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Friends of the River • Institute for Conservation Advocacy, Research and Education •
Klamath Forest Alliance • Klamath-Siskiyou Wildlands Center • Living Rivers Council •
Los Padres Forest Watch • Northcoast Environmental Center •
Public Employees for Environmental Responsibility • Sierra Forest Legacy •
Sierra Foothills Audubon Society • Western Watersheds Project •
The Wilderness Society • Wilderness Watch**

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Submitted via email to Forestplan_comments@waterboards.ca.gov

Re: Update of the Water Quality Management Plan for National Forest System Lands in California

To the State Water Board:

The undersigned groups write to register serious concerns with, and objections to, the State Water Board's decision to move regulation of the water quality impacts of national forest management from the Regional Water Quality Control Boards to the State Board, as well other changes proposed as part of the pending "Update of the Water Quality Management Plan."

Together, our groups review projects and policies on all of California's 18 national forests. Many of our groups have been engaged with public lands management and water quality protection in California for more than three decades. In our view, while an update of the water quality regulation for the National Forests is clearly necessary, the proposed change to a single statewide regulatory approach is unnecessary, not likely to lead to better management of California's water resources and water quality, and inconsistent with the good-faith exercise of the Water Board's statutory authority and responsibility to protect California's water. We urge the State Water Board to reconsider and to repeal the resolution of August 4, 2009, which endorsed a single statewide regulatory approach for National Forest Service lands without a sufficiently serious review of the legal, regulatory, and policy issues implicated in such a substantial change in oversight practices.

THE RATIONALES OFFERED FOR THE PROPOSED POLICY CHANGE DO NOT APPEAR CONSISTENT WITH RELEVANT FACTS, EVIDENCE, AND EXPERIENCE CONCERNING THE IMPACTS OF FOREST SERVICE MANAGEMENT PRACTICES ON WATER QUALITY AND BENEFICIAL USES.

California's national forests cover a huge and varied landscape, with broadly diverse geology, ecological communities, and many types of interactions with a range of human communities. State Water Board staff suggest they wish to "accomplish water pollution control and environmental restoration in the most efficient and effective manner." In our experience, the most efficient and effective water pollution controls and restoration measures are often carefully adapted to the particular conditions of a specific landscape. Measures that are appropriate and sufficient in one landscape may be wholly inadequate ("ineffective") in a different setting, but unnecessary (thus "inefficient") in a third circumstance.

Similarly, the suggested benefits of "minimiz(ing) duplication of effort and unnecessary regulatory burdens" appear largely illusory. The Forest Service has suggested that the proposed change is desirable to increase "certainty," but even a cursory review of the enforcement record strongly suggests that the Forest Service has encountered very few enforcement efforts by the various Regional Boards. Though we strongly doubt any have laid any truly substantial burden on the Forest Service, it's not clear that even a substantial burden would necessarily be disproportionate given the importance of clean water and the impact of Forest Service actions.

While we welcome the Forest Service's representations that the agency now considers water quality protection to be its primary mission, in our experience the Forest Service's actual management practices continue to be driven by timber production, fire suppression priorities, and legacy programs including livestock grazing and mining which have been, and continue to be, the source of continuing impairment to water quality and beneficial uses. At any rate, regional regulation has not been an impediment to that water quality protection on national forest lands in the past and there is no basis to believe that statewide regulation will better serve that goal in the future. In fact, the regional boards are best situated to work with the Forest Service in protecting water quality in each basin based on regional boards' and staff's unique knowledge of the site-specific issues.

There are substantial reasons to doubt the State Water Board is nearly as well-positioned as are the Regional Boards to offer or to implement fine-tuned policies and prescriptions for water quality protection across the wide array of landscapes, ecosystems, and land uses seen on the national forest system in California. The Regional Boards, with greater staff knowledge, field time, and specific knowledge of local conditions, have yet to fully control water quality impacts from national forests; that fact alone should indicate that those tasks would be far more difficult for a centralized State Water Board.

The timber harvest regulation programs instituted by the North Coast RWQCB have been the most effective pollution controls that have been developed by this agency. The Regional Board has been working to address the main cause of sediment pollution, logging roads and landings. The NCRWQCB has the largest timber staff of any regional board, and the most sophisticated programs addressing forestry impacts. To remove the NCRWQCB's authority over a critically important source of pollutants risks wasting the very significant resources and staff effort devoted to these issues over time, and destroying an important part of the public benefit those programs have created and help to maintain.

