YUROK TRIBE

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AUGUST 22, 2011

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DEAR MR. LEE

Thank you for the opportunity to review the documents related to the Mitigated Negative Declaration (MND), including the Initial Study, and the Conditional Waiver of Waste Discharge Requirements (Conditional Waiver) for Non-point Source (NPS) Discharges Related to Certain Activities on National Forest Service (NFS) Lands in California and submit formal comments. In addition, we have reviewed and submitted comments on the US Forest Service (USFS) Water Quality Management Plan, which will be adopted as the USFS Water Quality Management Handbook (WQMH).

Overall, we believe the proposed waiver program has the potential to be an excellent step in the right direction for addressing NPS pollution from USFS lands throughout California. Importantly, the USFS is agreeing to a significant program that is full of requirements and conditions on their operations and on their extensive road network and the SWRCB will be reviewing and overseeing their progress in accomplishing those tasks. This proposed program is complicated and technical, and includes many administrative requirements that will necessitate vigilance and oversight. The Yurok Tribe has been engaged in this process since it began in November 2009 and plans to continue to track the program and be constructively involved in its implementation and evaluation to ensure the WQMH is implemented appropriately and the regulatory and enforcement obligations are met by the State of CA

These comments were developed in part by Pacific Watershed Associates and are organized in two parts. The first part provides comments on the WQMP and the second part address concerns with the waiver itself. Lastly, a bibliography of references has been submitted to document past issues with land management on USFS lands to clearly outline the setting and hesitations we have with such a program. Both the SWRCB and the USFS are taking on huge commitments and have not adequately analyzed whether or not the financial resources are secured to meet them.

PART I. COMMENTS ON DRAFT WQMH

1) **Non-point versus Point Sources of Pollution on Forest Roads** - In spite of the federal Court of Appeals Ruling, and its straightforward implications, the proposed NPS Waiver program has acknowledged, but not addressed, the issues of NPS pollution and what will (and what won't) be covered under the Waiver program. The Court Ruling describing point sources should be more closely evaluated in the Waiver Program description. Portions of the Waiver program for NPS sediment discharges will likely become invalid when this fact is addressed, and this fact has important implications for the proposed activities and for the protection of water quality.

2) **WQMH Best Management Practices** - The USFS continues to advocate its two-tiered approach to BMP development in which they provide a generalized performance standard and leave it up to the ID Team to customize the BMPs as they are employed. Unfortunately, in our experience of seeing thousands of BMP installations, this leaves far too much "wiggle room" and relies too much on the various abilities, experience, and subjectivity of individual project managers and field personnel. We have not found this to be wise. First, many of the "performance standards," as they are described, are weak and vague, and thus not really standards. Second, there is far too much room for non-standardized, unproven approaches to be applied on the ground. A more disciplined, repeatable, concrete standard, would lead to more structured BMPs that could then be modified to fit individual project circumstances.

   The USFS has indicated that the WQMH now includes an on-line library of reference manuals that provide "specific standards" and BMPs from which the IDT can select their favorites. We believe this is an inadequate substitute for actual USFS BMPs that include standards, practices, techniques, and minimum specifications that are necessary and appropriate to give their personnel reliable guidance. The "specific standards" offered by a "library" of manuals and documents, as described above, will be buried in various manuals and difficult to find and extract. In all likelihood there will be multiple standards in these references, as not all manuals will be up-to-date or consistent.

   We believe the USFS needs to have one set of published standards and BMPs that meet their minimum requirements for sediment control and management. If the IDT then decides to make them more restrictive and customized, then that is fine and that is a good use of their valuable time and expertise. But a baseline standard is needed to provide guidance to the IDT. Without it, the BMP process appears completely opaque (non-transparent) and arbitrary to the outside observer, and it is open to subjectivity and inconsistency in its application. In addition, we suggest that the preparation of actual concrete standards and standardized BMP specifications would likely lead to improved performance, less personal subjectivity, more standardization (that can still be modified to fit ground conditions), and less time spent with multiple review teams on each and every project that is undertaken. We have found this to always lead to lower costs as well as improved cost-effectiveness.

