

**STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

STAFF REPORT FOR REGULAR MEETING OF MARCH 19, 2004

Prepared on February 26, 2004

ITEM: 14

**SUBJECT: WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR THE
BARTLEBAUGH TIMBER HARVEST, THP NO. 1-O3-071 SCR, SANTA CRUZ
COUNTY ORDER NO. R3-2004-0010**

SUMMARY

On December 1, 2003, Regional Board staff received a request from Big Creek Timber Company for Water Quality regulation of the Bartlebaugh Timber Harvest (THP). The THP involves selective harvesting of 34 acres of land utilizing ground based yarding techniques. During the June 9, 2003 preharvest inspection, Regional Board staff found the THP to pose a low risk to water quality and appropriate to receive a waiver of waste discharge requirements. The "Review Team" members evaluated this THP and reached concurrence on most issues and concerns that were raised. The extent of monitoring requirements remains a point of disagreement between the Regional Professional Forester (RPF) and Regional Board staff. Because the THP is located high in the Corralitos Creek Watershed and has no Class I or Class II watercourse crossings, Regional Board staff recommends that all monitoring be performed via photo points and visual observations. The Forester agrees with some of the visual observation and photo-point monitoring but disagrees with the extent of monitoring in subsequent years after the harvest is complete.

DISCUSSION

At the September 2003 Board Meeting Regional Board staff presented the "Timber Harvest Framework" and "Decision Matrix". Regional Board staff was able to follow the framework in a relatively stepwise manner (i.e., review the THP, attend the pre-harvest inspection (PHI) and review team meeting, come to general agreement on the issues that came up at the PHI, etc.).

The Decision Matrix focuses on risk to water quality and lends guidance to monitoring programs. If the timber harvest poses essentially no risk to water quality, then no action by the Board is necessary. If the THP does pose risk to water quality but this risk can be adequately mitigated then the THP is appropriate for a waiver of waste discharge requirements. And finally, if the THP poses risk to water quality and there is significant uncertainty that this risk will be adequately mitigated, then waste discharge requirements may be necessary.

The Bartlebaugh THP (THP) does pose some risk to water quality, but this risk is mitigated in the approved timber harvest plan. No additional mitigation measures beyond those contained in the timber harvest plan are proposed to be added via this Waiver, except for monitoring and reporting requirements. The proposed Monitoring & Reporting program is based in part on the risk to water quality along with site features. Regional Board staff's approach to developing the waiver and conditions for this THP follows.

Risk to Water Quality

Based on review of the THP and the preharvest inspection, Regional Board staff feels this THP poses a "low risk" to water quality. Regional Board staff considered the following facts to evaluate the risk to water quality posed by this THP:

1. Corralitos Creek is not listed on the 303(d) list of Impaired Water Bodies, but it is considered a "threatened and impaired watershed" because the Class I portions of the Creek (lower in the watershed) are habitat for steelhead, an endangered species.
2. Watercourses within the THP are all Class III except a small Class II watercourse reach near the property line.
3. Roads and landing are mostly in place. All existing roads are functioning properly.
4. The THP is small in size (i.e., 34 acres).
5. Big Creek Lumber Company has an established history of good land management.
6. Two landslides, which were observed during the pre-harvest inspection, are not expected to be adversely affected by this THP.
7. Most of the terrain of this THP is moderately sloped.
8. Monitoring will be implemented in a manner such that erosion problems that might occur will be addressed as soon as practical.
9. This THP will be executed primarily during the dry season and should be completed within one harvest season.

Monitoring & Reporting

Regional Board staff proposes that the Registered Professional Forester will be required to implement photo-point and visual monitoring of watercourses, unstable areas, roads, landings, and skid trails. Reporting should be required on an annual basis with additional reporting when significant erosion events are observed. The RPF should be required to report a water quality impact or a violation of the THP that could lead to a water quality impact to the Regional Board within forty-eight (48) hours. Log books of field inspections should be maintained by Big Creek Lumber Company.

Waiver Order

This project will be conducted as prescribed in Timber Harvest Plan 1-03-071 with the following proposed additional conditions.

