



CENTER *for* BIOLOGICAL DIVERSITY

VIA ELECTRONIC MAIL

November 21, 2011

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State Water Resources Control Board
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Re: Comment re: USFS Waiver: Revised Draft Statewide Conditional Waiver of Waste Discharge Requirements for Nonpoint Source Discharges Related to Certain Activities on National Forest System Lands in California

Dear California State Water Resources Control Board Members:

These comments are submitted on behalf of the Center for Biological Diversity (“Center”) regarding the Revised Draft Mitigated Negative Declaration and Draft Statewide Conditional Waiver of Waste Discharge Requirements for Nonpoint Source Discharges Related to Certain Activities on National Forest System Lands in California (“MND”) proposed to be adopted by the California State Water Resources Control Board (“SWRCB” or “Board”). These comments are timely filed pursuant to the revised notice issued Nov. 15, 2011 setting noon on Nov. 21, 2011 as the deadline for comments on this matter.

The Center for Biological Diversity (“Center”), a non-profit organization with over 42,000 members, the majority of whom reside in California and is dedicated to protecting imperiled species and their habitats through science, public policy, and the law. The Center represents members of the public who care deeply about water quality in California and the impacts on water quality, wetlands and riparian areas due to activities on the National Forest lands in California.

The Center participated in the stakeholder committee convened by the SWRCB to assist in providing advice to the SWRCB as the Forest Service updated the water quality management plan. As the stakeholder representing aquatic biology, Center staff participated in stakeholder meetings and submitted oral and written comments. More recently, on August 23, 2011 the Center submitted extensive comments and exhibits on the proposed mitigated negative declaration and draft waiver. All of the Center’s earlier comments and exhibits are incorporated herein by reference.

A. Revised Draft Waiver

The Center appreciates that the revised draft waiver provides more detail and clarifies the process for the waiver particularly as it pertains to livestock grazing impacts. Nonetheless, the Center remains opposed to the SWRCB proposal to approve a waiver with conditions applying to a suite of activities on all National Forest lands within the state of California because the waiver's structure and substance will not sufficiently protect water quality in the State.

Specific comments on the changes in the revised draft waiver are provided below:

Page 18, Para. 49:

The change regarding Category B from a standard of less-than-significance to “complies with all applicable water quality requirements” does not ensure that the activities will meet the CEQA standard required for the use of the MND by the board—for example in an area where water quality very good now, there could be “significant” impacts to water quality yet still meet the applicable water quality requirements and potentially the antidegradation standard as well.

New language “If a particular Category A project or activity is determined to have a potentially significant impact on the environment, that project or activity must be treated as a Category B activity.” The insertion of this language does nothing to explain how the Regional Boards would be able to ensure this occurs since the Category A projects are do not require specific approval of the boards.

Page 22, Para. 68:

The changes in this section provide conclusions that are not supported in the draft waiver or the MND, but rather simply assume the conclusions made regarding “less than significant impacts” and whether any limited degradation that occurs will be “consistent with maximum benefit to the people of the state.”

Page 24, Statewide General Conditions 2:

The addition of a specific language regarding improved water quality is a positive change but should also clearly include all “pre-existing discharges and/or threats” in the sentence defining “substantial improvements.”

“Each National Forest shall actively address legacy or pre-existing discharges and/or threats to water quality *by making substantial improvements through the life of this Waiver. Substantial improvement means that the USFS implements actions every year that reduce threats to water quality from legacy sites*” **[add] or pre-existing discharges and/or threats to water quality.**

Page 27, Statewide General Conditions 16:

This is an important addition clarifying that the Forest Service must comply with both CESA and the Federal ESA in order to proceed with projects covered under the waiver. However, this

language alone does not cure the Board's failure to adequately address impacts to protected species the MND and does not ensure that impacts will not occur even if the requirements of the waiver are followed. As a result, the Board has failed to comply with CEQA.

Page 27-28, Statewide General Conditions 19:

Providing a specific due date for reporting is a positive change. This report should also be published on the Board website so that the interested public access and review the report. In addition to the summary of the monitoring and mitigation reports all of the monitoring and mitigation data should be provided to the public as well.

Page 29, Statewide General Conditions 29:

This is an important clarification.

Page 30, Category A.

Concerns raised regarding the potentially significant impacts from category A activities have not been adequately addressed regarding species and riparian areas.

In addition, the limitation to outside of riparian areas in subsection 8, while good, should also at minimum have been included in subsection 6 and 10, and for other activities as well.

Category B General Conditions.

As noted above, the changes regarding grazing are generally an improvement.

Page 37, Waiver Application process, para. 4.

New language: "Should a Regional Water Board foresee that it may not be able to complete its review within the 30-day period, it shall immediately inform USFS. USFS may bring the matter to the attention of the State Water Board Executive Director."

The additional language regarding the timeline does not cure the short time provided to the regional boards to review Category B applications or the problem of regional boards that may have too few staff to deal with multiple Category B applications being submitted at the same time by the Forest Service. It also does not explain what the State Board ED would do in such a case or how this will cure the limited time allotted. I also fails to explain what will happen where a regional board has insufficient time—does the application get automatically denied? The process simply makes no sense. The regional boards should be given specific authority to extent the time for review for several reasons including short-staffing and/or if the Forest Service files more than a set number of applications within the same 30 day period. Alternatively, if regional boards do not have such authority to extend the time for review, then any Category B application that takes longer than 30 days to review should be deemed denied.

B. Failure to Comply with CEQA

As the Center has previously explained in detail, the SWRCB has failed to undertake the needed environmental review and instead is attempting to rely on a mitigated negative declaration (“MND”) for a project that not only may, but most certainly will, have a significant effect on the environment. By relying on a MND rather than the legally required environmental impact report (“EIR”), the SWRCB action would undermine both the letter and the spirit of the California Environmental Quality Act (“CEQA”) because the MND fails to provide any meaningful analysis of significant impacts to water quality and aquatic and riparian resources, fails to address cumulative impacts, and fails to provide any analysis of alternatives that could avoid the significant impacts of the covered activities.

Moreover, the SWRCB has failed to show that the alleged mitigation proposed in the MND, which will be outlined in a new Forest Service *handbook* rather than a planning document, is sufficient to reduce the impacts of the many covered activities below a level of significance. The handbook itself is permeated with discretionary language and thus many of the BMPs and other measures are uncertain to occur, and there is no provision for funding for the proffered mitigation measures (even if they were shown to be sufficient). In addition, the Forest Service has to date failed to undertake any environmental review under NEPA before adopting the handbook and failed to consult with the wildlife agencies as required under the Federal ESA.

Please do not hesitate to contact me if you have any questions about these comments or the attached reference materials. Thank you for considering these supplemental comments.

Sincerely,



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