3) **Road Inspections** - The WQMP stated that roads will be inspected "periodically" and following "major" storms. The revised draft WQMH now defines major storms as "*all storm events for which the National Weather Service issues a local flood watch, advisory, or warning.*" This definition is inadequate and irrelevant in that these are NWS forecasts and not actual flood events. That is, there is no obvious connection between such advisories or warnings and actual storm intensities, precipitation volumes, or subsequent road damage experienced in a watershed. Is it the intent of the USFS to inspect road systems after an advisory, even if the resulting precipitation is inconsequential? Major storms that trigger road damage inspections should be defined based on actual precipitation volumes and/or intensities. Inspection and maintenance is critically important to the protection of water quality from old, under-designed road systems. There is an express need to conduct road inspections and perform preventive and storm-triggered road maintenance to protect and improve water quality. This section of the WQMH has not been well conceived and needs further definition. The USFS response and draft WQMH provides little clarity of future inspection schedules and frequencies. The WQMH should be revised to incorporate a more relevant trigger for storm inspections, and a specific schedule for normal non-storm preventive maintenance inspections for all roads.

4) **Road Storage** - BMP 2.6, Road Storage, has been proposed as a way to reduce NFS road maintenance responsibilities and costs, and to reduce the adverse impacts of roads that are not currently being used or maintained. We maintain that this is false accounting, flawed logic and an unproven strategy. If a road is not being used and not being maintained, it should be decommissioned so it no longer represents a significant threat to water quality. The decommissioning can be considered temporary and the road can be rebuilt in the future, if needed. In the meantime, basic decommissioning standards have been employed and the long term threat to water quality degradation has been effectively eliminated (not simply reduced to an unknown amount).

   As an example, Green Diamond Resource Company's federally approved Aquatic Habitat Conservation Plan has provisions for temporary and permanent road decommissioning. Temporary decommissioning is performed on roads that the company plans to reopen in the future but which they will not need and will not maintain until they are reopened. Decommissioning standards, including the removal of stream crossing fills, still apply but the road bed is well drained and left largely intact. Would the Water Board condone private timber industry "storing" roads so they could save money and eliminate inspections? Not likely, or it would be a common practice in private industry.

   If a road is to be retained, whether or not it is used, it should be inspected and maintained. If not, it should be decommissioned. That is a hallmark of sound land management and stewardship. Road decommissioning is a proven, published strategy for watershed and water quality protection. If the Road Storage BMP is to be considered a viable pollution control strategy it should be first shown to be so through published, peer reviewed studies before it is included and implemented as a Best Management Practice.

5) **Risk-based Road Decommissioning** - BMP 2-7 in the previous draft of the WQMP called for the identification and decommissioning of roads "that are no longer needed." We considered this to be a minimal or inadequate justification for decommissioning forest roads when the goal is to protect or improve water quality. In their written response to this concern the USFS indicated that they will evaluate all roads during Travel Management Analysis according to both need and risk. This would be an improvement to the identification of decommissioning candidates based on lack of need only. Unfortunately, in the updated draft WQMH, BMP 2.7, the lack-of-need is still portrayed as the guiding rationale for selecting roads for decommissioning and there is no mention of the dual role of water quality risk as a driving or deciding factor. As currently stated, reducing water quality risk is a side benefit of decommissioning; not a component of site selection.

   In their response letter, the USFS also stated that past decommissioning has been "generally highly successful" (which means that some have not been so successful). In our experience, some roads that have been decommissioned did need to be treated to protect water quality, but most others clearly did not. They were removed because they were no longer needed and could be easily taken off the maintenance roles. It is our opinion that decommissioning of these lower priority routes has been "highly successful" because most of these roads contained few serious erosion problems or threats in the first place. As a result, decommissioning was easy and there were few opportunities to have subsequent, serious problems. The criteria employed for selecting and prioritizing roads for decommissioning still needs significant refinement and the specific inclusion of risk to water quality and aquatic habitat.

6) **Post-fire Road-related Sediment Control** - In the previous WQMP, BMP 6-6, Emergency Rehabilitation of Watersheds Following Wildfire, we indicated that the treatment of hydrologic connectivity and upgrading of culverted stream crossings on forest roads should be included in the list of post-fire BMP implementation measures. Post-fire BMPs should include aggressive hydrologic disconnection of road and ditch drainage from natural stream channels, and upgrading of stream crossing culverts to increase flow capacity, reduce plugging potential and eliminate diversion potential. We consider it an emergency or high priority activity primarily because it must be accomplished before the burned watershed experiences a post-fire flood, which could occur during the first winter following a wildfire event.