1. The discharger must comply with all requirements of applicable water quality control plans adopted by the Central Coast Regional Water Quality Control Board and approved by the State Water Resources Control Board, and water quality control plans and policies adopted by the State Water Resources Control Board.
2. The discharger shall conduct timber harvest activities in accordance with the approved Timber Harvest Plan and with all applicable sections for the Forest Practice Rules.
3. The discharger shall not create a pollution, contamination, or nuisance, as defined by CWC Section 13050.
4. The discharger shall not discharge any waste not specifically regulated by the waivers described herein and shall not cause alteration in stream temperature which exceeds Basin Plan requirements. Waste specifically regulated under this waiver includes: earthen materials including soil, silt, sand, clay, rock, and organic materials (e.g., slash, sawdust, or bark). Examples of waste not specifically regulated by this waiver include petroleum products, hazardous materials, or human wastes.
5. The discharger shall allow Regional Board staff reasonable access, pursuant to Public Resources Code 4604 (b), onto the affected property for the purpose of performing inspections to determine compliance with waiver conditions.
6. The discharger shall implement Monitoring & Reporting Program No. R3-2004-0010.
7. This Waiver does not regulate point-source discharges that require an NPDES permit under the Clean Water Act including silvicultural point-source discharges as defined in 40CFR Chapter 1 Part 122.27.

This project, if conducted in accordance with Timber Harvest Plan 1-03-071 SCR and the conditions above will be in the public interest. This waiver is conditional and can be terminated at any time. This waiver expires on March 1, 2009.

**CALIFORNIA ENVIRONMENTAL
QUALITY ACT (CEQA)**

The above-referenced Timber Harvest Plan (Plan) was submitted by Steve Auten, a Registered Professional Forester, and was granted discretionary approval by the California Department of Forestry and Fire Protection (CDF). The Secretary of the Resources Agency has certified that CDF's timber harvest plan regulatory program can function as a substitute for an Environmental Impact Report or a negative declaration. (CEQA Guidelines § 15251.) CDF considered all the potential significant environmental effects of the Plan and made a finding that the timber operations will not have a significant effect on the environment. Therefore the above-referenced Timber Harvest Plan serves as a substitute negative declaration for the proposed timber harvest. CDF consulted with Regional Board staff when it developed the Plan. The Regional Board has considered the Plan and has required the Plan proponent or their authorized representative (Discharger), as a condition of this waiver, to comply with all requirements of the Plan.

COMMENTS

Most of the following comments are paraphrased to make them concise and clear.

Steve Auten, RPF, Big Creek Lumber Company submitted the following comments on January, 2004:

- 1) **Monitoring & Reporting Program:** The monitoring requirements are excessive for a project size of 34 acres, particularly where necessity has yet to be demonstrated by the Regional Board. The project area is 1/2% of the Corralitos Creek Watershed. According to our cost analysis, 41% of the net return to the landowner would be paid out to comply with the Regional Board's requirements. This does not include Timber Yield tax or income tax. It is also important to point out that net return must be averaged over 10 years, as the minimum harvest re-entry period is 10 years.

STAFF RESPONSE: Regional Board staff appreciates the economic analysis that was submitted with this comment. Monitoring

surface waters adjacent to timber harvesting is justified by the fact that timber harvest activities tend to change how the land behaves hydrologically and because timber harvesting can disturb the soil (i.e., increase the risk of erosion). Monitoring is intended as a safeguard to ensure and verify that all foresters and landowners are carefully implementing the Forest Practice Rules and other best management practices needed to protect water quality. Regional Board staff has also observed situations where historic timber harvest activities have caused water quality impacts such as landslides triggered by road building. Monitoring will help document whether or not current timber harvest practices are adequate to mitigate and prevent these sorts of water quality problems. If the current Forest Practice Rules are in fact adequate to prevent water quality impacts, monitoring will help demonstrate this fact to all parties involved. Regional Board staff agrees that monitoring plans should be based on a clear goal and be as cost-effective as possible.

Regional Board staff has reassessed the previously proposed Monitoring and Reporting Program to evaluate if adjustments can be implemented and still ensure adequate forensic type monitoring occurs. The monitoring plan proposed by Steve Auten (see comment #3 below) was also considered in this evaluation. The following adjustments have been made to the proposed Monitoring & Reporting Program:

- Elimination of report submittal 30 days following each inspection (i.e., Section 3.b. of the draft Monitoring & Reporting Program has been eliminated from all proposed waivers for timber harvesting). Reports are already required following discovery of violations, significant releases of sediment and on an annual basis. Routine reporting 30 days following an inspection is redundant.
- A decrease of the trigger for inspections in the second year following completion of timber harvest operations is appropriate because the risk to water quality is expected to be lower at this time. Post storm monitoring is very important during the first winter following completion of timber harvest operations. However, by the second year, vegetation establishment,

soil stabilization and improvements to erosion control best management practices are normally in place. For this reason, increasing the amount of rainfall needed to trigger an inspection and increasing the amount of time to complete the inspection is considered reasonable for a timber harvest plan that has a good track record the previous wet season. Furthermore, because most foresters have timber harvest plans that were harvested in each of the preceding years, allowing more time to inspect the lower priority timber harvest plans is appropriate. For this timber harvest plan, the second year trigger for inspections is increased to three inches of rain in a 24-hour period and the amount of time to complete the inspections is increased to 48 hours.