It is clear the current program has been chronically underfunded and is not adequate to fully protect water quality. We strongly support revisions that will provide specific conditions and permit terms, including mandatory monitoring and reporting. However, the shortcomings of the present regulatory structure can best be remedied by increased support for the regional boards and their work. Again, the fact that the Regional Boards lack sufficient staff to implement workplans and regulatory commitments strongly suggests that a program with even less capacity at the State Board level would be less capable of supporting an effective and efficient program. There is no basis to believe that a less specific, statewide program would offer more effective protections for water quality.

An additional concern in this regard is the prospect that, under the proposed statewide prioritization of recovery and restoration funds, a few projects could command most of the available funding, leading to increased impacts in many other areas. Given the diversity, not to mention the sheer size, of the state, as well as the broad range and sheer intensity of California's water quality challenges, such a prioritization mechanism seems unlikely to maintain current water quality protection levels.

Yet the proposed shift from regional to statewide oversight will inevitably increase 'one size fits all' approaches to both regulation and oversight, each more likely than not to *reduce protections for California water even as water quality and quantity become critical resources for the state's citizens and ecosystems*. If, as we believe, the practical and net effect of the proposed change in regulatory regime would be to weaken the effectiveness of water quality protection statewide, we have serious doubts whether such an action would be consistent with the Porter-Cologne Act and the Federal Clean Water Act. As well, sound regulatory practice requires a greater congruence between policy and rationale than is demonstrated here, not least because duplicitous statements of purpose so often conceal improper ends.

The intended effect of the proposed centralization of authority appears not to be to more effectively protect California's water quality, but rather to create a regulatory regime that is more convenient for the regulated entity. At the recent workshop, State Board staff repeatedly referred to their Forest Service "partner." We believe the term, the characterization, and the relationship they imply, to be seriously inappropriate. The

State and Regional Water Boards are regulatory agencies; the Forest Service is a regulated discharger, not a partner.

ACTIVITIES CONDUCTED BY THE USFS ARE KNOWN TO HAVE SIGNIFICANT ADVERSE EFFECTS TO WATER QUALITY AND BENEFICIAL USES OF WATER.

Many of the watercourses on our national forests have been seriously harmed by, and are recovering from, the severe impacts of land uses authorized and encouraged by the Forest Service. These include logging practices explicitly intended to liquidate old-growth forests, as well as mining and grazing practices, which, while now recognized as unsustainable, nonetheless persist. Perhaps most destructive of all for clean water, they include the construction of a vast network of roads that now outstrips the Forest Service's ability to undertake, or Congress' willingness to fund, even basic maintenance activities.

Many are formally listed as impaired under § 303 of the Clean Water Act, particularly for sediment, temperature, and other pollutants that are the result of upstream land uses. Even the significantly improved logging practices generally seen today on national forests are not free of significant watercourse impacts. As noted, mining and grazing practices under Forest Service authority continue to incur significant impacts to water quality. And the enormous backlog in road maintenance needs, estimated at \$10 billion nationally before the Bush Administration changed accounting methods to conceal those costs, underscores two clear trends: 1) there's not likely to be enough money to remove or repair decaying roads and failing culverts across the landscape and 2) those roads and culverts are thus more likely to fail with every passing winter, with very serious impacts for downstream water quality. Each suggests that in order to maintain water quality on national forests, greater oversight may be necessary, not less.

The history of the land management practices supported by the Forest Service, and the institutional incentives which led to those practices, does not suggest that self-regulation is a viable, effective, or reliable means to insure that water quality is protected from the unnecessary impacts of logging, road building, road maintenance, and associated activities. With respect to water quality protection, self-regulation is a strategy that has been tried and found wanting. We no longer have the luxury, if ever we did, of risking further damage and degradation of water resources in order to continue to experiment with that failed model. This is as true for the U.S. Forest Service as it is for any other major agency or land-holding entity.

As your own staff report notes, national forest lands today face a series of additional impacts, particularly including those from off-road vehicles used for recreation, which were not seen in the past. Key public trust resources, including water quality and quantity, but also including a number of imperiled fish species, as well as wildlife species which depend on aquatic and riparian habitats, have suffered grievous harms from the direct, indirect, and cumulative impacts of land uses on national forests.

