

RESPONSES TO PUBLIC COMMENTS
on
THE PROPOSED STATEWIDE WAIVER OF WASTE DISCHARGE REQUIREMENTS FOR
NONPOINT SOURCE DISCHARGES RELATED TO CERTAIN ACTIVITIES ON NATIONAL
FOREST SYSTEM LANDS IN CALIFORNIA
and
THE PROPOSED MITIGATED NEGATIVE DECLARATION

December 1, 2011

Table of Commenters¹

1. Ara Marderosian, Executive Director Sequoia ForestKeeper P.O. Box 2134 Kernville, California 93238	101. Joseph A Cywik, P.E City of Big Bear Lake 39707 Big Bear Boulevard P.O. Box 10000 Big Bear Lake, California 92315-8900
2. Joshua Pulverman, Associate Transportation Planner Department of California Transportation Office of Community Planning 1120 N. Street, MS-32 Sacramento, California 94274	102. Michael Hogan
3. , 103. Robert Derlet MD, Professor University of California, Davis Davis, California	
4. William Thomas on behalf of David Wood Ranches (Submitted by Linda Graham) 652 Cromwell, Suite 103 Fresno, California 93711	104. Erik M. Holst
5. Robert Rowen, Vice President Snowlands Network P.O. Box 2570 Nevada City, California 95959 and Forest G. McCarthy, Public Lands Director Winter Wildlands Alliance P.O. Box 6723 Jackson, Wyoming 83025	105. Scott Heule, General Manager Big Bear Municipal Water District P.O. Box 2863 Big Bear Lake, California 92315-2863
6. , 106 Randy Moore, Regional Forester United States Department of Agriculture Pacific Southwest Region Regional Office, R5 1323 Club Drive Vallejo, California 94592	
7. Bruce Brazil	107. Gia Kim P.E., Chief, Land Development 825 East Third Street, Room 201 San Bernardino, California 92415-0835
8. Bruce Brazil	108. Raymond Nutting, Board of Supervisors County of El Dorado 330 Fair Lane Placerville, California 95667

¹ Number assigned to each commenter is used to identify the source(s) of a particular comment.

Numbers 1 through 37 are comments received during the California Environmental Quality Act public review period that ended August 24, 2011.

Number 38 is the transcript of the September 20, 2011 Board workshop.

Numbers greater than 100 are comments received during the second public review period ending November 21, 2011.

Where a commenter submitted comments during both public review periods, their name is listed only once, along with the number for each of their submittals.

9. Bruce Brazil	109 Mike Anderson Mendocino County Farm Bureau 303-C Talmage Road Ukiah, California 95482
10. Bruce Brazil	110. Mark Norton, TMDL Task Force Administrator Lake Elsinore & San Jacinto Watershed Authority 11615 Sterling Avenue Riverside, California 92503
11. Bruce Whitcher Paso Robles, California	
12. John Stewart, Nature Resources Consultant California Association of 4 – Wheel Drive Club 8120 36th Avenue Sacramento, California 95825	112. David Lawrence, Director of Public Works /City Engineer City of Big Bear Lake 39707 Big Bear Boulevard P.O. Box 10000 Big Bear Lake, California 92315
13. Karen Schambach Public Employees for Environmental Responsibility P.O. Box 4057 Georgetown, California 95634	
14. Chris Horgan, Executive Director Stewards of the Sequoia, Division of CTUC P.O. Box 267 Lake Isabella, California 93240	114. Janet Hashimoto, Chief – Standards and TMDI Unit , and Sam Ziegler, Chief - Watersheds Office U.S. Environmental Protection Agency, Region IX 75 Hawthorne Street San Francisco, California 94105-3901
15. Bruce Whitcher California Off-Road Vehicle Association 1500 W El Camino Avenue #352 Sacramento, California, 95833-1945	
16. Justin Hensley	116. James Furnish Rockville, Maryland
17. , 117. Lisa Belenky Center for Biological Diversity 351 California St., Suite 600 San Francisco, California 94104	
18. Scott Flake, General Power Manager Sacramento Municipal Utility District P.O. Box 15830 Sacramento, California 95851-1830	
19. William J. Thomas David Wood Ranches 652 W. Cromwell, Suite 103 Fresno, California 93711	
20., 120. Robert J. Lucas, Waste & Water Quality Project Manager California Council for Environmental and Economic Balance 100 Spear Street, Suite 805 San Francisco, California 94105	

<p>21. Justin Oldfield, Director of Government Relations California Cattlemen's Association, California Farm Bureau Federation 1221 H Street Sacramento, California 95814</p>	<p>121. Justin Oldfield, Elisa Noble</p>
<p>22. Thomas P. O'Rourke Sr. Yurok Tribe 190 Klamath Boulevard P.O. Box 1027 Klamath, California 95548</p>	<p>122. Justin Oldfield, Elisa Noble</p>
<p>23. Michael Damaso. President, Merced Dirt Riders Inc. 1119 East Linwook Avenue Turlock, California 95380</p>	
<p>24. Gail Farber, Director of Public Works, On behalf of Gary Hildebrand, Assistant Deputy Director of Watershed Management Division Los Angeles Department of Public Works 900 South Fremont Avenue Alhambra, California 91803-1331</p>	
<p>25. Peter Drekmeier, Program Director Tuolumne River Trust 111 New Montgomery Street, Suite 205 San Francisco, California 94105</p>	
<p>26.,, 126. John Buckley, Executive Director Central Sierra Environmental Resource On behalf of the Commenters Box 396 Twain Harte, California 95383</p>	
<p>27 , 127 Laurel Collins, Director Watershed Science 1128 Fresno Ave Berkeley, California 94707</p>	
<p>28. John Buckley, Executive Director Central Sierra Environmental Resource Box 396 Twain Harte, California 95383</p>	
<p>29. Central Sierra Environmental Resource Center Box 396 Twain Harte, California 95383</p>	
<p>30., 130. Jonathan Rhodes Planel Azul Hydrology P.O. Box 15286 Portland, Oregon, 97293-5286</p>	
<p>31. Central Sierra Environmental Resource Center (Comment Letter from the CD submitted) Box 396 Twain Harte, California 95383</p>	
<p>32. Central Sierra Environmental Resource Center (Comment Letter from the CD submitted) Box 396 Twain Harte, California 95383</p>	

<p>33., 133. Craig Thomas, Executive Director Sierra Forest Legacy P.O. Box 244 Garden Valley, California 95633</p>	
<p>34. Peter Bauer Bauer Ranch Commercial Cattle, Covelo, California</p>	
<p>35. Sam Davidson Trout Unlimited California Field Director 4760 San Juan Canyon Road San Juan Bautista, California 95045</p>	
<p>36. Hope Symthe Santa Ana Regional Water Board 3737 Main Street, Suite 500 Riverside, California 92501-3348</p>	<p>136. Kurt Berchtold Santa Ana Regional Water Board 3737 Main Street, Suite 500 Riverside, California 92501-3348</p>
<p>37., 137. Jesse Barton for OHV Clubs and Coalitions Gallery and Barton Professional Law Corp. 1112 I Street, Suite 240 Sacramento, California 95814-2865</p>	
<p>38. State Water Resources Control Board CalEPA Building 1001 I Street Sacramento, California 95814 Workshop Transcripts, September 20, 2011</p>	

RESPONSES TO COMMENTS

INTRODUCTION

The responses below address comments received by the State Water Resources Control Board (State Water Board) regarding the Statewide Waiver of Waste Discharge Requirements for Nonpoint Source Discharges Related to Certain Activities on National Forest System Lands in California (Proposed Statewide Waiver) and the supporting Initial Study/Mitigated Negative Declaration (IS/MND) during the June 10 - August 24, 2011 public comment period and at the September 20 public workshop, and regarding the revisions to the Proposed Statewide Waiver during the additional November 4 - November 21, 2011 comment period. The response to comments is not required under the Porter Cologne Act or the California Environmental Quality Act, but has been prepared to provide transparency and clarity in the decision making process engaged in by the State Water Board. Accordingly, *responses have been limited to those comments raising significant environmental, policy, or legal issues.*

The comment responses are organized by subject matter. The commenters making the comments have been noted in brackets by a number that corresponds to the attached table of commenters.

CEQA ISSUES

1. The project description is inadequate.

A. The project description is too vague and broad in scope and too conceptual to allow for meaningful environmental review. The Initial Study and Mitigated Negative Declaration (IS/MND) does not adequately describe the overall size, location, frequency, and magnitude of the Project. [#17, 26, 37]

California Code of Regulations, title 14 (CEQA Guidelines), section 15063(d) specifies that an initial study “contain *in brief form* . . . a description of the project including the location of the project” (emphasis added). The IS/MND’s project description meets and exceeds this standard. The State Water Board’s project is to adopt, pursuant to California Water Code section 13269, a statewide conditional waiver of waste discharge requirements (Proposed Statewide Waiver) for certain non-point-source (NPS) activities on National Forest Service (NFS) lands. The IS lists and describes eight categories of NPS activities on NFS lands that are eligible for coverage under the Proposed Statewide Waiver and briefly describes those activities. The IS states that the project is a statewide project and lists the National Forest Service lands within California. Under the section on the “Specifics of the Proposed Board Action,” the IS provides greater detail on the Proposed Statewide Waiver, on the types of discharges it does and does not authorize, and on the general conditions it imposes on those discharges. Finally, the Proposed Statewide Waiver constituting the proposed Board action was circulated along with the IS/MND and commenters had the opportunity to review it.

