later, the same fundamental problems with the FPRs and its process persist and the FPRs continue to be uncertified by the EPA. All the while the Board of Forestry and CDF have ignored and continue to ignore requests for revisions to the FPRs,

including requests from the County of Santa Cruz documented in the County's Justification Packet. These requests for revision were submitted as evidence with CRFM's comments before adoption of the conditional waiver; Santa Cruz County Justification Packet to the Board of Forestry – Proposed Rulemaking, Santa Cruz County Rules, October, 1998

**b. Numerous Scientists, Government Agencies and Other Experts Have Found the FPRs are Inadequate to Protect Water Quality and Beneficial Uses.**

CRFM submitted substantial evidence from noted scientists, numerous "blue-ribbon" panels, NMFS, and other experts that document serious ongoing problems with the FPRs and their implementation. Other experts have testified to the same, and experts presented concurring information at the July 2003 Regional Board Workshop on Timber Waivers held in Santa Cruz. This evidence shows that under the FPRs and a categorical waiver of waste discharge requirements, domestic water sources have been damaged, native fish populations have been extirpated, and more than 100 miles of the streams and rivers on the Central Coast can no longer support their designated beneficial uses. Thus, based on the information in the record, it is evident that the FPRs are inadequate and cannot be relied on to protect water quality and beneficial uses.

**i. The waiver will have an adverse impact on aesthetics**

The Initial Study relies on the FPRs and Basin Plan to prevent aesthetic impacts. Additionally, Special County Rules to the FPRs prohibiting clear-cutting are cited. All of the above have been in effect prior to approval of the conditional waiver. None of the above has ensured or will ensure that excessive sediment will be kept from streams. Such sediment has an adverse impact on aesthetics.

**ii. The waiver will have an adverse impact on biological resources, including endangered terrestrial and aquatic species**

Despite the abundance of information and data establishing the serious adverse impacts that logging operations have on biological resources, including both terrestrial and aquatic species, the Regional Board's conclusory assertion that its project will not have any adverse consequences on those species is astounding.

In 1996 and 1997 the National Marine Fisheries Service ("NMFS") listed the Central California and Southern Oregon/Northern California Coast populations of coho salmon as threatened under the ESA. On August 18, 1997, NMFS listed the Central California Coast and South-Central California Coast populations of steelhead as "threatened." On June 7, 2000, NMFS listed the Northern California population of steelhead trout as "threatened." In all of these rules, NMFS has repeatedly criticized the state's regulation of logging on private lands as inadequate to protect endangered fish from harm, and NMFS specifically

cited these inadequacies as one of the bases for its decisions to list these species. Regulation of Logging on Private Land in California Under Governor Gray Davis, Thomas N. Lippe and Kathy Bailey, Spring, 2001

Additionally, Joseph Blum, NMFS, stated by Declaration, DECLARATION OF JOSEPH BLUM, NMFS, 2000 [For Case No.: 00-0713-SC. I/S. District Court, Northern District of California – EPIC et al. v. A. Tuttle et al.]:

NMFS' review included the Board of Forestry's interim revisions to the California Forest Practice Rules which become effective July 1, 2000 (and are due to expire on December 31, 2000). NMFS concluded *that the California Forest Practice Rules with the recently adopted interim changes are inadequate to protect anadromous salmonids or provide for properly functioning habitat conditions.* (65 FR 36,074, 36,084-36,085.) *Specifically, the California Forest Practice Rules with the interim changes lack critical elements necessary to avoid, minimize and/or mitigate adverse site-specific and cumulative watershed impacts on salmonid populations.*" (emphasis added)

The Initial Study's conclusion that the waiver will not adversely affect biological resources relies heavily on adherence to the FPRs, which have consistently been shown to be inadequate to protect water quality and avoid significant adverse impacts to beneficial uses. The Initial Study states that "The requirements of the Order further mitigate any impacts with additional conditions, including prohibiting the creation of nuisance conditions as prescribed in the Basin Plan, and requiring resolution of non-concurrences and mapping skid trails. The non-concurrence and skid trail mapping language was deleted during Board discussion at the July 8 hearing. Accordingly, it cannot be relied on to support the conclusion that biological resources will not be adversely impacted.