   In their letter response, the USFS indicated that by staff consensus "the BMPs for fire suppression were not reviewed for this WQMP." We believe they missed the point of the comment – we are not talking about suppression BMPs. The updated WQMH defines suppression BMPs as those directly related to suppression activities including "fireline construction, construction of temporary access roads, back-firing operations, and aerial or ground application of short-term and long-term fire retardants." Our comment is directed to post-fire BMPs for road systems to reduce hydrologic connectivity and make the road and its drainage facilities more resilient to subsequent storm damage – not suppression-related BMPs. Post-wildfire periods are when water quality impacts from roads have the

potential to be the greatest, and specific BMPs need to be formulated for road system treatment during these post-fire periods.

7) **Program Feasibility Analysis** - The proposed Waiver program is very promising and we believe it is an excellent step in the right direction for addressing NPS pollution from USFS lands across the State. However, we are concerned with the financial feasibility of the Waiver Program and its required elements. We believe one cannot effectively promise to develop and implement a long term program of this magnitude without having first determined what it will cost and if it is economically feasible. Even if no new funding is forthcoming, as the USFS has indicated, they should have prepared at least a brief analysis of the requirements implied by this large program. Without performing a financial feasibility analysis there will be no way to know how much to request for future funding, if and when such opportunities present themselves. From the perspective of the public and various stakeholders, it is considered due-diligence to perform such an analysis. Without it there is no reasonable assurance that what is being discussed and agreed upon in the Waiver, and included in the WQMH, can actually be implemented to the degree necessary to satisfy SWRCB requirements. The State Water Board may have no significant concern for the cost of the program but the USFS, as a public entity, should and must be concerned about the cost of each major component of the program they have agreed to implement. In a time of limited and shrinking public budgets it is inconceivable to us that such an analysis has not been performed, or that the USFS would deem it unnecessary. Lack of a printed feasibility analysis does not imply that it will not or cannot be accomplished as proposed, but it does reduce confidence and transparency in the process.

   The USFS correctly acknowledges that they cannot commit to specific future funding levels, but also state that they have no plans to reduce funding for watershed improvements or monitoring. Unfortunately, funding cuts are hardly ever planned; they just happen and the agency has to respond. Based on recent budget trends, reductions are possible and even likely. Simply stated, the analysis would allow the agency and the public to gain an understanding about what can be accomplished with current funding levels, and what would likely have to be cut when and if funding reductions occur. Feasibility studies and financial analyses are an important and functionally useful tool in the development and implementation of any new program, and ignoring these important elements is not sound practice in either business or government. We suggest that the SWRCB and the USFS collaborate to conduct at least a preliminary analysis of the financial and personnel requirements implied by the program as it has been described, and report that analysis as an element of the proposed Waiver program.

8) **Scientific Peer Review** - We previously suggested that outside practicing scientists, in addition to stakeholders, be included in developing, designing, reviewing, implementing and monitoring adaptive management associated with the WQMP program. The USFS has indicated they welcome outside scientific review of the program, but are unable (or unwilling) to pay for such services. There was no specific suggestion in our proposal that the participating scientists be paid. Many panels are convened using volunteer scientists,

and perhaps only travel expenses are covered. Although the USFS stated that they cannot offer or afford to fund such participation we continue to believe that unbiased, outside experts would lend credibility and improve the transparency of the program. It is our contention that this would be one of the most cost-effective uses of funds they could employ early in the program, as it could steer them away from less effective actions and towards those elements that are both effective and less costly. Even at full rates, the cost of an outside, scientific peer review panel would be nominal and inconsequential compared to the cost of actually designing, implementing and complying with the requirements of the waiver program and the associated monitoring.. The intermittent use of outside professionals would add transparency and credibility to the process without the need for adding year-round permanent staffing. It can be a highly cost-effective practice as it is focused in scope and of limited duration compared to hiring and training full time, in-house scientific staff.