Commenters are misguided in holding the brief project description required of an IS/MND to the more specific standard of a project description for an EIR. Moreover, commenters overlook the fact that the Board action is programmatic in nature and that the project description is therefore by necessity conveyed in more general terms. The project description has not been amended in response to these comments.

B. The project is undefined because it purports to apply only to activities that do not have a significant impact on the environment. This approach is contrary to CEQA because it leaves

open the very question at issue, which is which activities have the potential for significant impacts and which do not. The Board may not avoid preparing an EIR in adopting a new regulatory program by simply stating that the program applies only to projects that do not have significant impacts, because to do so creates an uncertain project description under CEQA. [#17, 26]

The comment misconstrues the approach the Proposed Statewide Waiver and the IS/MND take with regard to project-level evaluation of significant impacts. The Project Description spells out eight categories of NPS activities on NFS lands and states that all activities and projects under those categories are eligible for coverage under the Proposed Statewide Waiver. The IS/MND then proceeds to evaluate the potential significant impacts of the activities eligible for coverage under the Proposed Statewide Waiver in the environmental checklist section and analyze the mitigation measures incorporated into the project that will reduce those potentially significant impacts to less than significant.

However, as acknowledged in response 1.A. above, because of the programmatic nature of the Proposed Statewide Waiver, and, by necessity, the IS/MND, the discussion of the potential significant impacts is framed in general descriptive terms. The broad scope of the proposed project means that the environmental analysis cannot anticipate all site and project-specific factors that may result in potential significant impacts beyond those considered in the IS/MND. The Proposed Statewide Waiver therefore provides that the Regional Water Boards evaluate project applications to ensure that project and site specific impacts do not fall outside the scope of the type and severity of impacts considered in the IS/MND. Regional Water Boards must reject coverage of a specific project if that project has 1) potential significant environmental impacts not identified in the IS/MND, 2) potential significant impacts that are substantially more severe than the impacts identified in the IS/MND, or 3) environmental impacts that cannot be reduced to less than significant levels through mitigation identified in the Initial Study. The discussion in the IS/MND has been revised to clarify the Proposed Statewide Waiver's approach to project level review. Additionally, the Proposed Statewide Waiver has been revised to state that a Category A project must be treated as a Category B project if it is determined that it will have potentially significant impacts on the environment. If the project may impact an environmental resource of critical concern, including, but not limited to critical habitat or areas with intrinsically high erosion potential, the project must be treated as a Category B activity. This clarification ensures that any project with potentially significant environmental impacts is subject to Regional Water Board review, even if it is of the type of project that is normally characterized as a Category A project.

2. The discussion of the environmental setting is inadequate.

The IS/MND does not adequately describe the environmental setting (e.g., types of roads or trail systems likely to be affected, the extent of impact, the potentially impacted rare, threatened and endangered species.) [#17, 26, 35, 37]

CEQA Guidelines section 15063(d) requires that an initial study contain "in brief form . . . an identification of the environmental setting." The Initial Study provides a summary of the general environmental conditions and land uses for each of the State's major ecological sections that include NFS lands. For each ecological section, the Initial Study provides a brief description of altitude, vegetation, wildlife, including the presence of steelhead, coho salmon and Chinook salmon, cultural history, threat of wildfire, and historic activities, such as mining or logging, as well as existing important activities. Figures showing NFS lands, USFS priority watersheds, and the ecological subdivisions of California are also included in the Initial Study, and a website reference is provided for more detailed information on the ecological subdivisions.

Given that the environmental setting for the project is all NFS lands in California, commenters' expectation of a more detailed discussion of physical environmental conditions state-wide is unreasonable and not required by the law.

3. The environmental baseline is mischaracterized.

A. The Board cannot presume that, in the absence of a regulatory waiver, activities that have caused nonpoint source pollutant discharges in the past would simply continue without regulation. The alternative is not continued lack of regulation but the issuance of waste discharge requirements by the Board or cessation of the harmful activities. The cases cited in the MND do not address when an agency proposes to adopt a regulatory program purporting to regulate future activities that will cause future environmental impacts. The environmental baseline is falsely represented so that for most activities there can by definition be no new environmental impacts. This information skews the public's ability to meaningfully evaluate the potential effects of the waiver. [#17, 26, 35]

CEQA requires a lead agency to prepare an Initial Study to determine whether a project may have a significant effect on the environment (CEQA Guidelines, §15063(a).) A "significant effect on the environment" means "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance" (CEQA Guidelines, §15382.) The baseline by which a lead agency determines whether an impact is significant is generally "the physical environmental conditions in the vicinity of the project, as they exist . . . at the time environmental analysis is commenced." (CEQA Guidelines, §15125.)

The types of activities that will be covered by the Proposed Statewide Waiver are currently ongoing on NFS lands. The physical environmental conditions of the NFS lands include conditions resulting from these ongoing activities. These include, for example, an extensive system of roads that has been built on NFS land in California, especially following the end of World War II. Historically, such roads were built primarily to accommodate commodity extraction (e.g., timber, minerals, water). Today, some continue to be used as access roads, many have been converted to recreational roads or trails, while others have been closed or decommissioned. Portions of the existing road system are significant sources of sediment discharges. NFS lands are also home to extensive recreational facilities and activities. These include campgrounds, hiking and biking trails, boating docks, and trails designated for OHV use. Certain historic uses of NFS lands may also be considered part of the environmental setting, including existing areas of concentrated recreational use, public campgrounds, and trails. Existing grazing under long-term allotments is another ongoing NPS activity.

Physical environmental impacts that result from ongoing operations are part of the baseline conditions for environmental review. (See *Communities for a Better Environment v. South* it is also *Coast Air Quality Management District* (2010) 48 Cal.4th 310, at 321-22.) Moreover, it is well-established in case law that the baseline incorporates existing physical conditions from pre-existing structures and activities, regardless of whether such structures and activities were subject to prior regulatory action or CEQA review. (See *Fat v. County of Sacramento* (2002) 97 Cal App.4th 1270; *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428; *c.f. Bloom v. McGurk* (1994) 26 Cal.App.4th 1307.) The continuation of such activities does not create an environmental impact as compared to the baseline environmental conditions. Adoption of a new regulatory program for NPS activities on NFS lands does not require the Board to "back-date" the baseline to a time prior to existence of such activities; the relevant baseline for the environmental analysis is still the existing physical conditions at the time the environmental analysis is commenced. Only increases over that baseline are project impacts for purposes of the analysis of the significance of the impacts.

Nevertheless, commenters overstate the Board's reliance on the environmental baseline in the IS/MND. The IS/MND acknowledges that many Category B activities and projects eligible for enrollment under the Proposed Statewide Waiver will be new projects (defined as projects undergoing NEPA review after adoption of the Proposed Statewide Waiver) with the potential to generate significant environmental impacts above and beyond the baseline conditions. For example, the development of a new recreational trail or significant repairs to an existing trail (both of which would be subject to NEPA review by the USFS and review by the relevant Regional Water Board as Category B activities) may have the potential to cause significant environmental impacts beyond impacts pre-existing Board action. The IS/MND accordingly sets out a full analysis of the potential significant impacts, as well as proposed mitigation measures, in the environmental checklist that constitutes the bulk of the IS/MND. However, the IS/MND does so while also positing that some ongoing activities with no expansion in scope may receive coverage under the Proposed Statewide Waiver. As an example, the Proposed Statewide Waiver contemplates that camping in developed recreation sites will be covered under the Waiver as a Category A activity. The impacts from such activities do not constitute significant environmental impacts as compared to the baseline conditions.

B. The IS/MND does not provide a regulatory baseline to understand how or whether any continuing, similar, or new BMPs will correct historically significant impacts. The MND provides no description of how USFS activities have been regulated in the past, nor how regulation in the form of BMPs or other tactics has historically been successful or unsuccessful. The MND provides no discussion of the extent to which weakening of the existing Regional Water Board regulatory regimes has the potential for significant impacts. [#17, 26, 35]

The baseline by which a lead agency determines whether an impact is significant is “the physical environmental conditions in the vicinity of the project, as they exist . . . at the time environmental analysis is commenced.” (CEQA Guidelines, §15125 (emphasis added).) There is no requirement under CEQA for discussion of a “regulatory baseline.” Commenters’ concerns regarding the historic challenges in effective regulation of the NPS activities on NFS lands are addressed as part of the response to comment 4.D below.