The deleted non-concurrence language would have prohibited issuance of a waiver without prior resolution of a THP non-concurrence from another reviewing agency. This language would have empowered other agency THP reviewers and most likely required implementation of additional site-specific BMPs to satisfy removal of the non-concurrence. Because there is no requirement in the conditional waiver that Regional Board staff participate in the review of a THP, staff may have no first hand knowledge of issues of concern prompting other agencies to non-concur. The substitute language of 4(c) places all power in the hands of the Regional Board Executive Officer and discards and disregards serious water quality concerns of other agency personnel.

The removal of the skid trail language and substitution of an additional unscientifically substantiated risk factor in the Soils Disturbance Factor is like equating apples with camels. The replacement language which includes a new factor under the Soil Disturbance Factor (SDF) for skid trails for unmapped areas, simple states, "[f]or unmapped acreage, add 100 feet per acre". It is also inadequate to prevent or mitigate impacts to biological resources.

Mapping would have allowed site-specific field review by staff, while the replacement condition does not. Mapping of skid trails was the one and only Best Management Practice (BMP) incorporated into the waiver. BMPs are more effective in preventing discharges than after-the-fact monitoring. The mapping requirement has been removed from the final Order.

The removal of the non-concurrence and skid trail language is an impediment to efforts to prohibit impacts to biological resources, including endangered terrestrial and aquatic species.

The Initial Study cites 1) compliance with the Basin Plan, 2) staff site access, 3) THP approval and, 4) Special FPRs as protective measures of the waiver. Compliance with the Basin Plan has always been a requirement for potential polluters, but is rarely assured without substantive implementation conditions. Staff access to perform inspections has always been present, and approval of a THP has always been a requirement. These conditions have consistently failed to provide adequate protection for biological resources. Special FPRs for Santa Cruz, San Mateo and Santa Clara Counties which prohibit even-aged management have also been in effect for years and have also failed to provide adequate protection for biological resources. Extensive road systems kept in place long-term are required for the un-evenage management silviculture of the Central Coast. Experts agree that roads and water course crossings are key sources of sediment discharges.

The Findings also rely on “[c]ompliance with these performance standards”. No performance standards other than the ineffective FPRs are evident in the waiver.

**iii. The waiver will have an adverse impact on hydrology and water quality**

The Regional Board’s treatment of water quality impacts is perhaps the most exasperating portion of the Initial Study. Like all of the other sections, the Regional Board’s water quality “analysis” inappropriately relies on future environmental documents, the presumed success of future mitigations – especially those based on the FPRs - to assume that these impacts will be fully mitigated. *Id.* Its finding of no significant impact is directly contradicted by its acknowledgement that “timber harvesting activities have the potential to alter the existing drainage pattern of the site or area, including the alteration of the course of a stream or river, in a manner which would result in erosion or siltation on- or off-site, flooding on- or off-site, provide additional sources of polluted runoff, or otherwise affect water quality” if measures are not correctly implemented. Even where correctly implemented, management measures do not prevent all of the described impacts.<sup>9</sup>

The Findings state, “The Order requires that timber harvest activities adhere to environmental documents [to be] prepared for them pursuant to the FPR”, then mistakenly in light of the full body of evidence, and without justification, concludes that, “[t]hese conditions also prevent timber harvesting activities from causing an unreasonable interference with

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<sup>9</sup> Santa Cruz County Justification Packet to the Board of Forestry – Proposed Rulemaking, Santa Cruz County Rules, October, 1998.

beneficial uses amounting to a pollution or nuisance as defined by California Water Code section 13050." Because the FPRs do not prevent cumulative water quality impacts and do not ensure protection of beneficial uses, this waiver condition also does not prevent such impacts or protect beneficial uses.<sup>10</sup>

**iv. The waiver will have an adverse impact on geology and soils**

Equally astounding is the Regional Board's treatment of impacts related to geology and soils. Applying the same legal errors regarding the scope of its project and reliance on future environmental documents, the Regional Board finds that the project will have no adverse impacts while simultaneously admitting that "[s]pecific timber harvesting activities could cause substantial soil erosion or the loss of topsoil" if mitigation measures are not properly implemented. Substantial evidence in the record actually shows that, even where recognized management practices are employed, significant erosion may nevertheless result. The Regional Board's assertion that the project would have no impact ignores the ample evidence in its files documenting serious and widespread landslides resulting from the existing waiver and the same procedures implementing the FPRs relied upon by the conditional waiver.

