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November 21, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



By email delivery

Comment re: USFS Waiver

Dear Ms. Townsend:

The following comments are submitted on behalf of the California Off-Road Vehicle Association (CORVA) and a coalition of outdoor recreation organizations, clubs, and individuals. CORVA is a diverse group of outdoor recreationists who are extremely active in promoting the positive aspects of vehicular access on public lands and protecting that right. CORVA's main purpose is to work with the land managers for responsible off-highway vehicular access and recreation opportunities. Secondarily, CORVA educates its membership on the constantly changing rules and regulations and promotes clean-up and trail maintenance projects.

My clients and I have reviewed the Revised Draft Statewide Waiver and have the following comments. At the outset, we disagree that the SWRCB has made merely clarification, amplification, or insignificant modification to the Mitigated Negative Declaration (MND) such that the MND does not require recirculation. The changes to the MND are substantive and in any event do not address the concerns with the document we outlined in our letter of August 24, 2011. We therefore incorporate by reference each and every concern with the MND into this comment letter.

We also question the basis for not performing CEQA or NEPA on the USFS Water Quality Management Handbook. On pages 10 and 11 of the Waiver, the SWRCB outlines the process under which the original 2000 Water Quality Management Plan (WQMP) was updated to meet various California legal requirements. The updated 2000 WQMP is now called the Water Quality Management Handbook (WQMH), which is strictly a California document and was drafted to meet California legal requirements.

Public Resources Code section 21066 defines a "person" for purposes of CEQA, to include "to the extent permitted by federal law, the United States, or any of its agencies or political subdivisions." Public Resources Code section 21006 requires CEQA as "an integral part of any public agency's decision making process, including, but not limited to, the issuance of permits, licenses, certificates, or other entitlements required for activities undertaken pursuant to federal

statutes containing specific waivers of sovereign immunity.”

When combined, the intent of these changes was “to subject the federal government to CEQA obligations otherwise applicable to ‘persons,’ to the extent that Congress had subjected particular federal agencies, under particular federal statutes, to California law specifically, or state law generally.”¹

In this situation, the USFS is seeking a waiver from individual NPDES permits for nonpoint sources of pollution on federal public lands, which is required under the Clean Water Act. Congress has specifically waived the federal government’s sovereign immunity for purposes of the Clean Water Act in this situation; otherwise the USFS would not be seeking such a waiver from California. Regardless of NEPA requirements, the USFS WQMH contains what are essentially mitigation measures that are being incorporated into the SWRCB Waiver without giving the public the opportunity to comment on them. The public has a right to review the WQMH, and its mitigation measures, pursuant to CEQA and the USFS has not given the public the opportunity to do so. This is a violation of CEQA and we request that the WQMH be circulated for public comment.

If not subject to CEQA, we also cannot see how the WQMH can escape NEPA compliance. As a revised policy, plan, or procedure, the new WQMH is still subject to NEPA. See 40 C.F.R. 1508.18. The new WQMH will dictate to USFS personnel certain actions necessary to maintain water quality. These measures, incorporated into the Waiver as mitigation measures, are as formal and as binding on the USFS as any plan, policy, or procedure that goes through the Administrative Procedures Act, which nearly always requires NEPA compliance.

Our remaining comments will focus on the changes to the Revised Draft Statewide Waiver (“Revised Waiver”).

I. Erosion Control Plans

The Revised Waiver now requires Erosion Control Plans and NEPA documents for “all projects or activities described in finding 4.” (See paragraphs 9 and 10 on page 26 of the Waiver.) This new Statewide General Condition requirement undermines the purpose of Category A activities that have little to no impact on water quality. (See bottom of page 29 and top of page 30 of the Waiver.) By now requiring that an Erosion Control Plan be developed and NEPA documents prepared for activities as trivial as cutting down a single Christmas tree, hand thinning of vegetation, or the routine maintenance of a road or trail, the SWRCB is precluding any of these activities from taking place. What family a few weeks before Christmas is going to pay the USFS to develop an Erosion Control Plan and an Environmental Assessment before it can cut down a family Christmas tree? Similarly, what employee of the USFS is going to perform routine road maintenance, such as cleaning a culvert, when cleaning that culvert is going to require an Erosion Control Plan and an Environmental Assessment? The answer is that no employee will do so because the burden is simply too high and expensive, which will lead to road deterioration and worsening water quality. These new requirements are utterly nonsensical and they should be deleted from paragraphs 9 and 10 on page 26 of the Revised Waiver.