4. The proposed mitigation measures are legally inadequate, technically ineffective, and unenforceable.

A. CEQA case law requires commitments to specific performance standards and triggers for action. The BMPs set forth in the IS/MND primarily concern agency management and do not constitute legally-sufficient mitigation measures. Nothing in the WQMH requires the USFS line officer to choose any specific BMP. [#17, 26, 38]

Under CEQA case law, a mitigated negative declaration can rely on clearly laid out performance standards that are subsequently applied to site-specific conditions for determination of specific mitigation measures. (See *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1395-96 (where conditions committed the project proponent to mitigating the impact of a recognized potential environmental effect and articulated specific performance criteria, the use of such criteria in mitigated negative declaration was not improper deferred mitigation); see also CEQA Guidelines, §15126.4(a)(1)(B); *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906-907; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App.4th 603, 621; *Sacramento Old City Ass’n v. City Council* (1991), 229 Cal. App. 3d 1011, 1028-29; *Shaeffer Land Trust v. San Jose City Council* (1989), 215 Cal.App.3d 612.) The BMPs in the WQMH, as well as in USFS Guidance (including laws, policies, and guidelines detailed at pages 7-14 of the IS/MND) are performance standards required to be applied by the USFS, during environmental and project review, at a project and site-specific level for determination of specific on-the-ground mitigation measures. The broad BMPs of the USFS

Guidance and WQMH are also narrowed and supplemented by the conditions of the Proposed Statewide Waiver, which set measurable and enforceable standards for projects, including compliance with the water quality standards in the Basin Plans and other water quality requirements.

The Proposed Statewide Waiver recognizes that the USFS has significant discretion in how the WQMH and USFS Guidance will be applied at a site-specific level. In order to ensure that the general provisions of the WQMH and USFS Guidance, as well as the mitigation measures subsequently developed during a project's NEPA process, are implemented in a manner that mitigates any potentially significant environmental impacts and meets the water quality requirements of the Proposed Statewide Waiver, the Waiver imposes the following procedural and substantive requirements.

1. The documents that directly control project implementation (e.g., the agreement, lease, permit, or contract) must include the site-specific on-the-ground prescriptions to be used to implement the WQMH, Guidance, NEPA mitigations, and Statewide Waiver conditions.
2. Any project determined to have potentially significant environmental impacts must be treated as a Category B project (even if it is a type of activity generally categorized as a Category A activity) subject to application to the Regional Water Board and review of that application. (Proposed Statewide Waiver Categories, Category A discussion)
3. The application package must set forth the site-specific, on-the-ground prescriptions designed to meet the requirements to reduce potential environmental impacts to less than significant levels and prevent violations of water quality requirements. (The application package must also include the NEPA documents and any public comments received in the course of NEPA review so that the Regional Board may consider comments on the prescriptions.) (Proposed Statewide Waiver Application Process for Category B Activities, conditions 6, 7)
4. Prior to enrolling any activities or projects under the Proposed Statewide Waiver, the Regional Water Board must ensure that the site-specific on-the-ground prescriptions mitigate any potentially significant environmental impacts to a less than significant level. (Statewide General Conditions 17)

B. The State Water Board cannot actually ensure that the BMPs will be implemented because the WQMH is unenforceable. [#17, 26, 38]

The Proposed Statewide Waiver requires that, for each project, a BMP checklist be prepared, be submitted as part of any application package, and be filled out during USFS auditing of each project. The completed checklists are to be kept as part of the project record and available to RWQCB staff. (See Attachment C.) This is used to verify both that BMPs are actually implemented, and that corrective actions are taken where they are needed. Additionally, the Proposed Statewide Waiver requires a certification, at project completion, that the agreed-to mitigation measures were in fact implemented. (See Attachment G.)

While the Water Boards may not directly enforce the BMP requirements of the WQMH, they may take enforcement action to ensure compliance with the conditions of the Proposed Statewide Waiver. The Proposed Statewide Waiver's conditions include a requirement that all activities and projects under the Waiver be conducted in accordance with the site specific on-the-ground prescriptions designed to implement the BMPs identified to avoid any adverse impacts to water quality and any additional site specific on-the-ground prescriptions necessary to implement the applicable mitigation measures in the MND. (Statewide General Condition 13.) This requirement applies to all contractors, grazing permittees, and other third parties

(Statewide General Condition 10(b)), in addition to the USFS. The Proposed Statewide Waiver also requires compliance with all applicable water quality requirements and prohibits any discharges that cause a pollution, contamination, or nuisance. (Statewide General Conditions 13, 15.) Water quality requirements include water quality standards, as well as all other requirements, including guidelines, TMDLs, and prohibitions, set forth in water quality control plans and policies adopted or approved by the State Water Board. Because violations of the Proposed Statewide Waiver's conditions are subject to enforcement by the Water Boards, the Boards can ensure that the USFS and third parties are in fact implementing the site-specific, on-the-ground prescriptions that have been determined to avoid adverse impacts to water quality and any additionally needed to avoid potentially significant environmental impacts.

C. The IS/MND does not provide adequate information about how the Plan or BMPs will ensure USFS activities will not cause significant environmental impacts. For example, nowhere in the IS/MND or project review documents is clear information presented on how the BMPs will effectively prevent water quality impacts from OHVs. The CEQA documents should refer to some quantitative measurement of the BMP effectiveness. [#17, 26, 35]

CEQA requires the initial study to include, in brief form, "an identification of the environmental effects by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are briefly explained to indicate that there is some evidence to support the entries" with a narrative or a reference to another information source being sufficient to support the brief explanation. (CEQA Guidelines, §15063(d)(3).) Further, an initial study shall include, in brief form, "a discussion of the ways to mitigate the significant effects identified." (Id., §15063(d)(4).) There is no requirement for a quantitative measurement of BMP effectiveness; the requirement is for a brief discussion of the significant impacts and the ways in which they will be mitigated.

Moreover, in the context of a statewide project, with multiple categories of activities eligible for regulatory coverage, the IS/MND cannot provide the type and extent of detail on impacts and mitigation that might be expected in an IS/MND addressing a single, site-specific project. The IS/MND identifies the range of environmental impacts generally expected when the outlined NPS activities are carried out on NFS lands and identifies the performance standards of the WQMH, USFS Guidance and the conditions of the Proposed Statewide Waiver, that, when translated into site-specific on-the-ground prescriptions, are expected to mitigate these impacts.

In relying on a more general and non-quantitative discussion of the impacts and mitigation, the State Water Board is in no way relinquishing the lead agency's responsibility to ensure that any potentially significant impacts are in fact mitigated to less than significance. To the contrary, the Proposed Statewide Waiver anticipates that, for individual projects, there may be site or project-specific factors causing potentially significant impacts outside of the scope of the more general considerations of the IS/MND. Recognizing the programmatic nature of the Proposed Statewide Waiver and, by necessity, the programmatic nature of the environmental analysis of this IS/MND, the Waiver sets up a process by which project-level review ensures projects outside the scope of the IS/MND analysis do not receive coverage under the Waiver. A project cannot receive coverage under the Proposed Statewide Waiver, if it has 1) potential significant environmental impacts not identified in the Initial Study, 2) potential significant impacts that are substantially more severe than the impacts identified in the Initial Study, or 3) environmental impacts that cannot be reduced to less than significant levels through mitigation identified in the Initial Study. Projects that are rejected for coverage under the Proposed Statewide Waiver are subject to further CEQA review and individual permitting.

D. Historically, the USFS has been unwilling or unable to enforce existing BMPs or otherwise effectively regulate such activities so as to avoid significant water quality impacts. The MND should acknowledge the challenges faced by the USFS in regulating non-point source

discharges such as grazing and OHV use. For example, there is inadequate discussion of the USFS's inability or unwillingness to enforce against illegal OHV trail use. There is also no discussion of how the USFS has ignored clear evidence of sediment discharge in the past due to lack of funding, staffing, or initiative. The IS/MND should explain how and whether such roadblocks to proper implementation of BMPs can be fixed. Such discussion seems necessary in order for the interested public to evaluate the efficacy of proposed new BMPs. [#26, 35]

The State Water Board acknowledges that the USFS has historically faced challenges in funding, staffing, and initiative to regulate NPS discharges on NFS lands. However, the State Water Board does not agree that the efficacy of the BMPs proposed in the IS/MND must be framed with reference to past regulatory challenges.

To the extent that commenters are arguing that the proposed BMPs, even if properly implemented, will not provide appropriate mitigation based on past experience, commenters ignore the extensive discussion in the IS/MND of the lengthy stakeholder process for BMP review, and the resulting significantly revised and strengthened WQMH. Commenters also ignore the commitment of the Proposed Statewide Waiver conditions to ensuring that the BMPs are in fact implemented at the project and site-specific level in a manner effective at reducing any potentially significant impacts, as discussed in Response 4.A above.

Primarily, however, commenters' concern implicates not the effectiveness of the proposed mitigation measures when properly implemented, but rather the effective enforcement of their proper implementation. As a preliminary matter, it should be noted that an agency need not prepare an environmental document to analyze a project other than as proposed and approved. Any future non-compliance is an issue to be dealt with through enforcement, not through a CEQA analysis. BMP administration was, however, a priority issue identified by both the November 30, 2009 public workshop and the stakeholder group and recognized by the Board in development of the Proposed Statewide Waiver. The USFS WQMH sets forth significant improvements in the process for BMP administration, and the Proposed Statewide Waiver incorporates a number of conditions to address this concern.

Most importantly, as discussed in response 3.B above, the conditions of the Proposed Statewide Waiver are subject to enforcement and the Water Boards can take enforcement action to ensure that the agreed upon site-specific on-the-ground prescriptions are in fact properly implemented.

Further, the State Water Board or its Executive Director, or the Regional Water Board or its Executive Officer may deny or terminate Proposed Statewide Waiver coverage of an individual project at any time if it is determined that the project may result in violation of water quality requirements. The State Water Board or its Executive Director may more broadly terminate coverage for classes of projects/activities or for projects/activities implemented by specific National Forests, for failure to adequately comply with water quality requirements.