THE FOREST SERVICE'S BMPs ARE INSUFFICIENT TO ADEQUATELY PROTECT WATER QUALITY AND BENEFICIAL USES OF WATER.

While the Forest Service has instituted a series of Best Management Practices (BMPs) intended to correct past mis-management, to prevent further impairment of water quality, and to lead to recovery of impaired watersheds, implementation of these BMPs has not adequately protected water quality and beneficial uses of water. In general, the Forest Service's BMPs are very generic, vague, and procedural in nature. For example, the primary BMPs for range (grazing) allotments are simply to write allotment management plans and to take actions such as adjusting stocking levels (i.e., numbers of livestock) to protect water quality. USFS can easily say that it has written plans and adjusted the numbers of animals, but has it adequately protected water quality? The answer is too often "no."

We have consistently observed serious shortcomings in the application of Forest Service BMPs to actual projects. In addition, the existing BMPs include BMPs that are inadequate or poorly adapted to certain conditions. Moreover, in many circumstances BMPs are poorly implemented for a number of reasons, while in others, BMPs that are described in plans and programs are never actually implemented. Revision of the significant fraction of Forest Service BMPs which are inadequate must be a focus of the revision process in order to create a truly effective and comprehensive watershed protection regime. *The bottom line: adverse impacts to water quality can, have, do, and are continuing to result where the USFS has applied its BMPs. Thus, the BMPs alone cannot be relied on to achieve compliance with state standards.*

Compounding the inadequacy of Forest Service BMPs, the USFS touts its Best Management Practices Evaluation Program (BMPEP) as proof that its BMPs are sufficient. But the Water Boards themselves have criticized the BMPEP and detailed its substantial shortcomings and limitations.

The Forest Service's well-documented disregard of BMPs suggests the need, not for expediency, but for more strenuous enforcement, as well as for continuing development of improved and additional BMPs. Given the importance of water resources, and the difficulty of consistently protecting them, it is far from surprising that the Forest Service should seek to reduce its accountability for the watershed impacts of its management. It is surprising that the State Board would suggest reducing Forest Service accountability might not harm water quality, when both reason and experience so clearly suggest otherwise.

One particularly troubling aspect of Forest Service BMPs that may not be sufficiently appreciated by Water Board staff and members is that these measures are now largely unenforceable: because they are contained in the Forest Service Manual, rather than the Forest Service Handbook, courts treat BMPs as entirely subject to agency discretion. For these reasons and others, it is inappropriate to rely exclusively on Forest Service BMPs to protect water quality.

GIVEN THE KNOWN AND POTENTIAL SIGNIFICANT EFFECTS, AN EIR/EIS IS REQUIRED.

The adoption of a new Water Quality Management Plan by the State Water Board and USFS is a major action that requires a joint EIR/EIS. The Forest Service has taken the position that the proposed action would not constitute an “action” under the National Environmental Policy Act (NEPA), and could be adequately analyzed and mitigated under the California Environmental Quality Act (CEQA) with a Mitigated Negative Declaration, to be issued at the close of the process some months or years in the future. We strongly disagree on both points. A program change which could easily – is most likely to – lead to increased water quality impacts on a scale as large as even a single national forest, much less all of Forest Service Region 5’s 18 national forests, clearly requires full analysis, including due consideration of reasonable alternatives.

Changing both the management controls and the substantive content of these pollution control programs does, in our view, constitute a “project” as that term is understood in CEQA caselaw. Thus, the lead agency (State Board) must perform environmental analysis including a complete description of how all activities will be changed and what implementation standards have been changed with disclosure and discussion of related environmental effects—including potential effects to water quality values; forest values; greenhouse gasses (and potential climate change) effects under AB 32; effects related to the public’s ability to participate; related mitigations and their effectiveness under the different scenarios; discussion of alternatives, etc. Significant impacts to water quality from activities on Forest Service lands must be avoided, minimized and mitigated. We urge the State Board to begin the CEQA scoping process soon if it intends to meet the 18 month deadline in the August, 2009 resolution. An Environmental Impact Report (EIR) will need to be prepared to analyze the potential impacts of the proposed action, including the potential cumulative effects, and appropriate avoidance, minimization, and mitigation measures should be analyzed and adopted before the proposed policy may legally be finalized.