**8. The Negative Declaration Incorrectly Assumes Its Conditions or Mitigation Measures Will Work.**

The Initial Study and Negative Declaration assume the success of future unidentified measures and fail to identify "meaningful information" that justifies an expectation of compliance. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 77, fn. 5. Instead of demonstrating that the "conditions" will work, the waiver documents provide no basis for determining that its conditions will achieve any of the asserted goals. No management practices are evaluated under the proposal. As noted above, Best Management Practices (BMPs) adopted from the FPRs do not ensure that discharges will not adversely affect the quality of or beneficial uses of waters of the State, and are against the public interest pursuant to California Water Code § 13269. No additional BMPs were included as conditions for enrollment under the conditional waiver. The waiver's monitoring requirements will not be able to produce information about the effectiveness of the waivers conditions at mitigating impacts to water quality from logging. The waiver's assumption that its arbitrarily developed program will work is simply not supported by the record and is inconsistent with CEQA's standards. *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d 296, 306-314.

The Regional Board relied on mitigation measures that are to be developed at a later date, using post hoc rationalization for its findings. This is expressly prohibited by CEQA, and has been repeatedly condemned by the courts. Mitigations and information must be revealed at the earliest moment in the review process as possible, "where genuine flexibility remains." See *Sundstrom v. County of Mendocino* (1988), 202 Cal. App. 3d 296. The Regional Board's

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<sup>10</sup> May 18, 2005 letter from Lompico Watershed Conservancy-photos attached. Exhibit B

reliance on deferred mitigation measures is effectively preventing disclosure of impacts at the point at which public input has, or is supposed to have, its highest influence.

The monitoring required under the MRP is not scientifically defensible, incorporates little or no quality assurance or quality control procedures, will not ensure protection of water quality, will not identify violation of the Basin Plan regarding turbidity and sediment loads, is overly broad in identifying temperature violations, will not identify polluters, and hence, cannot protect water quality or beneficial uses.<sup>11</sup>

## **B. The Eligibility Criteria and Monitoring and Reporting Program Violate Water Code Requirements.**

Section 13269 of the Water Code states:

The conditions of the waiver shall include, but need not be limited to, the performance of individual, group, or watershed-based monitoring.... 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. 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. Monitoring results shall be made available to the public.

### **a. The Eligibility Criteria for determining risk and Monitoring Tier Level are Not Based on Science**

The Regional Board, in an effort to educate itself (and its staff) hosted a field trip April 28, 2003 to view timber harvest sites including BMP failures, hosted a workshop in 2004 with presentations from some of the most renowned experts in the field of timber management and associated impacts, and received oral and written testimony from a host of experts representing the public, the timber industry and various agencies. The Regional Board chose not to incorporate recommendations from CDF, the Department of Fish and Game, the City of Santa Cruz Water Department and the Santa Cruz County Environmental Health Department.

In spite of these efforts to gather information, staff prepared and the Regional Board adopted The Monitoring Requirement Eligibility Criteria Decision Tool (Eligibility Criteria) and a Monitoring and Reporting Program (MRP) not based on science, and therefore seriously flawed. Apparently, staff neglected to even review or consider waivers from other regions which require BMPs to qualify for WDRs or categorical waivers. The majority of THPs approved in the Central Coast Region would not qualify for a waiver under the BMP requirements of the North Coast.

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<sup>11</sup> May 18, 2005 letter of Dennis Jackson to Regional Board. (Attachment C)

Additionally, the waiver and Eligibility Criteria (EC) neglected to require that staff fully participate in the THP review (or participate *at all*) as is required by the Central Valley waiver. In spite of strong Central Coast Board support for staff field participation in THP review, seconded by CRFM as well as industry, the first three THPs to be reviewed following adoption of the conditional waiver have conducted pre-harvest inspections without Regional Board staff participation.

Eligibility Criteria are designed to assist the Regional Board and its Staff in deciding whether a proposed THP is eligible for a conditional waiver or if individual WDRs would be more appropriate. The Eligibility Criteria also determine the minimum level of Monitoring and Reporting to be required. The Water Code does not provide for varying levels of monitoring for waivers. As noted above, Section 13269 requires that monitoring for **all** waivers must be adequate to verify the effectiveness of the waiver's conditions. The waiver must be consistent with the Basin Plan, and the monitoring program must demonstrate this consistency. The Eligibility Criteria are arbitrary and are not linked to the beneficial uses of water. Accordingly, the waiver's reliance on these criteria to justify varying levels of monitoring is misplaced.