Additionally, the Proposed Statewide Waiver's Monitoring and Reporting Plan (Attachment C) sets out an expanded monitoring and reporting program that allows for auditing of projects and activities through a BMP checklist, as well as random BMP effectiveness monitoring, retrospective monitoring to evaluate long-term performance of BMPs, and more focused monitoring for key sites in selected watersheds, for high risk activities, and for range allotments. It also requires that USFS annually report to the Water Boards and the public the results of its monitoring and any corrective actions that have been or need to be taken to ensure adequate water quality protection.

The Proposed Statewide Waiver directs staff from each national forest to meet at least annually with staff from each affected Regional Water Board to discuss and rectify any issue with Waiver

compliance, legacy remediation, watershed restoration, TMDL implementation, monitoring or any other issues associated with the Proposed Statewide Waiver, and to report the resolution of such issues to the State Water Board Executive Officer. The State Water Board Executive Director, one State Water Board member, Regional Water Board representatives, and the USFS Regional Forester are directed to meet at least annually to review the USFS annual report and to discuss and resolve issues not resolved through the Regional Water Boards' meetings with USFS staff.

Finally, the Proposed Statewide Waiver also authorizes the State Water Board and the USFS to enter into a Memorandum of Understanding for continued cooperation and for further revisions to the BMPs of the WQMH.

5. The Board was required to prepare an EIR.

A. The Board's proposal to consider approval of this project using an MND violates CEQA because a fair argument can be raised that the WQMH and accompanying BMPs will not avoid significant environmental impacts. There is voluminous documentation in particular of impacts to water quality and biological resources resulting from the activities proposed to be regulated through the Proposed Statewide Waiver, especially grazing, OHV, roads, and timber management. If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, even after mitigation measures are implemented, the lead agency must prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. [#14, 15, 17, 26, 35, 37]

Based on the entire record, including comments and evidence received on the IS/MND, the State Water Board continues to find that there is not a fair argument that the project, as mitigated by the WQMH, the USFS Guidance, and the conditions of the Proposed Statewide Waiver, will have significant water quality impacts specifically, or environmental impacts more generally. As discussed in responses above, the BMPs of the WQMH have been updated and significantly strengthened. Moreover, the mitigation measures extend beyond the WQMH, to incorporate not just the broader USFS Guidance, but, most significantly, the conditions of the Proposed Statewide Waiver itself. The Proposed Statewide Waiver conditions ensure, among other things, that the performance standards articulated in the WQMH and USFS Guidance are in fact translated into site-specific, on-the-ground prescriptions sufficient to mitigate environmental impacts. Where project or site-specific factors result in potential significant impacts different or more severe than those anticipated by the IS/MND, such that the impacts cannot be mitigated to less than significant through site-specific on-the-ground prescriptions, the project will not receive coverage under the Proposed Statewide Waiver and will be subject to further CEQA analysis, including, if needed, a project-specific EIR.

B. The Board should have considered the regulatory alternatives to mitigate the potentially significant impacts. Preparing an EIR would, for example, have permitted the Board to consider differing alternatives for adaptive management and provide a side by side evaluation. Also, an EIR would have allowed the Board to have considered a regional waiver alternative. [#17, 26, 35, 38]

CEQA requires consideration of alternatives to the proposed project only where that project will cause potentially significant impacts and an EIR is prepared. Because the State Water Board finds that the project, as mitigated, will not have a substantial effect on the environment, the Board is not required to consider alternatives to the project.

C. A Master EIR is appropriate in this case because this type of EIR is specifically for projects, such as general plans, or projects that consist of smaller individual projects that will be carried out in phases over a period of years. An MND in this case is completely inappropriate since it

cannot even begin to address the multitude of projects and impacts that will be undertaken over a period of five years and across 20 million acres in California. [#37]

The State Water Board has recognized the challenges of evaluating a multitude of activities across a broad area through a Mitigated Negative Declaration. Precisely because of this challenge, the Proposed Statewide Waiver contemplates that individual projects will be reviewed by Regional Water Boards to determine if project impacts are different or more severe than the environmental effects contemplated by the IS/MND and, if so, be excluded from coverage under the Proposed Statewide Waiver. However, there is no support in the CEQA regulations or case law for commenters' assertion that the State Water Board is precluded from relying on a mitigated negative declaration, and must proceed to an EIR, simply because the project reviewed is programmatic in nature.

6. Additional CEQA-related comments:

A. The waiver will lead to the widespread and unnecessary closure of USFS roads throughout the state of California due to the WQMH BMPs 2.7 (road decommissioning), 4.7.7 (wet weather operations) and 4.7.8 (restoration of off-highway vehicle-damaged areas). Reduced or displaced and concentrated OHV recreation will have reasonably foreseeable significant effects biological resources, geology and soils, hydrology and water quality, and greenhouse gas emissions, and recreation, transportation and traffic, and impacts to human beings, and cumulative impacts. The IS/MND does not disclose these impacts. [#15, 37, 38]

Road and trail decommissioning and closures have the potential to concentrate existing non-motorized and motorized recreational activity on fewer trails. However, such a shift in activity is expected to be minimal as the USFS uses the travel management planning process to account for the social, economic, and land-management needs of the area before decommissioning any unneeded roads. Further, the degree of impact is speculative, being based on the choices made by both by the OHV user community and USFS.

B. The IS/MND fails to explain how the Proposed Statewide Waiver will apply to existing OHV activities that are discharging significant amounts of sediment to watercourses or how these impacts, including impacts to aquatic and riparian species and habitats, will be mitigated. The MND should acknowledge at the outset that the Proposed Statewide Waiver proposes to exempt all OHV activities from waste discharge requirements. The MND should have a discussion of the number of OHV roads and trails in existence, including those created by illegal use, and the ongoing environmental impacts caused by these roads and trails. The BMPs for OHV use proposed in the WQMH are not applicable to the vast majority of already existing OHV routes. [#17, 26, 35]

The IS/MND's section on the "Specifics of the Proposed Board Action," has been revised to address this comment and similar comments expressing confusion about the extent to which existing roads and trails will receive coverage under the Proposed Statewide Waiver. The description of OHV activities under Category B has been revised to describe the activities as "Construction or reconstruction of OHV trails and facilities, and their use under an approved application for enrollment."

Many of the activities listed under Category B are ongoing activities on NFS lands; however, generally, *new* Category B projects are eligible for coverage under the Proposed Statewide Waiver. New projects are projects that undergo NEPA review after the adoption of the Proposed Statewide Waiver. Ongoing Category B activities, such as ongoing OHV use on an existing trail, are not "automatically" covered under the Proposed Statewide Waiver. Ongoing use and operations are not subject to USFS environmental and project review unless, for example, an existing trail is expanded or repaired, at which point the USFS is expected to

conduct the appropriate environmental review and generate an application for Regional Board review. The Proposed Statewide Waiver contemplates that, in limited circumstances, the USFS may request coverage of an ongoing activity (such as use on an existing OHV trail) but requires that the USFS then generate and submit project and environmental documents sufficient to provide for meaningful Regional Board review, including a demonstration that the ongoing activity or project has been reevaluated in light of the requirements of the USFS Guidance, updated USFS WQMH, and the requirements of the Proposed Statewide Waiver. (Category B General Condition 15.)

C. The Proposed Statewide Waiver's automatic coverage of grazing allotments, in the absence of NEPA review, is problematic, given potential significant impacts to water quality and riparian and aquatic resources. The BMPs will not even apply to allotments until the USFS allotment management plan and related annual operating instructions are prepared and legally approved. For those allotments that won't be up for renewal for years, revised BMPs have little application potential. As a result, water quality will not be restored or protected through the application of those BMPs. [#17, 26]

The Proposed Statewide Waiver has been revised to provide coverage for grazing permits only through application to and review by a Regional Water Board. Category B General Condition 12 now provides for enrollment under three circumstances:

1. Where NEPA analysis and decision are completed during the life of this Statewide Waiver: Where possible, prior to the scheduled review of a grazing allotment, the responsible National Forest may submit an application for enrollment, along with the required NEPA documentation and record of decision, to the Executive Officer of the affected Regional Water Board.
2. Where the NEPA analysis and decision were completed prior to the life of the Statewide Waiver, but re-analysis is not during the life of this Statewide Waiver, the responsible National Forest may advise the permittee during its annual meeting regarding the opportunity for Waiver coverage and what lease modifications will be needed to achieve compliance with Waiver conditions. The responsible National Forest may then submit a Notice of Application for the allotment to the affected Regional Water Board. The application must include information to support an informed, reasoned, and affirmative Regional Water Board decision regarding enrollment.
3. Where NEPA analysis has never been performed and is not scheduled for completion during the life of this Statewide Waiver: The responsible National Forest may request that the affected Regional Water Board consider enrollment of such an allotment. The request must include the rationale and the information needed to explain and justify that request. If the Regional Water Board agrees, the process for modifying the permit and applying for Waiver enrollment will be as set forth in 2 above, except that, in lieu of the NEPA document, the National Forest must submit with the application other available information sufficient to support an informed, reasoned Regional Water Board decision regarding enrollment.