- Photo point monitoring before and after the first wet season following timber operations is still required, however, only one set of photos of each photo point is needed in subsequent years.

2) **Risk to Water Quality (Staff Report):**

Considering the relevant factors associated with the Bartlebaugh THP listed below, there is insignificant risk to the beneficial uses of water:

- a. The THP is located near the top of a ridge.
- b. The THP has a harvest area of 34 acres.
- c. The THP has approximately 200-300 feet of Class II watercourse with no equipment operations proposed within the WLPZ.
- d. The THP is approximately 1800 feet from Corralitos Creek.
- e. The project will be conducted on approximately 97% existing infrastructure.
- f. The condition of the existing infrastructure is excellent and has withstood several large storm events since the last two harvest entries.
- g. The property will be selectively harvested.
- h. The majority of the harvest area is on moderate slopes.

- i. All winterization shall be completed by October 15, the start of the Winter Period.

STAFF RESPONSE: Comment noted. No changes were made as a result of this comment.

3) **Monitoring & Reporting Program:** Please consider the following proposal.

- a. Visual monitoring of all roads, watercourse crossings, landings, skid trails, water diversions, watercourse confluences, and all mitigation sites within 24 hours of each storm event or 2" or greater shall occur for the first Winter Period following operations. Erosion control structures not functioning properly shall be fixed as soon as possible and monitored during each following visit. If all erosion control structures have functioned properly during the first Winter Period, then one inspection of the property shall occur by the PRF or his supervisor designee each Winter Period until September 1, 2008.
- b. Photo-point monitoring above and below M5, M6, R2, R3, and S4 at the beginning and end of the first Winter Period following operations. Photo-points shall be made available to the Regional Board on request.
- c. Functionality of erosion control structures will be monitored under the Big Creek Road Inventory Program. Summary inspection reports will be completed. Big Creek Road Inventory forms shall be made available to the Regional Board on request.
- d. If at least ten cubic yards of soil is released to a Class II or III watercourse due to natural or anthropogenic causes, a report shall be submitted to the Board within 48 hours of detection.
- e. If a violation of the Forest Practice Rules occurs which is related to water quality, it shall be reported to the Board within 24 hours.
- f. An annual report shall be submitted by August 15 to the Board following each Winter Period. The report will summarize

the previous year's harvest activities, wet weather problems, erosion control practices, wet weather recommendations for the next year, water quality monitoring performed, and recommendations for improving monitoring and reporting

- g. These are site-specific recommendations (above) solely intended for the Bartlebaugh THP and should be used to establish site-specific requirements for any other project.

STAFF RESPONSE: See Comment #1 for changes implemented to the Monitoring & Reporting Program. Other proposed changes were not incorporated because they have not been adequately justified. For example, performing visual monitoring only once per year after the first post-harvest wet season is not justified by the commenter. Similarly, photo-point monitoring sites have not been changed because no direct justification for eliminating them has been given. Increasing the reporting of sediment release events from one cubic yard to ten cubic yards is not justified by the commenter.. The one cubic yard of soil reporting requirement is based on Regional Board staff's best professional judgment of roughly the amount of soil that has the potential to impact beneficial uses in a typical stream. This reporting requirement is also considered reasonable especially considering the fact that no reports of sediment release have been received by Regional Board staff as of February 26, 2003 from the 10 timber harvest plans required to do this type of reporting.

Regional Board staff agrees that each monitoring & reporting program should be site specific. However, as we discover which monitoring techniques work well and which do not, future monitoring & reporting programs will be influenced by these experiences.

- 4) **General Comment - General Waiver:** The Board should strongly consider returning to a general waiver since the Board has the authority to order denial of any THP under SB 810. As part of the Waiver, the Board should have their permitting process coincide with that of CDF and the review team process. The Board also retains the ability to non-concur. A General Waiver would significantly reduce

the costs associated with the Board and staff review including costly individual hearings for each individual waiver.