¹ Guide to CEQA (2007, 11th Ed.), Remy, Thomas, Moose & Manley, note 2, page 935.

II. Volunteer Efforts

The new requirement for an Erosion Control Plan in paragraph 10 on page 26 of the Revised Waiver will also lead to reduced volunteer work on USFS roads and trails. The USFS relies heavily on volunteer labor to perform needed trail and road maintenance under its "Adopt-a-Trail" program. By requiring an Erosion Control Plan and reserving authority to take enforcement action against the volunteer (see subsection b of paragraph 10), the Revised Waiver is going to impose a chilling effect on volunteer work in our National Forests. Consistent with our recommendation above, this is a second reason to delete the changes to paragraph 10 and restore the original paragraph 10.

III. Category B Activities

The Revised Waiver includes many changes to Category B activities (see pages 30 and 31 of the Revised Waiver). Since the introductory paragraph has been changed, all of the listed activities will be interpreted differently, which means the entire Category is subject to comment. Our first concern is with activity 7—"Road decommissioning." This term is nowhere defined in the Revised Waiver and different Forests can and do interpret "decommissioning" differently. Some Forests consider only permanent destruction and reforestation of a road as "decommissioning," where others consider roads closed and put into storage are also "decommissioned." Without a clear definition, we cannot know what types of actions are included in this activity. Failing a definition, the next best remedy is to broaden the scope of "road decommissioning" to include all those actions that include many of the same actions. Thus we recommend that activity 7 be rewritten to read "Road and trail closures, storage, and decommissioning."

Activity 9 has been amended to include the "re-opening of previously decommissioned roads or roads that have been placed in 'storage' status..." By including the re-opening of a road as a Category B Activity the SWRCB is essentially ensuring that any temporarily closed roads will never reopen. This requirement creates a one-way ratchet, essentially, because if the USFS can put a road into "storage" more easily than it can remove one from storage, then roads that go into storage will never come out, thereby reducing recreational opportunities to the public. We recommend that the new language to activity 9 be deleted if our suggested changes to activity 7, above, are not adopted. It only makes sense that if bringing a road out of closed or storage status requires compliance with Category B requirements, then closing a road or putting one into storage should require compliance with Category B requirements.

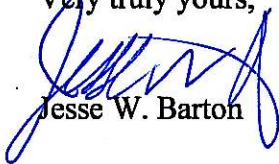
With the revisions to the introductory paragraph of Category B, activity 10 ("Motor vehicle trails and their use") is less clear. Since more documentation is required for all Category B activities, it is unclear what constitutes "motor vehicle trails and their use." Does this include maintenance, or is this covered by Category A, activity 6? If it doesn't include maintenance, then does it include operation? And if it includes operation, then why is it a Category B activity at all? This is an ongoing activity that does not require NEPA review (see paragraph 15 on page 35). Therefore, we recommend that activity 10 be moved to Category A. Ongoing use of an existing trail should not be subject to the more stringent Category B conditions.

IV. Conclusion

In summation, the Revised Waiver includes several changes that are detrimental to the travelling public and their public lands and will do nothing to improve water quality. We recommend the following:

1. The changes made to paragraphs 9 and 10 on page 26 of the Revised Waiver be deleted.
2. Activity 7 on page 31 be rewritten to read "Road and trail closures, storage, and decommissioning."
3. The new language to activity 9 on page 31 be deleted if our suggested changes to activity 7, above, are not adopted.
4. Activity 10 on page 31 be moved to Category A. Ongoing use of an existing trail should not be subject to the more stringent Category B conditions.

Very truly yours,



Jesse W. Barton

cc. Client