D. The IS/MND's conclusion that the project will not result in cumulatively significant impacts is not supported by the evidence in the record. [#14, 17, 26, 37, 38]

A project's impacts are cumulatively considerable if "the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (CEQA Guidelines, § 15065(a)(3).) After review of the comments, the State Water Board has not changed its conclusion in the IS/MND that the adoption of the Proposed Statewide Waiver will not result in cumulatively considerable environmental impacts. At a programmatic level, the environmental

impacts of NPS activities on NFS lands are expected to decrease as a result of the Board action, even if the action will permit new NPS activities to go forward with less than significant impacts at a localized project level. Moreover, the Proposed Statewide Waiver, while allowing some new projects to go forward, also requires remediation of legacy problems or pre-existing discharge sites and watershed restoration. Minor revisions have been made to the section of the IS/MND addressing cumulative impacts to clarify the Board's analysis of such impacts.

E. The IS/MND does not address potential impacts on aquatic and riparian species of water consumption by the covered activities, either as direct impacts of the proposed waiver or in a cumulative impacts context by watershed and/or regionally. [#17]

The CEQA checklist format addresses this issue indirectly, under IV. Biological Resources (impacts on resident or migratory fish and wildlife) and XVII. Utilities and Service Systems (sufficiency of water supplies from existing entitlements). For the former, the finding is less than significant with mitigation incorporation due to existing USFS requirements for threatened or endangered species and for aquatic, wetland, and riparian habitats. For the latter, the finding is less than significant impact because such uses will be short term in duration and relatively minor in scope. Water supplies would come from existing developed sources with existing water rights on NFS lands. If short-term water drafting from streams in the vicinity of the project area is required for a project, the USFS would be required to comply with all applicable current regulations.

F. There is no indication that responsible and trustee agencies such as the Department of Fish and Game and the State Lands Commission have weighed in concerning the IS/MND. [#17, 38]

The IS/MND was circulated to the Department of Fish and Game and the State Lands Commission through the State Clearinghouse. No comments were received.

G. CEQA cumulative effects analysis is State responsibility, and should not be shifted to the Forest Service. [#26, 35].

As the State's lead agency under CEQA, the Water Board is responsible for analyzing cumulative environmental effects. The State Water Board has met this obligation with its analysis under section XVIII b) of the checklist in the IS/MND. Under NEPA and its own directives and processes, USFS must also analyze cumulative watershed effects of proposed projects. The Waiver incorporates USFS' own requirements among its conditions.

H. The USFS should have prepared an environmental review of the WQMH under either NEPA or CEQA. [#137]

The USFS, not the State Water Board, determines the USFS's obligations under NEPA and CEQA. Moreover, with regard to CEQA, the requirements apply to "discretionary projects proposed to be carried out or approved by public agencies." (Public Resources Code, §21080(a).) The term "public agencies," as defined under CEQA, does not include federal agencies. (CEQA Guidelines, § 15379.)

I. The State Water Board's revisions to the IS/MND required recirculation of the IS/MND. [#126, 137]

The IS/MND was circulated for public review on June 10, 2011, as required by CEQA Guidelines section 15073. The CEQA Guidelines require a review period of 30 days and the Board met and exceeded this requirement by allowing public comments through August 24, 2011. In addition, the Board heard oral comments at a workshop on September 20, 2011.

As a result of comments received, the Board made a number of revisions to the Proposed Statewide Waiver and to the IS/MND. These revisions include, but are not limited to, clarification of the application process for Category B projects, including coverage of ongoing projects; elaboration of the legal discussion of the environmental baseline; revisions to the discussion of the grazing allotments to make that discussion consistent with revisions to the Waiver; revisions to the description of monitoring requirements for consistency with revisions to monitoring requirements in Waiver Attachment C; listing in the hydrology section of the checklist of specific BMPs for OHV recreation (previously only referenced); addition of a discussion in the recreation section of the checklist to address the comment received that OHV trail closures will lead to environmental degradation on remaining trails; revision of a discussion in the mandatory findings section to elaborate on the legacy site remediation requirements of the Waiver; other edits and revisions to make the discussion in the IS/MND consistent with minor revisions to the Waiver; and numerous corrections of phrasing, spelling, and typos.

CEQA Guidelines section 15073.5 requires that a lead agency recirculate the mitigated negative declaration if the document must be substantially revised. A substantial revision means:

- 1. A new, avoidable significant effect is identified and mitigation measures or project revisions must be added in order to reduce the effect to insignificance, or*
- 2. The lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required.*

On the other hand, if mitigation measures are replaced with equal or more effective measures, new project revisions are added in response to comments on effects that are not new avoidable significant effects, measures and conditions are added which do not create new significant effects and are not necessary to mitigate significant effects, or new information is added which merely clarifies, amplifies, or makes insignificant modifications, recirculation is not required.

The revisions that have been made to the IS/MND in response to comments received primarily clarify, amplify, or make insignificant modifications to the documents. The revisions concerning the eligibility of grazing allotments and other ongoing activities for coverage under the Waiver narrow, rather than expand the scope of the project and the potential significant impacts it may have.

Commenters in particular argue that the revised monitoring provisions “were intended to make up for the lack of adequate monitoring in the original Waiver,” and that these changes should have triggered recirculation. The Board disagrees with commenters’ assertion. Monitoring requirements are not mitigation measures that are part of the CEQA public review process and the State Water Board was not required to include discussion of the monitoring requirements in the mitigated negative declaration. Under CEQA, monitoring and reporting requirements are considered and adopted only at the time of adoption of a mitigated negative declaration in order to ensure that the mitigation measures and project revisions are implemented. (CEQA Guidelines, §§15074(d), 15097.) In any case, the revisions to the monitoring requirements were not necessitated by a determination by the Board that the monitoring requirements in the first draft were not sufficient to mitigate potentially significant impacts.

For these reasons, the revisions made to the IS/MND do not require recirculation of the IS/MND under California Code of Regulations, title 14, section 15073.5. The Board will, however, hear any oral comments at the adoption meeting.

Issues Related to the State Water Board’s Legal Authority

1. Logging roads require NPDES permitting.

The Proposed Statewide Waiver should address the 9th Circuit ruling in Northwest Environmental Defense Center v. Brown which held that storm water runoff from logging roads that is collected and then discharged from a system of ditches, culverts and channels is a point source discharge for which an NPDES permit is required. [#22, 114]

The State Water Board considered the implications of the 9th Circuit ruling on logging roads when developing the Proposed Statewide Waiver. The Proposed Statewide Waiver clearly states that any discharges that require permitting under an NPDES permit shall not be covered under the Waiver. (See Finding 36(b).) The State Water Board will not be providing additional specificity in the Waiver on the permitting of storm water discharges from logging roads, as the Board believes such specificity is premature while a petition for certiorari on the case is pending before the Supreme Court. If the 9th Circuit decision becomes the final determination of this issue, Finding 36(b), as currently written, will ensure exclusion of logging road discharges from coverage under the Statewide Waiver.

2. The Statewide Waiver is not consistent with the Anti-degradation Policy.

The Proposed Statewide Waiver and associated documents do not demonstrate water quality impacts from the activities it covers (e.g., range management), are “consistent with maximum benefit to the people of the State,” that it “will not unreasonably affect present and anticipated beneficial use of such water,” and that it “will not result in water quality less than that prescribed in the policies.” Achieving consistency with the Antidegradation Policy would require that water quality in source streams in high elevation areas of NFS lands must be maintained at a high level to provide maximum benefit to the people of the State. [#26, 36]

The Proposed Statewide Waiver requires all discharges, including discharges by grazing permittees, to comply with all water quality requirements. Water quality requirements include water quality standards, as well as all other requirements, including guidelines, TMDLs, and prohibitions, set forth in water quality control plans and policies adopted or approved by the State Water Board. This definition is inclusive of the Anti-Degradation Policy, Resolution 68-16 and the Regional Water Boards may exclude from coverage any proposed projects that are not consistent with the requirements of 68-16. The Proposed Statewide Waiver contains the appropriate findings required by Resolution 68-16 at Finding 68.

3. Coastal Zone Act Reauthorization Amendments (CZARA) do not support adoption of the Statewide Waiver.

CZARA only affects the Coastal Zone, so it does not justify the statewide Nonpoint Source Pollution Control Program Plan, and therefore the proposed Statewide Waiver is not justified [#7]

The federal Clean Water Act authorizes the Water Boards to control NPS pollution anywhere in the State; CZARA does not restrict this authority. In 1999, the State Water Board and the Coastal Commission jointly adopted the Plan for California’s Nonpoint Source Pollution Control Program (NPS Program Plan) to comply with the requirements Clean Water Act section 319 and CZARA section 6217. California Water Code section 13369(a)(1) requires the State Water Board to prepare a detailed implementation program for the State’s Nonpoint Source Program, addressing both Clean Water Act section 319 and CZARA section 6217. In 2004, the State Water Board adopted the Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Policy). The NPS Policy requires Water Boards to control NPS discharges through waste discharge requirements, waivers, or prohibitions.