STAFF RESPONSE: Regional Board staff is reconsidering a general waiver for timber harvest by monitoring the progress of general waivers for timber harvest in other regions and the proposed general waiver for agriculture in this Region. Regional Board staff is also considering general waste discharge requirements. Resources to develop a general waiver or general waste discharge requirements are not available at this time.

The Ocean Conservancy, Citizens for Responsible Forest Management, Sierra Club – Santa Cruz Group and the Lompico Watershed Conservancy jointly submitted the following comments. (The comments and responses to this letter are identical for all three timber harvest waivers on the March 19 2004 Board agenda.)

7. **Monitoring & Reporting Program:** The Monitoring Provisions of the proposed waivers are inconsistent with Porter-Cologne Monitoring Requirements for Waivers.

Under SB 923 (Sher 2003), a recent amendment to the Porter-Cologne Water Quality Control Act, "the conditions of waivers 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." Accordingly, monitoring must be able to verify that the waiver's conditions are consistent with the Basin Plan.

Currently, no systematic water quality monitoring occurs to assess the water quality impacts of timber harvesting throughout the State. In general, approved plans are monitored only at the individual site level, and then only to check internal compliance with FPRs and BMPs. It is widely acknowledged that this THP-level monitoring is inadequate to gauge the effectiveness of BMPs at meeting basin plan standards. Consequently, under most monitoring regimes, "the actual water quality impact of silvicultural activities

conducted under the current THP process is unknown for most watersheds.”

The monitoring provided for in the proposed waivers does not go beyond the minimal, site-level monitoring alluded to above and is therefore inconsistent with SB 923’s requirements for monitoring pursuant to waivers of waste discharge requirements. A watershed-based, in stream monitoring plan is the only effective means of gauging the waivers’ ability to meet Basin Plan Goals. If the Board intends to issue waivers of waste discharge requirements for these timber harvest activities, it is legally obligated to adopt such a plan. If it does not, waste discharge requirements must be issued.

It should be noted that in order to monitor the effectiveness of waiver conditions, comprehensive pre-harvest water quality data is necessary. Such “background” data should be sufficient to describe pre-harvest conditions during both dry-weather and wet-weather flows. If such data is unavailable, the effectiveness of the waiver will, by definition, be impossible to assess, and consequently the Board cannot legally issue a waiver under Porter-Cologne. Under these circumstances, the Board would be obligated to either conduct the necessary background monitoring before issuing waivers or develop waste discharge requirements for these plans.

STAFF RESPONSE: The monitoring requirements are intended to be forensic in nature and not a rigorous study. If visual or water column monitoring indicates a problem, then the forester must fix it as soon as possible. And if the monitoring does not indicate a problem, this is considered preliminary evidence that the best management practices for the timber harvest plan are working adequately.

Senate Bill 923 does not require comprehensive watershed-based monitoring or a comprehensive baseline analysis. Water Code section 13269 specifically permits individual monitoring and allows the Board to consider existing monitoring efforts. The Regional Board’s ambient monitoring program and monitoring data from existing discharges provide significant background information about watershed conditions. In addition, since none of the three THPs in

question discharges to a 303(d)-listed water body, we know that water quality objectives are currently being attained. If ongoing monitoring demonstrates that the waivers are not adequately protective, appropriate action can be taken once that data becomes available.

8. **General Comment – Legal Landscape:** Within the last several months, several significant events changed the law governing the management of timber harvest. We refer, specifically, to the opinions of the District Court in EPIC v. Pacific Lumber Company, et al., and the enactment of SB 810 (Burton 2003). The implications of these occurrences are discussed in detail below. SB 923 (Sher 2003) also made important changes, the significance of which was discussed above. We respectfully request that the Board cease consideration of these and other prospective logging waivers and direct staff to begin development of a new program that takes these legal changes into account.

Two recent decisions of the Court in EPIC v. Pacific Lumber Company, et al. (C 01-2821 MHP) portend changes in the regulatory landscape governing timber harvest activities by clarifying that many logging-related activities result in point source discharges, making them expressly subject to the requirements of the National Pollutant Discharge Elimination System (NPDES) program. Specifically, on October 14, 2004, the Court held that EPA’s regulation establishing the scope of the term “silvicultural point source” might not be interpreted to exclude any pollution source that would qualify as a point source under the language of the Clean Water Act. The Court stated that:

Where this runoff system utilizes the kind of conduits and channels embraced by Section 502(14) [of the Clean Water Act], EPA’s regulation does not control: It cannot control, for one, because ... EPA may not alter the definition of an existing ‘point source.’