Similarly, the proposed action could clearly lead to potentially significant effects on the environment, and the Forest Service is developing a Water Quality Plan that will result in mandatory measures to be followed on all National Forests in California. Therefore, in order to comply with NEPA, an Environmental Impact Statement (EIS) must be prepared, and must take a ‘hard look’ at the potential impacts of the proposed action, together with feasible alternative means of achieving the same larger purpose, prior to any irretrievable commitment of resources.

We note as well that there are areas where the California Coastal Zone Management Act may be implicated in the proposed change in authority.

MINIMUM REQUIREMENTS OF ANY PROGRAMMATIC PERMIT OR WAIVER TO BE ISSUED BY THE WATER BOARDS FOR USFS ACTIVITIES

Regardless of which agency issues waivers to the USFS, any permit(s) or waiver(s) for nonpoint source discharges by the USFS must include four basic elements: 1) explicit and binding legal requirements that all water quality standards still apply; 2)

unambiguous requirements for monitoring and reporting; 3) clear requirements for timely corrective action when problems are identified; and 4) Regional Water Boards must retain the discretion and authority to require a Report of Waste Discharge and project-specific approvals any time they find that a project (for whatever reason) poses risks to water quality that may not be adequately addressed by the statewide waiver/permit.

Any programmatic permit(s)/waiver(s) must require that each project or activity conducted by the USFS resulting in nonpoint source discharges that may affect the quality of the waters of the state must fully comply with all plans and policies adopted by the State Water Board and the Regional Water Boards. This must necessarily include, but is not limited to, the antidegradation policies adopted by the State Water Board (i.e., Resolution 68-16) and all applicable: 1) waste discharge prohibitions, 2) narrative and numeric objectives, 3) implementation policies, and 4) antidegradation objectives contained in the water quality control plans adopted by the Regional Water Boards and the State Water Board.

The “sideboards” for any programmatic permit(s)/waiver(s) must include a fundamental acknowledgement that the USFS’s Best Management Practices (BMPs) are generic, vague and procedural in nature. While the BMPs may be applied to attain compliance with the state’s water quality objectives, the BMPs must not replace or become the standards. The prohibitions, narrative & numeric objectives, and implementation policies contained in the state’s existing water quality control plans must remain in full force and effect.

To specify the necessary elements of a monitoring and reporting program for each national forest in California, with respect to each category of activity producing water quality impacts, is necessarily beyond the scope of these comments. Indeed, that such programs would best be specified for individual national forests, or at a minimum a group of forests functionally similar with respect to the activity in question, is one of our basic points.

For one example, however, with respect to OHVs: each Forest's OHV system should be surveyed at least annually for adverse effects to water quality, including sedimentation. The Regional Boards should require Reports of Waste Discharge from each forest for their OHV systems. Both the RWDs and monitoring reports should be posted on each Forest's website, as well as the Regional Board's website. One or both website should have a means for the public to report problem roads and trails, submit photos and to request a site visit.

Similarly, instream monitoring points should be established for each planning watershed, both above and below any potentially significant land management activity, and particularly in known or potential fish refugia. Monitoring results from such points should be reviewed no less often than annually by Regional Board staff to assess the adequacy of BMPs and other mitigation measures.

The Regional Water Boards must retain their authority and discretion to require a Report of Waste Discharge and project-specific approvals any time they find (for whatever reason) that a project or activity conducted or proposed by the USFS poses risks to water quality that may not be adequately addressed by the statewide waiver/permit. The State Water Board is too far removed from the ground, and USFS activities too varied, to reasonably conclude that a programmatic permit/waiver issued by the State Water Board will adequately address all situations.

CONCLUSION

In sum, the undersigned groups are unable to support the proposed transfer of water quality oversight for national forests in California from the regional water quality control boards to the state board. While the existing programs have not proven adequate to fully protect water quality and beneficial uses, as required by law, we have grave concerns that the proposed transfer is likely to lead to less effective protection for California's water resources. As well, we are concerned that the process now underway is not consistent with CEQA and NEPA, nor with state and federal administrative law which require a policy change be supported by clear rationales that accord with the facts and evidence.

Thank you for your careful attention and diligent efforts to protect California's water resources.

Sincerely yours,

/s/

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