The EC uses three criteria, the Drainage Density Index, the Soil Disturbance Factor and the Cumulative Effects Ratio:

The Drainage Density Index (DDI) proposed by staff is not supported by the literature. Letters submitted by Richard Harris, Cooperative Extension, and Dennis Hall, CDF both support Jackson's contention that staff's formulation of the DDI is not justified by the literature. Additionally, there is no information in the literature that would support a claim that a given DDI represented a low risk to water quality from management actions and that another value posed a high risk to water quality from management actions.<sup>12</sup>

Staff has developed a Soil Disturbance Factor (SDF) in an attempt to characterize the potential of a given THP to disturb the soil. Again, the procedure used is seriously flawed. Staff's SDF combines several procedures into a single numerical rating which is arbitrarily classified as being high, medium or low. Their method is not supported by the literature and, therefore, totally unproven.

The Cumulative Effects Ratio (CER) attempts to account for non-timber related cumulative impacts in a watershed by adding a sentence stating that if a watershed is 303(d) listed as impaired for sediment or temperature then the CER is always considered to be high. This change is inadequate since it ignores cumulative impacts from non-timber land use in watersheds that are not 303(d) listed for sediment or temperature such as San Vicente Creek or Corralitos Creek.

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<sup>12</sup> May 18, 2005 letter of Dennis Jackson to Regional Board. (Attachment C)

**b. Monitoring and Reporting Program is Seriously Flawed and Cannot Verify Protection of Water Quality or Beneficial Uses.**

The Monitoring and Reporting Program will not be able to generate useful data regarding the effects of timber harvesting on water quality since the MRP lacks any requirement for the specified monitoring to be done according to a rigorous Quality Assurance/Quality Control (QA/QC) Plan. Therefore, it is highly likely that similar data collected by different individuals will not be comparable and will be of little scientific value.

The MRP relies heavily on visual monitoring. There is no QA/QC protocol for visual monitoring or water quality (WQ) data collection and reporting. There are no background data requirements. The water quality data that has been generated under the individual waivers and that will be under the conditional waiver is, therefore, essentially useless. Besides the lack of quality control, the data will also be collected too late after storm events to determine compliance with the Basin Plan. Data is to be collected only for new culverts, even though CDF's own Hillslope Monitoring Report identifies roads and existing culverts as the main culprits. The Hillslope Monitoring Program reviewed 300 THPs and found that 50% of all crossings reviewed had implementation departures (27 RPF requirements rated).<sup>13</sup> The Hillslope Monitoring data only included operations where property owner permission was granted, which most likely indicates a conservative assessment of culvert problems. No WQ data is to be collected above or below the THP, again precluding determination of Basin Plan compliance.

Additionally, the monitoring reports are not required to be received by the Regional Board until November 15, after the winter period is well under way and therefore far too late to allow for adaptive management to increase water quality protection.

Superficially, the MRP looks impressive, but in reality it is an exercise that will deliver very little useful data and will do little to protect water quality and beneficial uses and less to determine compliance with the Basin Plan.

**B. The Regional Board's Categorical Waiver Is Contrary to the Public Interest**

Substantial evidence in the record demonstrates that logging pursuant to the FPRs is inconsistent with the public interest and leads to a violation of the Basin Plan. As discussed above, the Regional Board cannot refer to any evidence in its record upon which it can rely for a conclusion that its conditional waiver will either meet water quality objectives or reduce pollutant loadings in Central Coast surface waters. As a result, it is not surprising that the public's interest was entirely overlooked by the Regional Board and the only interest served is providing the logging industry the opportunity to remain free of any effective regulatory control

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<sup>13</sup> Hillslope Monitoring Program, monitoring results from 1996-2001, CDF/Board of Forestry/Monitoring Study Group Monitoring Program, Cafferata, P.H. and J.R. Munn, 2002



As noted above, the Regional Board lacked evidence regarding who is discharging, what they are discharging, where they are discharging, what management practices are in use or available beyond the disputed Forest Practice Rules, or whether particular management practices are effective in controlling specific pollutants.

The Regional Board failed to explain what, if any, fees will apply to logging operations seeking to operate pursuant to the categorical waiver. If no fees are required, this runs counter to the public interest. By issuing a fee-less waiver, the Board has decided to further subsidize the pollution discharges of logging operations with public monies.