Put simply, discrete conveyances of pollution associated with logging activities are subject to the Clean Water Act’s NPDES permitting requirements. The Court provided further clarification on this point in its January 23, 2004 order, in which it also expressed

frustration with Pacific Lumber's failure to acknowledge the significance of its interpretation of the law.

In its complaint, EPIC alleges that many of the pollution sources in the Bear Creek area are "point sources," discharging both stormwater and pollutants into the creek itself. These pollution sources were (and are) "point sources" like other "point sources" subject to the terms of the CWA and the NPDES. That PALCO misunderstood, and apparently continues, despite the court's October 14, 2003 opinion, to misunderstand - this point does not change the validity of this legal conclusion or the scope and effect of Section 402(p). Where PALCO's Bear Creek runoff system utilizes the kind of conduits and channels embraced by section 502(14), this court has noted, the pollution sources are definitively "point sources"; EPA may not alter this categorization, and section 122.27 does not - and cannot - absolve silvicultural businesses of CWA's "point source" requirements. Nor does section 402(p).

We acknowledge that, because the Board is not a party to the EPIC lawsuit, it is not, technically, bound by these opinions. However, as the language above indicates, the Court has repeatedly articulated its intention to construe to relevant sections of the CWA and its implementing regulations as requiring NPDES permits for discrete conveyances of silvicultural runoff. All that remains for the Court to do is complete its review of the merits of the claims (*e.g.* decide the question of whether the Pacific Lumber timber harvests actually utilize discrete conveyances).

The Board should not wait for the ultimate resolution of the fact issues in this case, because the issue of significance to the Board - whether THPs utilizing discrete conveyances for runoff are required to obtain NPDES permits - has already been decided. Nor should the Board await the application of this precedent to the Board through a lawsuit in which it is the named defendant. The Board should see the writing on the wall and recognize that, as a result of the decisions in this case; it will ultimately be required to write NPDES permits for these and other timber harvesting operations. The Board could most efficiently and effectively use its resources by addressing this issue now.

The Regional Board has an obligation to "obtain coordinated action in water quality control..." Accordingly, the Board must do more than simply note that: "[t]his waiver does not regulate point-source discharges that require an NPDES permit under the Clean Water Act..." The Board should cease its development of waivers for prospective timber harvest plans and direct staff to develop an integrated program for regulating these discharges that includes solicitation of NPDES permit applications, as appropriate.

SB 810 (Burton 2003) empowers the Board to reject a timber harvest plan whenever it finds that the plan allows discharges into an impaired waterbody where such discharges cause or contribute to a violation of the Basin Plan. This gives the Board substantial new regulatory authority over timber harvest plans. To date, the Board has been relegated to participation in an inter-agency review team in which it makes recommendations and may occasionally file a nonconurrence - an action that has few practical implications - if it determines that the plan "does not adequately protect water resources." This new legislation gives the Board a substantially stronger voice at the stage of timber harvest plan review and strengthens the legal standard under which the Board must review timber harvest plans.

Although none of the three THPs that the Board is currently reviewing are located on water bodies that are listed as impaired for sediment, there are 35 such impaired water bodies in the Central Coast Region. Consequently, it is inevitable that the Board will be faced with this issue in the near future. Pursuant to the Board's obligation to "obtain coordinated action in water quality control," it is critical for the Board to decide how it will handle this new authority and advise staff and the public accordingly before it makes any further decisions on timber activities in our region. The Board should cease its development of waivers for prospective timber harvest plans until this issue has been formally addressed.

STAFF RESPONSE: The State Board recently issued the following ruling regarding timber harvest waivers:

The Waiver specifically states that it “does not apply to discharges requiring an NPDES permit under the Clean Water Act, including silvicultural point sources as defined in 40 Code of Federal Regulations part 122.27.” (Waiver at p. 4.) We also note that the State Board, the regional boards, and USEPA traditionally have not required NPDES permits for discharges associated with forest roads and other types of discharges associated with timber harvesting that are not listed as point sources in 40 Code of Federal Regulations part 122.27(b) or other applicable regulations. In the absence of legal authority establishing that such discharges should be regulated under the NPDES permit system, the State Board concludes that the regional boards may continue to issue waivers for discharges associated with timber harvesting subject to compliance with applicable requirements under Water Code section 13269.13. In the event future legal developments establish that an NPDES permit is required for certain types of discharges previously considered to be non-point source discharges, then the Regional Board can advise affected dischargers to apply for a permit at that time.