4. Relationship of the Proposed Statewide Waiver to TMDLs

A. The Proposed Statewide Waiver should have specific requirements for attainment of TMDLs

and discharges to impaired waters should only be allowed if they don't exceed the specified load allocation or violate water quality standards. The permit is not clear on who would determine if TMDL requirements are more rigorous than the Waiver's conditions, requiring further actions from the USFS [#24, 36, 105, 112, 136]

The Proposed Statewide Waiver requires compliance with all water quality requirements, which are defined to include TMDLs (See Statewide General Condition 13). The Proposed Statewide Waiver does not supersede any applicable more stringent TMDL requirements (See Finding 40). On the other hand, the Proposed Statewide Waiver anticipates that reasonable implementation of the USFS Guidance and WQMH and the Waiver's conditions will generally be sufficient to contribute substantially toward recovery of already-impaired beneficial uses of water (See Finding 45). However, in specific instances where the Regional Water Board finds this to be untrue, it may so inform USFS (See Finding 32), and require USFS to carry out any additional actions necessary to meet the requirements of the TMDL.

B. Statewide prioritization of USFS watershed restoration may retard USFS compliance with some TMDLs and adversely affect local agencies [#107, 108, 110]

USFS is responsible for contributing toward recovery of waters that are impaired due to anthropogenic discharges originating on NFS lands, but it must manage its expenditures on a statewide basis. The most likely impact of statewide prioritization on a Regional Water Board and on local entities is on the schedule for implementing a local TMDL. The Proposed Statewide Waiver sets the expectation that the Water Boards will collaborate with USFS during the watershed prioritization process which allows for coordination of TMDL implementation schedules and the statewide USFS prioritization schedule.

C. Statewide General Condition 13 should be modified to clarify that the water quality requirements include any TMDLs adopted or approved by the Regional Water Boards since some TMDLs are adopted by single action votes or certification by Executive Officers of Regional Boards. [#114]

No change has been made in response to this comment. The Board is not aware of any TMDLs that have been adopted by single action votes or certifications by the Regional Water Boards. If this should occur in the future, the resulting WDRs, Cleanup and Abatement Order, or 401 Certification would be independently enforceable.

5. Effect on USFS Legal Authorities and Processes

A. Conditions of the Proposed Statewide Waiver contradict mandates of National Forest Management Act and Multiple Use Sustained Yield Act [#14].

The State Water Board does not intend or expect this to be true. USFS itself has not raised this objection.

B. The Proposed Statewide Waiver may prolong and interfere with project review and divert USFS funding resources for maintenance work, utility work, and other beneficial activities [#14, 18, 20, 21, 34]

We recognize that the extra time needed for Regional Water Board review could prolong and interfere with beneficial activities, and the Water Boards and USFS will work with affected parties to minimize such effects. The Proposed Statewide Waiver has set out as efficient and timely review process as feasible.

C. The Proposed Statewide Waiver is unnecessary because USFS requirements are already extremely strict and more than sufficient (#14, 23)

USFS is required by Clean Water Act section 313 to comply with applicable state water quality requirements. USFS requested Waiver coverage in order to help satisfy that requirement. Additionally, the NPS Policy directs the Water Boards to regulate non-point source discharges through WDRs, waivers of WDRs, or basin plan prohibitions, and the Statewide Waiver is issued consistent with that Policy.

D. In addition to emergency activities, the Proposed Statewide Waiver should exempt all USFS activities that have USFS environmental mitigations. [#14]

Under CEQA, the State Water Board is the lead agency on the adoption of the Proposed Statewide Waiver and must consider the environmental impacts of covered activities and projects, even if such activities and projects are additionally reviewed by the USFS. The State Water Board may exclude activities and projects from environmental review only to the extent that a specific exemption is available under CEQA. Certain emergency actions qualify for an exemption from the requirements of CEQA under CEQA Guidelines section 15269.

E. The Proposed Statewide Waiver does not address how projects that USFS categorically excludes from NEPA analysis will be handled. [#12, 26, 35]

Revisions have been made to the Proposed Statewide Waiver to clarify that USFS must submit, as part of its project application for Regional Water Board review, the decision memorandum regarding the categorical exclusion for such projects, as well as any public comments received on that determination. We expect that some categorical exclusion activities will fall into Waiver Category A and some into Category B.

F. The Proposed Statewide Waiver essentially ignores local conditions, would to leave an unacceptable amount of discretion regarding any actual implementation in the hands of Forest Service line officers, and fails to provide adequate guidance for line officers to make decisions related to nonpoint sources of pollution to comply with water quality standards. [#26, 35]

To address local conditions, the Proposed Statewide Waiver requires that USFS develop project-specific on-the-ground prescriptions for every Category B project/activity to be covered by the Waiver (see Statewide General Conditions 7, 9) and project-specific BMPs checklists to be used to audit BMP/prescription implementation on every project (see Attachment C). While the Proposed Statewide Waiver does not control internal USFS procedures, it allows the affected Regional Water Board to independently review the adequacy of the USFS prescriptions to comply with water quality requirements, as well as to review the filled-out checklists.

G. Some Waiver conditions intrude on USFS authority and overstep Water Board authority, particularly for land use, management practices, pesticide application, riparian vegetation, and soil compaction. The Waiver should not require USFS to implement its own requirements. [#19, 21])

The Proposed Statewide Waiver implements the requirements of the Clean Water Act, the Porter Cologne Act, and State Water Board regulations and policies and the Waiver's conditions are entirely within the scope of Board authority. BMPs are recognized as the primary means for controlling NPS pollution. The State Water Board has the sole authority to determine what management practices can be considered appropriate BMPs for control of NPS pollution in California. Among the most important BMPs are riparian buffers established to mitigate water quality effects of land use are directly within Water Board authority (See Attachment A, Management Measure 2B, as are BMPs addressing land management practices that compact soils and otherwise contribute to increased surface erosion, sedimentation and other NPS discharges. Water Boards do regulate point sources of pesticide application pursuant to NPDES permits, but the Waiver excludes coverage for such discharges. For NPS pesticide discharges, the Waiver imposes no conditions on use or applications, only a condition that the affected

Regional Water Board be notified in advance when such applications will occur (See Attachment A, Management Measure 2I). In waiving the requirements for WDRs, in part based on the USFS's implementation of its own WQMH and Guidance, the State Water Board is not requiring the USFS to implement its own requirements but rather specifying that those USFS actions, if implemented consistent with the conditions of the Waiver, are also sufficient to meet the USFS's obligations vis-à-vis the water quality requirements under the authority of the Board.

USFS itself has not raised any of these objections

H. The USFS WQMP is a national document and is not subject to Water Board approval. [#21]

The State Water Board is not explicitly approving, adopting, certifying or otherwise endorsing the new WQMH; it is implicitly endorsing it insofar as WQMH implementation is a primary condition of the Waiver for achieving compliance with water quality requirements under the authority of the Board. Further, neither the existing USFS WQMP nor the new USFS WQMH is a national document; both are specific to California. USFS itself has not raised this objection.

I. The Proposed Statewide Waiver should require only those conditions necessary for California Water Code compliance. [#21]

The Proposed Statewide Waiver is consistent with the Nonpoint Source Policy and the NPS Program Plan, which fulfill the requirements of not just the Porter-Cologne Act but also both Clean Water Act section 319 and CZARA. Further, the State Water Board is the lead agency for purposes of CEQA and must require mitigation measures consistent with the IS/MND.

J. The USFS must maintain sole authority to negotiate contract and permit terms with third parties and to determine if contractors or permittees are in compliance with contract or lease terms as well as any NEPA terms and conditions. The USFS remains the agency responsible for managing forest lands to accommodate multiple uses as directed by Congress. [#19, 109, 121]

If restricting exclusive authority to determine a contractor's compliance or permittee's compliance with contract terms or grazing permits to USFS will limit the ability of the Regional Boards to enforce against contractors or permittees, we suggest removal of that condition so that the Regional Boards retain the ability to enforce against water quality violations. [#114]

The permit states that, for purposes of enforcing the contract or permit, the USFS maintains exclusive authority to determine whether contractors or grazing permittees are complying with the terms and conditions of the contract or grazing permit. (See Statewide General Condition 12.) However, contractors and permittees are required to comply with all water quality requirements of the Proposed Statewide Waiver, and all applicable local, state and federal laws, including the State and federal Endangered Species Acts, and may not cause a pollution or nuisance. This is made clear in Statewide General Conditions 10b). Accordingly, the Water Boards retain the authority to take enforcement actions against third parties (as well as the USFS) for any violations of these provisions. Additionally, the Statewide Waiver requires the contractors and permittees to implement all site-specific, on-the-ground prescriptions agreed upon in the project approval (id.), and the Water Boards may enforce such compliance directly against third parties, as well as the USFS. USFS itself has not raised these objections.

K. There should be an appeal process if termination of Waiver coverage impacts a USFS permit or contract (#109)

Termination of Waiver coverage *per se* does not impact a USFS permit or contract; its terms remain unchanged unless they are explicitly tied to continued Waiver coverage or compliance. USFS can petition a Regional Water Board termination of Waiver coverage to the State Water Board.

6. Effect on Regional Water Board authorities and processes

A. The Proposed Statewide Waiver would remove Regional Water Board authority to impose individual WDRs or individual waivers [#36].

The Proposed Statewide Waiver does not supersede the authority of a Regional Water Board to issue WDRs or individual waivers. (See findings 40(a) and 42.). Rather, it provides a programmatic base that greatly minimizes the Regional Water Board workload that would otherwise be required to impose individual WDRs or waivers on specific projects or watersheds. The Proposed Statewide Waiver allows Regional Water Boards to determine which projects/activities pose too much risk to water quality to be covered by the Waiver and to focus their limited resources on developing individual WDRs/waivers for those discharges.