The conditional waiver cuts the general public out of significant decision points. Rather than specific permits coming to the Regional Board for review and approval, along with public review and comments, the conditional waiver proposes to delegate all decisions to staff. No notice or public hearings will be available to the public regarding numerous decisions by the Executive Officer deciding, for example, which dischargers will be allowed to operate under a waiver, whether the interagency decisions regarding water quality mitigations on a given THP were sufficient, or what type and level of monitoring will be required or where monitoring points will be located. Reviews and decisions by staff do not need to be done at a public hearing with accompanying notice and comment procedures. Nor would staff's actions necessarily be subject to State Board or judicial review. Hence, the conditional waiver seriously undermines the public's interest in participating in the Board's efforts regarding logging-related discharges.

## **5. HOW CRFM IS AGGRIEVED**

The Petitioners are non-profit, community based organizations that are concerned with the protection and restoration of beneficial uses of water on the Central Coast. CRFM represents thousands of individuals that have been, and may in the future be, adversely affected by the Regional Board's action. Problems experienced under the categorical waiver that has been in effect since 1987 include road and property damage from THP sediment discharges, loss of and damage to drinking water sources, loss of swimming holes, the extirpation of native species from great portions of their natural range, and other degradation to beneficial uses. The majority of CRFM's members reside in the Central Coast region, and depend on the watersheds in the area for their domestic water sources and other beneficial uses. CRFM's members also include recreational fishermen, restoration workers, and other persons who have vital interests in ensuring that beneficial uses are protected and restored as required by law. Furthermore, CRFM's members frequently hike, backpack, and otherwise spend time in the watersheds affected by the Regional Board's action, and derive recreational, aesthetic, educational, scientific, and spiritual enjoyment from these waters. CRFM's members recognize that as these watersheds are degraded, so is the quality of their own lives.

## **6. THE ACTION CRFM REQUESTS THE STATE BOARD TAKE**

CRFM requests that the State Board take the following action with respect to the categorical waiver adopted by the Regional Board:

- A. Vacate Resolution No. R1-2005-0075 and remand this matter back to the Regional Board for their reconsideration of waste discharge requirements for logging operations;
- B. Order the Regional Board to prepare a full EIR for any action relating to a waiver of waste discharge requirements for logging operations.
- C. Order the Regional Board to develop a functional MRP consistent with the recommendations of experts such as Robert R. Curry and Dennis Jackson

**7. A STATEMENT OF POINTS AND AUTHORITIES FOR LEGAL ACTIONS RAISED IN THE PETITION**

CRFM's arguments are set forth at paragraph (4) above. Should the State Board have additional legal questions regarding the issues raised in this petition or require further information, CRFM will provide additional briefing to the State Board.

**8. A LIST OF PERSONS, IF ANY, OTHER THAN THE PETITIONER AND DISCHARGER, IF NOT THE PETITIONER, KNOWN BY THE REGIONAL BOARD TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THE PETITION.**

CRFM obtained from the Regional Board a list of interested parties in this matter, which is attached hereto as Exhibit D.

**9. A STATEMENT THAT COPIES OF THE PETITION HAVE BEEN SENT TO THE REGIONAL BOARD**

On August 6, 2005, CRFM sent copies of this petition via first class mail to the following address:

Roger Briggs, Executive Officer  
Regional Water Quality Control Board  
Central Coast Region  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401

Additionally, CRFM sent a courtesy copy of this petition, minus the attachments, to the following interested party:

Mr. Steven Auten

Big Creek Lumber  
3564 Highway One  
Davenport, CA 95017

**10. A COPY OF A REQUEST TO THE REGIONAL BOARD ASKING PREPARATION OF THE ADMINISTRATIVE RECORD, INCLUDING A COPY OF THE TAPE RECORDING OF THE REGIONAL BOARD ACTION OR A TRANSCRIPT, IF AVAILABLE**

A copy of CRFM's letter requesting the Regional Board to prepare the administrative record for this matter is attached hereto as Exhibit E.

**11. CRFM REQUESTS AN EVIDENTIARY HEARING**

CRFM respectfully requests that the State Board hold an evidentiary hearing to consider newly available evidence and to fill in the gap left by the Regional Board's failure to gather sufficient evidence upon which to base a decision establishing either waste discharge requirements or a conditional waiver.

If you have questions regarding this petition, please contact Jodi Frediani at (831) 426-1697.

Dated August 6, 2005

Respectfully Submitted,



Jodi Frediani, CRFM

Kevin Collins, Lompico Watershed Conservancy

Aldo Giacchino, Sierra Club, Santa Cruz Group