(Petition of California Forest Agency, State Board Order WQO 2004-0002 at 13.) The State Board further held that reliance on *Environmental Protection Information Center v. Pacific Lumber Co.* was not warranted until that decision becomes final. (Id. at 13 n.13.) Although the *EPIC* court issued an additional ruling on January 23, 2004, that ruling did not augment, clarify or change the October 14, 2003 ruling and does not call the State Board’s conclusion into question.

Regarding SB 810, your letter concedes that the “veto” authority of Public Resources Code section 4582.71 does not apply. We do not recommend that the Regional Board refuse to issue any waivers until it decides how to address hypothetical THPs that are not before it and that may discharge into listed water

bodies. The alternative would not be to delay making any decisions on THPs, but to require the dischargers to submit reports of waste discharge and for the Board to issue WDRs.

9. **General Comment – Timber Harvest Policy:** The Board Must Adopt a Comprehensive Timber Harvest Policy, with Public Notice and Comment and Environmental Review Pursuant to CEQA.

Unlike every other Regional Board that manages water quality impacts from timber harvest operations, the Central Coast Regional Water Quality Control Board waives waste discharge requirements for individual THPs, instead of acting categorically. Staff has argued that, by approving waivers on a THP-by-THP basis, the waivers fall under the CEQA equivalency of the California Department of Forestry and Fire Prevention’s (CDF’s) THP review and that, consequently, the Board is exempt from environmental review.

The Regional Boards have an obligation, independent of the Management Agency Agreement (MAA) with CDF, to protect the quality of the waters of the Central Coast Region. It is well known that the Forest Practice Rules (FPRs) and the THP Review process have proven grossly inadequate to protect water quality. Numerous experts have criticized the FPRs and THP Review for failing to address cumulative watershed effects and for failing to monitor for those effects as well as the effectiveness of Best Management Practices (BMPs) in protecting water quality and beneficial uses. Similarly, it is widely recognized that BMPs, even if perfectly implemented, are simply not designed to eliminate water quality impacts from logging activities. Consequently, it is clear that CDF’s timber harvest review process is inadequate to protect water quality in the Central Coast Region.

The only other layer of water quality protection that the Board is providing, and the only other action the Board takes in furtherance of its obligation to protect water quality is the waivers. However, individual waivers do not, indeed cannot, address the deficiencies cited above, particularly the deficiencies in cumulative impact review. Any THP-by-THP review, regardless of which

agency conducts it, will never be able to assess, predict, or mitigate cumulative watershed effects that may be caused by an individual logging project throughout an entire watershed. At a minimum, some sort of coordinated, watershed-wide review must occur.

The Regional Board has a "Timber Harvest Framework," which appears to attempt to coordinate decision-making on waivers in the region. The Framework is a mysterious document. Although it was listed as an action item on the Board's September 12, 2003 agenda, a staff report prepared, and public comment received, it is unclear what action the Board has taken on the Framework, which has also been known, variously, as a "template" and "decision model." As described in a staff report, the Framework outlines: (1) what constitutes a complete waiver application, (2) what the main components of a monitoring program are, (3) what maintenance activities will be required; and (4) how staff will handle enforcement. Despite these apparent policy-like characteristics, staff claims that the Template is "a work in progress" and "an internal staff guidance tool."

In light of the Board's obligation to protect water quality, the failure of the THP review process to do this especially as it relates to cumulative impacts, and the critical importance and legal necessity of coordinated management under these circumstances, we respectfully request that the Board assemble a cogent, transparent, and formal policy for its prospective regulation of timber harvest projects. Such a policy must be adopted following public rulemaking procedures and only after conducting an appropriate environmental review pursuant to CEQA. The Timber Harvest Framework has some characteristics of such a policy; if it is to serve as the Board's framework for timber-related water quality regulation, it should be formally adopted following public procedures and environmental review. Until the Board has adopted a uniform policy with respect to timber-related discharges, it should cease development of waivers for prospective timber harvest plans.

STAFF RESPONSE: The Regional Board considered a proposed framework for

evaluating timber waivers at its September 2003 meeting. At that meeting, staff and the Regional Board made clear that the framework was intended to be a dynamic document. The staff report, the document itself and the Board's comments all indicated that the framework is not a binding document, either on staff decision-making or on applicants. In fact, your letter actually criticizes staff for *not* following the usual procedure for the Smelt-Locatelli plan, where site-specific timing issues made a different procedure more appropriate. The framework clarifies for the Board and the public what information is necessary to support a waiver and why the information is significant. No formal procedural or environmental review requirements apply to the framework, except the Open Meeting Act requirements applicable to staff discussions with the Board. Nor does any law require the Board to adopt a policy or procedural requirements before considering site-specific waivers. Simply put, staff had two choices: to inform the public and the Board about the usual procedures and technical factors that inform staff decisions, or to avoid writing any of the timber harvest framework down. We believe the former better serves the public interest.