B. The Proposed Statewide Waiver may reduce Regional Water Board ability to effectively address local conditions. It should allow Region-specific modifications to be made to the Waiver [#114].

Regional Water Boards were given the opportunity to suggest region-specific Waiver conditions, but none were suggested. However, the Waiver does not preclude consideration of local conditions. Project applications must include site-specific on-the-ground prescriptions that implement the USFS WQMH and Guidance with local project conditions in mind. More broadly, Waiver Finding 58 allows a Regional Water Board and USFS to execute agreements to, when necessary, develop BMPs specific to one or more National Forests to address forest-specific conditions. Additionally, the Waiver does not supersede the authority of a Regional Water Board to adopt WDRs for a project or activity where the Regional Water Board determines that certain region-specific conditions are necessary.

C. The Proposed Statewide Waiver does not address every type of NPS activity on NFS lands (e.g., beaches, ski resorts without NPDES permits) [#26]

This is true. For such activities, a Regional Water Board can impose its own WDRs or waivers.

D. Is there a Waiver application fee or annual fee? [#36]

At this time, there are no fees associated with the Statewide Waiver, and none is being considered with this action. Fees are set by the State Water Board through a separate action under Water Code section 13260(d).

E. The Proposed Statewide Waiver should allow USFS applications to a Regional Water Board to be deemed approved after 30 days if the Regional Water Board has failed to act on the application. This change is needed both to avoid unduly taxing the resources of the Regional Water Boards and to allow the USFS to proceed with typical projects in a timely matter. [#6, 106, 121]

The State Water Board is sympathetic to both the resource constraints of the Regional Water Boards and the need to prevent unnecessary delay for the USFS for time-critical projects. However the State Water Board continues to believe that Regional Water Board review is a significant step in confirming that site-specific, on-the-ground prescriptions are implemented for Category B projects consistent with the USFS WQMH and Guidance and the requirements of the Statewide Waiver. The State Water Board has not added a “deemed approved” provision to the Waiver, but has instead addressed the commenters’ concerns by setting clear expectations for Regional Water Board action on applications within 30 days, by requiring the Regional Water Boards to inform the USFS in those instances where additional time will be needed for review, and by setting out an informal process by which the USFS may bring the delay to the attention of the Executive Director of the State Water Board.

F. The 30-day review period is too short for meaningful Regional Water Board review. It is unclear what will happen if the Regional Water Board has insufficient time to review a project. The Regional Water Boards should either be given specific authority to extend the time for review of Category B activities or, absent such authority, any Category B review that exceeds 30 days should be deemed to be denial. [#17, 117, 36]

The State Water Board anticipates that for the large majority of projects, 30 days will be sufficient for Regional Water Board review. The Regional Water Boards have the opportunity to provide input on the project even prior to submission of a project application by participating in and providing comments during the NEPA review. Where the Regional Water Board requires additional time to complete the review, it may so notify the USFS and the State Water Board. The project will not be deemed approved or denied, but rather the USFS, Regional Water Board, and the State Water Board Executive Director will work together to determine an appropriate schedule for completion of the review. (See Waiver Application Process for Category B Activities, provision 4.)

7. Effect on Water Rights

Waiver implementation should not affect water rights [#12]

Neither USFS nor the State Water Board intend or foresee that the Proposed Statewide Waiver would have any effect on water rights.

General Policy and Technical Concerns and Comments

1. Past USFS performance in protecting water quality has been poor, so waste discharge requirements should not be waived [#1, 3, 13, 26, 33, 35].

The State Water Board recognizes that USFS performance in protecting California's water quality has been imperfect. There are numerous local examples of significant and continuing water quality impacts from past and present activities on National Forest System (NFS) lands, and the Board understands that some interested parties are frustrated with and distrustful of USFS. This frustration was voiced during the stakeholder process, the recent State Water Board workshop, and in written comments.

However, the State Water Board also recognizes that, unlike most other organizations, USFS has specific mandates, guidance, directives and programs for protection of watersheds, riparian systems, fisheries, and water quality, as well as funding, resources and expertise for implementing those requirements. In general, the quality of water coming off of National Forest System lands in California is among the highest in the State. Over the past several years, USFS managers at both the national and regional level have shown strong renewed commitment to preserving and enhancing water quality.

It is the State Water Board's intent that that implementation of the Proposed Statewide Waiver will augment USFS' focus on and performance in protecting and restoring water quality. In promulgating the Waiver, the State Water Board is engaging USFS as a trusted partner. At the same time, however, the Proposed Statewide Waiver incorporates provisions to verify Waiver implementation. The Proposed Statewide Waiver and USFS WQMH together include a much more comprehensive monitoring and reporting program, as well as an adaptive management program. Additionally, the conditions of the Waiver, including compliance with water quality requirements and implementation of site-specific, on-the-ground prescriptions, are subject to Board enforcement.

Also, USFS and Water Boards recognize that further program improvements are possible and desirable, so the Waiver incorporates both a schedule of future actions and a Memorandum of Understanding to ensure that continued improvements are made during the life of the Waiver.

2. The cost of implementation has not been adequately analyzed, but both USFS and Water Boards lack funding and resources for effective implementation (#22, 35, 36]

From the outset of this process, we have emphasized that USFS should not agree or commit to provisions that it cannot fulfill. The goal has been to create a program that fits within USFS' existing programs, funding, and resources. On the Water Board side, we also assume that Waiver will be implemented with existing funding and resources. The funding and resources of both the Water Boards and USFS have been legislatively limited, and are likely to remain uncertain as the current economic and political climates persist. It is speculative to make any assumptions regarding the level of future funding and resources for either agency, although it is reasonable to assume that there will be no increases in the foreseeable future. Both agencies must try to optimize use of the funding and resources they have been given by, among other things, prioritizing the activities in which they engage, seeking to operate as efficiently and effectively as possible, and acting in partnership, rather than as adversaries.

3. Water quality protection should be strengthened.

A. The USFS BMPs should be significantly strengthened (especially those for timber, road and range management, OHV and other recreation, and fire suppression and fuels management). The BMPs are nebulous, lack specific objectives, measurable standards, and triggers for corrective action. [#17, 25, 26, 126, 27, 127, 28, 29, 30, 130, 35, 38]

Participants at the November 30, 2009 public workshop identified five categories of NPS activities that were of greatest concern: timber management, road management, fuels treatment, off-highway vehicle recreation, and range management. USFS and Water Board staff reviewed the BMPs in these categories and prioritized those that BMP Evaluation Program (BMPEP) results indicated were least effective. The new USFS WQMH completely rewrites and significantly strengthens the road management BMPs, adds new OHV BMPs and revises the range management BMPs. It significantly strengthens the USFS administrative processes used to implement the BMPs. The Waiver incorporates a schedule of future actions (Waiver Attachment B) and an MOU for continued revision and upgrading of other BMPS during the life of the Waiver.

In general, commenters' expectations regarding BMP specificity in the WQMH is not achievable, given the programmatic nature of WQMH and of the Board's action. Non-point source BMPs are appropriately developed based on a number of broad considerations, including technical, economic, and institutional feasibility, and with the expectation of further refinement. (See USEPA's 1987 guidance regarding Nonpoint Source Controls and Water Quality Standards (http://water.epa.gov/scitech/swguidance/standards/upload/1999_11_03_standards_npscontrols.pdf). This guidance has been incorporated by reference into USEPA's Water Quality Standards Handbook: Second Edition (updated through June 2007) (<http://water.epa.gov/scitech/swguidance/standards/handbook/intro.cfm#changes>)) The WQMH incorporates an adaptive management process for continuing refinements. If monitoring shows that reasonable implementation of BMPs is not achieving water quality requirements, the BMPs must be adjusted. As discussed in responses under the CEQA section, the BMPs in the WQMH are set out as performance standards, which will be implemented considering project and site-specific conditions as on-the-ground prescriptions proposed for each project are reviewed by the Regional Water Board. (See discussion under CEQA Issues 4.) In many cases, specific responses and action schedules related to adaptive management are best decided on a regional or local basis, as opposed to a statewide basis, as they are affected by

local conditions and institutional resources.

More to the point, however, the USFS BMPs do have specific objectives and measurable standards when implemented within the framework of the conditions of the Proposed Statewide Waiver. In order to receive coverage under the Waiver, any discharge must be controlled by the relevant BMPs in a manner that achieves all water quality requirements, including water quality standards. Water quality standards, laid out in region-specific Basin Plans, specify the narrative or numerical criteria that must be achieved for protection of the beneficial uses of the region's water bodies. NPS discharges from NFS lands covered under the Waiver must comply with these standards, as well as other water quality requirements found in TMDLs, guidance and policies adopted or approved by the State Board. Any exceedances are violations of the Waiver and subject to enforcement action by the relevant Regional Water Board.

B. The Waiver should strengthen, not weaken, water quality requirements [#25]

The proposed Statewide Waiver requires compliance with all water quality requirements, defined to include water quality standards, as well as all other requirements, including guidelines, TMDLs, and prohibitions, set forth in water quality control plans and policies adopted or approved by the State Water Board. (See Statewide General Condition 13). This is an enforceable provision of the Waiver. The Waiver does not change any applicable water quality requirements.