9) **WIP Program** - As discussed in a previous review of earlier versions of this chapter, the USFS nation-wide Watershed Improvement Program (WIP) needs to be better referenced (cited) in this document. Because the WIP program is identified as an important component of the watershed restoration process, to be used in concert with the WQMH, it is important to include adequate documentation of that program. In response to our concern, the USFS response included a web link to their watershed program where the WIP program was supposedly described (http://www.fs.fed.us/biology/watershed/index.html). The watershed web page did not have any reference to the WIP program, nor did it return any other web page or link to the WIP program when the search engine at that page was queried. The most complete and only description of the WIP program is the short summary contained in Chapter 5 of the draft Water Quality Management Handbook (WQMH). Additional program description and definition is still needed for this important element of the Waiver Program

PART II. COMMENTS ON DRAFT WAIVER OF WASTE DISCHARGE REQUIREMENTS

Finding #4 – According to the draft Waiver (Finding #4 – Road Management): "Forest roads are the single most significant anthropogenic source of sediment on NFS lands." Because of their recent official classification as point sources of pollution, this NPS Waiver program may no longer be a suitable vehicle with which to address many of these road-related sediment sources, including fine sediment delivery from hydrologically-connected roads and ditches.

The joint, official interpretation of the California State Water Resources Control Board and Region 9 of the US EPA states: "*On August 17, 2010 the US Court of Appeals for the Ninth Circuit ruled that runoff flowing from logging roads into systems of ditches, culverts, and channels and then discharged into forest streams and rivers is now considered a "point source" of pollution within the meaning of the CWA [Clean Water Act] and therefore requires permit coverage under the National Pollutant Discharge Elimination System (NPDES).*" At the same time, the last sentence of Finding #4 of the draft Waiver states: "This Waiver does not apply to

point source discharges that are subject to the National Pollutant Discharge Elimination System (NPDES) permit program under the federal Clean Water Act (CWA)."

The draft Waiver and the draft (WQMH) continue to address these newly defined point sources as being treatable under the NPS Waiver program. The draft Waiver makes no mention of the recent reclassification of certain sediment sources and discharges. Even though the EPA has not yet published guidance on how these new road-related point sources will be treated, the ruling still stands and they are no longer eligible to be treated under the NPS Waiver program. We believe the Waiver needs to add a finding that addresses the Ninth Circuit ruling, the apparent implications for the Waiver program, and clarify how (or if) these newly defined point sources will be addressed on NFS lands. For the public's benefit and for clarity, road-related sediment sources formerly eligible to be treated as NPS pollution sources should be broken down to indicate which ones are now considered point sources and which will remain as NPS sources under the Waiver program.

Finding #4, Off-highway Vehicle (OHV) Recreation – According to the draft Waiver (Finding #4): "OHV recreation is the most rapidly increasing source of sediment discharges on NFS lands." We would be interested in learning the source of this statement and the supporting data. It may be more accurate to say that it is "a" rapidly increasing source of sediment. The USFS has acknowledged that they lack sufficient funds to maintain their expansive road system. Draft Waiver Finding #9 states that lack of road maintenance is contributing significantly to sediment discharges. We believe that lack of road maintenance and the consequent and ever-increasing vulnerability of forest road systems to storm damage is a much greater and increasingly important threat to water quality than is OHV recreation. OHV recreation results in fine sediment discharges. Lack of road and stream crossing maintenance results in increasing erosion and fine sediment discharges, but also in increasingly common episodic, catastrophic road failures whose impacts will be large and long lasting.

Finding #5 – Finding 5(a)1 indicates that the covered activities under the Waiver program "*are limited to those that have only potentially low or moderate impact on water quality.*" We believe this needs better or more complete definition. Is this a waste discharge (sediment volume) classification, or a rate of discharge classification? Or is it more based on potential impacts or risks to beneficial uses? Waiver Category Activities "A" and "B" refer to risk levels and these should be referenced at this location in the Waiver text. Similarly, it would be very important to define what activities are those that typically have a potentially high impact on water quality, and are thus not considered eligible for inclusion under the Waiver program. Although the USFS may be informed which planned projects are eligible and which are not through a process of annual application, the definitions and examples are appropriate for public transparency of the process.

Findings #10-#12 – The WIP program is briefly described in the draft Waiver. It is acknowledged to be an important part of the Waiver program. Technical information on the WIP program has not been made available for review. Nowhere on the national USFS web site or in readily available printed manuals were we able to find a clear technical description of the nation-wide WIP program. This information should be made available (see comment #9 in Part I of

these comments above).