Your letter also objects to a THP-by-THP review, as opposed to a watershed-wide review. Unless it decides to issue a conditional waiver of waste discharge requirements for all timber harvesting, the Board can only consider the specific facts of each THP and waiver before it, on a case-by-case basis. This consideration can include any cumulative impacts of a particular project, if the CEQA document or other evidence in the record identifies any. The Regional Board does have other programs, including ambient monitoring and total maximum daily load (TMDL) programs, to address watershed-wide impacts. The data from these programs do not indicate that any of the waivers are inappropriate.

Moreover, the alternative to issuing site-specific waivers is to consider applications for waste discharge requirements, not to develop a region-wide policy. WDRs also require decision-making on a case-by-case basis. Although we agree that coordinated, watershed-wide planning is good public policy, the time constraints for reviewing

WDRs applications (see Water Code section 13264(a)(2)) do not allow the Board to delay a decision on WDRs while policy is being developed. As with individual waivers, the Board would base each WDRs decision on the CEQA document and other evidence before it.

10. **General Comment – Public Interest:** The proposed waivers are not in the public interest. Underlying the comments above are the three THPs that are the subject of the proposed waivers (on the March 2004 Board agenda). Although the THPs themselves pose threats of varying magnitudes, the points above apply equally to all three, as well as to any THPs the Board will consider in the future. We request that the Board consider these points both as applied to these specific THPs, and also as generally applicable to the Board's overall approach to timber harvest. These comments are not exclusive. We will continue to review these plans for consistency with the law and the public interest, and in the upcoming weeks, will supply additional comments that are specific to the individual THPs and waivers. However, the points outlined above amply demonstrate that the proposed waivers are not in the public interest because they do not contain safeguards adequate to protect water quality. The Board should refuse to approve the waivers and undertake to either develop waste discharge requirements for these plans or provide for such safeguards, including development of a comprehensive and protective timber program and development of legally sufficient monitoring programs.

STAFF RESPONSE: The California Legislature has declared in the Z'berg-Nejedley Forest Practice Act "that it is the policy of this state to encourage prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations."

Regional Board staff has participated in the THP Review Team process and has been consulted in the development of this THP. Furthermore, Regional Board staff has imposed additional conditions on the THP proponent in the proposed waiver document.

In addition, monitoring is proposed to be required of the project proponent in order that he will adapt accordingly to any problems in a timely manner. Regional Board staff feels that these protective measures in conjunction with CDF and Regional Board staff inspections will protect water quality and downstream beneficial uses while allowing "prudent and responsible forest management".

11. **General Comment – Public Review:** The Board has not provided for adequate public review of the proposed Waivers.

We have serious concerns about the procedure followed by staff in releasing these plans for review by the public. All three of the proposed waivers were completed and sent to the applicants on December 23, 2003, requesting that comment be submitted in writing by January 23, 2003. The Board will consider the proposed waivers at its March 19, 2004 meeting. As of the date of this writing, neither the agenda of the March meeting, nor the staff reports accompanying these plans, are available on the Board's website. Most alarmingly, as of the date of this writing, a THP has not been approved for the Smelt-Locatelli Timber Harvest (THP No. 1-04-008 SCR).

For the RMC and Bartlebaugh plans, although this timeframe may comply with the letter of the law, it did not provide sufficient time to meaningfully review these plans and compare them with the proposed waivers. Timber harvest plans are massive documents, and the water quality issues concerned are both numerous and complex. Often, a meaningful review would involve consultation with an expert with experience in timber management, water quality, or geology. By providing only the minimal 30-day review period, (beginning two days before Christmas, no less) the Board indicates either that it is unaware of the need for detailed review of plans, or that it does not care about meaningful public input. We appreciate that staff has been flexible on this deadline in this case, and has permitted us to submit these comments past the official deadline. However, we respectfully request that in the future, the public review period set by the Board be adequate to provide sufficient time to complete a meaningful and detailed review.

STAFF RESPONSE: Your letter suggests that a public review period of thirty days is required. That is incorrect. Water Code section 13167.5 provides a thirty-day comment period for waste discharge requirements. It does not apply to waivers. The only applicable notice period for waivers is the ten-day requirement under the Bagley-Keene Open Meeting Act. (Ca. Gov. Code §11125.) However, our policy is to provide a longer review period where possible because we agree with you that doing so is good public policy, and we will continue to provide as much opportunity for public comment as is feasible. In this case, the public comment period was 30 days, and staff allowed you an extra week to submit comments. In addition, the Board will hear public comments at the March 19 meeting and the agenda notice permits further written comments on the draft waivers in the agenda, so the public review period is actually closer to three months.

The Open Meeting Act does not require publication of the agenda or staff report more than ten days before the meeting. Both the agenda and staff reports will be posted on our website and provided to interested parties in a timely fashion. Staff makes all available documents available to the public at the earliest possible date. Any interested parties who believe that consultation with experts is necessary have the opportunity to initiate that consultation when the timber harvest plan becomes available or during the Board of Forestry review process. There is no reason to wait to initiate such consultations until draft waivers become available. In this case, your letter does not specify what additional comments or evidence you would provide given a longer comment period, or make any other offer of proof. Generalized concerns do not justify a delay of the March hearing date.

Kevin Collins, Lompico Watershed Conservancy submitted the following comments:

12. **General Comment – Drainage to a Landing:** The Bartlebaugh plan is relatively small (34 acres) but 2 of the 4 log landings are in the ELZ (Equipment Limitation Zone) of a Class 3 watercourse, and on one landing, the flows spill onto the staging area (landing) for trucks and loaders. I did not see reference to this in the staff documents for this plan.

STAFF RESPONSE: The commenter is referring to Landings L2 and L3 in the approved Plan. Equipment operation in an ELZ is regulated by Section 916.4, 936.4, 956.4 Watercourse and Lake Protection [All Districts] of the Forest Practice Rules. Subparagraph 6(c)1 states in part:

- a) Where operations occur adjacent to Class III watercourses, the RPF shall designate in the THP an equipment limitation zone (ELZ) of at least 25 feet where side slope steepness is less than 30%.
- b) The RPF shall describe the limitations on the use of heavy equipment in the THP.
- c) Where appropriate to protect the beneficial uses of water the RPF shall describe additional protection measures, which may include surface cover retention, vegetation protection and timber falling limitations.

Regional Board staff contacted the RPF and requested a detailed description of the limitations planned for the two landings (attached). Regional Board staff believes the planned limitations and the mitigations spelled out in the THP will be sufficient to protect water quality.

13. **PHOTO-POINT MONITORING:** Photo points can be more useful (than turbidity monitoring), but taking photos only at the beginning and the end of the winter rain season will miss most of the opportunities to correct problems or stop operations when necessary. Nearly all major erosion takes place episodically during intense storms, not in April or November. There is still the problem of asking a THP operator such as the LTO or RPF to monitor him or herself. If smog tests were done by car owners, in such a subjective situation, I doubt there would be much reason to do it. This is why I have consistently recommended that fees for these permits be collected to pay for the staff time necessary. The point of this monitoring is to determine if Clean Water Act requirements are being met, not to conduct an exercise that uses up time without a useful outcome. The most cost effective monitoring, region wide, could be on the ground staff inspections of THPs during and after THP operations.

STAFF RESPONSE: Photo-point monitoring is intended to document long-term changes to

the landscape. Episodic events are monitored via visual monitoring at this THP. At this time, Staff is not aware of any reason Registered Professional Foresters, cannot perform visual and photo-point monitoring. The vast majority of monitoring done in association with Regional Board Orders is self-monitoring. Falsifying monitoring reports is a serious offense that will be prosecuted to the full extent of the law. Nevertheless, staff will perform compliance inspections to the maximum extent possible with existing resources. The idea of collecting fees to fund additional staff time to perform monitoring is not being considered at this time due to the existing hiring freeze.

RECOMMENDATION

Staff recommends adopting Resolution R3-2004-0010 and Monitoring and Reporting Program R3-2004-0010.

ATTACHMENTS

1. Draft Resolution No. R3-2004-0010
2. Draft Monitoring & Reporting Program R3-2004-0010
3. Timber Harvest Information Package
4. June 26, 2003 Board letter.
5. Site Plan
6. Limitations and Mitigations for Landings L2 and L3
7. Comment Letters
 - Big Creek Letter
 - Ocean Conservancy Letter
 - Lompico Watershed Conservancy Letter