Findings #22(b) and #50 – The draft Waiver claims that "*new and stronger BMPs*" have been developed by the USFS for projects and activities. We believe this is an overstatement of the facts. What are continually referred to as BMPs in the WQMH are more accurately described as "guidance" and intent language on what a BMP is supposed to provide or accomplish in very general terms. There are relatively few explicitly defined BMPs included in the draft WQMH that are ready to be employed on-the-ground. Waiver Finding #50 further states: "*...activities covered under this Waiver must incorporate site-specific on-the-ground prescriptions to implement the WQMH BMPs and do so in a transparent manner.*" As described by the WQMH, the BMP guidance contained within is to be used by the IDT to help them develop BMPs for each specific situation during project planning and implementation. This is an awkward approach that makes the BMP process non-transparent to overall review and critique. The Waiver finding should be revised to reflect this; the guidance may be new and stronger, but the BMPs are actually fashioned on a project-by-project basis by the IDT.

The WQMH calls the BMPs listed in the document "action initiating mechanisms" that are "neither detailed prescriptions nor solutions to NPS pollution problems." From our perspective, very few action oriented BMPs have been provided in the draft WQMH and NFS staff and IDTs are left with a burdensome task to develop and receive approval for the NPS treatments that will be applied for everyday projects throughout each Forest. It is our observation that industrial timberland owners and land managers in the same geographic regions are required by the Water Board to spell out in far greater detail what the standard is (a specification), how it will be implemented, how it will be evaluated in terms of water quality protection, and what is done when there is a discharge violation.

Finding #22(c) – This Finding states that the updated WQMH contains "*new and stronger administrative processes for implementing BMPs, turning what are primarily performance standards into specific on-the-ground prescriptions for individual project sites.*" We disagree with the finding that specific on-the-ground prescriptions have been developed. They have not. The USFS states that those specific prescriptions are developed project-by-project by the ID Team, based on the guidance included in the WQMH BMPs. The WQMH BMPs remain as largely guidance and intent language. The Waiver finding should be revised to reflect this.

Finding #29 – This finding reviews the authority of the Water Board to waive WDR requirements under certain conditions. The waiver program being developed for (and with) the USFS under this authority is a complicated, involved program that contains many facets and will require considerable financial resources and staffing to successfully accomplish. We are impressed with the potential of the NPS Waiver Program to effectively address NPS pollution on USFS lands and we are hopeful it can be successfully accomplished.

We are concerned, however, that the program may exceed the capacity of the USFS to fund and implement the measures to the extent required by Board, especially because no new funding is being provided and USFS budgets are in a general state of decline. Currently there is no way for the public or stakeholders to understand the expected fiscal requirements of implementing the

Waiver activities, or of the capacity of the USFS to undertake the program as it has been described. We assume the USFS has conducted this analysis to assure themselves that it a reasonable program. We believe it is important to conduct this analysis ahead of time rather than to suffer violations and enforcement remedies pertaining to the agreement, or to have to scale it back or terminate it if it is discovered that certain elements cannot be adequately implemented because of financial constraints (see Findings #41 and #52).

Although it may not be a requirement of the Water Board waiver program, we believe it is important for the two collaborating agencies to evaluate the economic feasibility (cost) of the proposed Waiver Program, specifically identifying the financial and personnel requirements that will required. To our understanding, no such analysis has been performed and yet the Waiver is conditioned on full implementation of the USFS WQMH, other USFS Guidance, and the additional conditions specified in the Waiver (see Finding #63(d)). The USFS would logically use the joint analysis to evaluate its impact on their other programs and on their capacity to conduct each of the Program's various elements. Such an analysis and disclosure would provide the transparency needed to assure the public and stakeholders that the proposed Waiver program can be successfully implemented employing existing resources. Regardless, chronic and substantial failure to meet the water quality protection and monitoring obligations in the Waiver should be grounds for revoking the waiver.

Thank you for the opportunity to provide comments on the WQMP and the Draft Waiver. We look forward to continuing to work with you and applicable staff in the future on this very important issue. If you have any questions or concerns please feel free to contact Ken Fetcho, Assistant Director, Yurok Tribe Environmental Program at 707-954-1523 or at kfetcho@yuroktribe.nsn.us.

Sincerely,

Thomas P. O'Rourke Sr.

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