Comments and Concerns Regarding Road Management

1. Correction for current and legacy logging road impacts should be prioritized and strengthened [#33]

Both the USFS WQMH and the Waiver prioritize and strengthen correction for current and legacy logging road impacts. It is expected that implementation of the USFS Travel Management Planning process will identify more appropriate levels of use and maintenance for almost all National Forest Transportation System roads, and the new road management BMPs will apply to such maintenance activities.

The new and stronger road management BMPs are applicable to any new construction and reconstruction of NFTS roads. Where post-project auditing or monitoring finds waste discharges resulting from such projects, corrective actions are required.

Waste discharges from legacy (pre-existing anthropogenic) sources (primarily roads or trails) are to be addressed through either of two approaches. First, USFS watershed planning can identify and prioritize such sources and establish a schedule for corrective actions. The Waiver requires that USFS implement the corrective actions according to such a schedule. In watersheds where this has not been done, the Waiver requires that USFS identify and remedy existing legacy sites as part of any proposed project.

2. Preparation of an erosion control plan (ECP) every time wheeled or tracked equipment is used for routine maintenance operations would be overly burdensome [#11]

The Waiver does not require an ECP for Category A projects/activities, including routine annual road and trail maintenance, whether or not wheeled or tracked equipment is used. However, there are sometimes non-routine road or trail maintenance projects (e.g., major road repair) which would be Category B projects and would require an ECP.

3. USFS road closure and storage should be added to Category B activities (#137)

Where these activities pose very little risk to water quality, they could be treated as Category A, but where they pose moderate risk, they should be treated as Category B. USFS does not

support this suggestion, and we concur.

Comments and concerns Regarding Range Management

1. The degree of threat to water quality posed by cattle grazing on NFS lands.

A. Grazing of livestock poses a serious threat to water quality, especially at higher. [#3, 25, 26]

Both USFS and Water Boards are treating this potential threat seriously. USFS has been conducting a study of fecal indicator bacteria (FIB) and sources in a number of National Forests over the past two years. The proposed Waiver requires FIB monitoring at high-use water recreation sites in or immediately downstream of collaboratively selected grazing allotments in affected Water Board regions and, if violations of Basin Plan standards are found, further forensic monitoring to determine the FIB sources, and, if necessary, trigger corrective actions.

B. Grazing is low-risk; should be a Category A activity [#19]

Although grazing on USFS grazing allotments is often managed to prevent or minimize water quality impacts, evidence presented by other commenters indicates that such grazing has sometimes caused significant water quality impacts.

2. Whether the Proposed Statewide Waiver should impose specific practices to control water quality impacts from livestock grazing.

Waiver conditions related to riparian vegetation and soil compaction may imply fencing requirements [#19, 21]

Fencing is among the practices for controlling livestock access to surface water that may be appropriate for a given allotment or portion thereof (See Waiver Attachment A, Management Measure 1E).

3. Whether and how grazing allotments should be enrolled under the Proposed Statewide Waiver.

A. The Proposed Statewide Waiver should allow automatic allotment. [#21, 121, 122]

The evidence of grazing impacts provided by other commenters shows that automatic enrollment is not warranted. As revised, the Proposed Statewide Waiver allows three paths to allotment enrollment (See Category B General Condition 12) for USFS grazing permittees, where the permits incorporates practices needed to satisfy Waiver conditions. This allows an affected Regional Water Board to make a reasoned informed decision on whether an allotment qualifies for enrollment.

B. The Proposed Statewide Waiver should not predicate allotment enrollment on the current Rescissions Act schedule [#21]

The Revised Statewide Waiver predicates enrollment of a grazing allotment on the availability of USFS NEPA documentation and supporting information (especially the grazing permit), not on the Rescissions Act schedule.

C. The Revised Statewide Waiver's processes for allowing grazing allotment enrollment are unacceptable [#126, 130].

The Revised Statewide Waiver has two processes for allotment enrollment; the final Statewide Waiver adds a third (see Category B General Conditions 12, 13 and 15).

Category B General Condition 12.a. is for allotments which go through NEPA analysis and USFS decision during the life of the Waiver. USFS must go through this process to amend the terms of an existing grazing permit, such as may be needed to ensure compliance with Waiver conditions. A Regional Water Board can participate in the NEPA process and review the NEPA

documentation and grazing permit as part of USFS application package to reach an informed decision whether the site-specific prescriptions will satisfy Waiver conditions.

Category B General Condition 12.b. is for allotments that have gone through NEPA analysis and decision prior to the Waiver and would not go through NEPA again during the life of the Waiver. In that case, USFS can, with the consent of the permittee, make modifications to its permit terms as needed to ensure compliance with Waiver conditions. A Regional Water Board can review the NEPA documents, the modified grazing permit, and any supporting information (e.g., results of USFS rangeland condition monitoring) to reach an informed decision. This approach is needed to allow enrollment of well-qualified allotments that otherwise could not be enrolled under the 12.a. process.

Category B General Condition 12.c. is for allotments that have never been through NEPA, but for which USFS and the permittee wish to come into compliance with Waiver conditions. It will be up to the individual Regional Water Board to determine what information is needed beyond the modified permit to allow it to reach an informed decision.

4. The USFS – permittee relationship should be maintained [#34]

Waiver Statewide General Condition 12 states that USFS has exclusive authority regarding compliance with its permit or contract provisions.

Comments and Concerns Regarding Off-highway Vehicle (OHV) Recreation

1. The IS/Waiver statements re OHV growth and impact are overstated [#8, 14, 15, 16, 22]

Nationally, between 1993 and 2003, the total existing number of OHVs grew from fewer than three million to more than eight million. Between 1994-95 and 2007, the number of OHV users increased from 27.3 million to 40.6 million. Between 2001 and 2007, the average number of days of OHV recreation per user increased from 23.2 to 31.1. OHV sales and use leveled off or declined slightly since 2003 (<http://www.fs.fed.us/recreation/programs/ohv/IrisRec1rpt.pdf>).

In California, between 1999 and 2007, about 4.986 million persons (17.6 percent of the State's population and 11.6 percent of all US OHV users) participated in OHV recreation. These numbers overwhelm those for any other state (<http://www.fs.fed.us/recreation/programs/ohv/IrisRec1rpt.pdf>).

The impacts of unmanaged OHV recreation on forest lands and waters are well recognized and have been well-documented by other public comments during this process. During the middle 2000s, USFS Chief, Dale Bosworth, repeatedly identified unmanaged OHV recreation as one of the four primary threats on NFS lands, with soil erosion being among the primary adverse impacts. This led to promulgation and implementation of USFS' Travel Management Rule beginning in 2008.

The California Legislature has also recognized the need to control accelerated and unnatural erosion caused by OHV recreation. Section 5090.02 (c) of the Public Resources Code (PRC) 5090.35 requires that the State Off Highway Motor Vehicle Recreation (OHMVR) Division:

- Promptly repair and continuously maintain areas and trails, anticipate and prevent accelerated and unnatural erosion, and restore lands damaged by erosion to the extent possible.
- In consultation with several other federal and State agencies, establish a generic and measurable soil conservation standard at least sufficient to allow restoration of off-highway motor vehicle areas and trails.
- Close any portion of state vehicular recreation area that is not in compliance with the soil

conservation standards to repair and prevent accelerated erosion, until the soil conservation standards are met.

- Close and restore any portion of state vehicular recreation area where the soil conservation standards cannot be.

Accordingly, the OHMVR Division promulgated “2008 Grants and Cooperative Agreements Program Regulations, 2008 Soil Conservation Standard and Guidelines. 14 CCR § 4970.06.3.”

Recognizing the extensive public participation in both the implementation of USFS Travel Management Rule and development of the OHMVR Division’s 2008 standards and guidelines, USFS and Water Board staff ensured that the WQMH BMPs were consistent with both sets of requirements. USFS and the State Water Board neither intend nor expect that the WQMH BMPs or Waiver requirements will affect OHV recreation in a way that is inconsistent with those requirements. We greatly appreciate the work being done by non-governmental organizations to help repair and maintain OHV trails.

The language in the Proposed Statewide Waiver and in the IS/MND describing the growth of OHV recreation has been revised only minimally.

2. OHV trails and their use, as well as routine maintenance, are low impact and should be Category A [#14, 15, 37, 137]

Evidence provided by other commenters convincingly contradicts this assertion. The Waiver itself places no constraints on OHV recreation. It does require that USFS implement its own OHV BMPs and Guidance (e.g., the Travel Management Rule). The Waiver provides coverage for routine annual maintenance of OHV trails as Category A activity, while new construction, reconstruction or maintenance/restoration projects for OHV trails or facilities, as well as the use of trails, can be enrolled as Category B projects if they have been through NEPA project analysis.

The Waiver has been revised to clarify that ongoing OHV recreational use does not receive automatic coverage under the Waiver. Waste discharges from such activities may be enrolled under the Waiver only if the USFS specifically requests enrollment and provides environmental and project documentation sufficient to allow for meaningful Regional Water Board review of the environmental impacts of the use. Enrollment of an ongoing OHV use, if requested, would be considered a Category B activity because it cannot be said to have a low likelihood of impact to water quality. In the absence of a specific request for enrollment, the ongoing use is subject to Regional Water Board WDRs or enforcement actions. It is expected that USFS will implement the suite of OHV BMPs (e.g., BMPs 4.7.6, 4.7.7, and 4.7.9) in a manner that will minimize the need for such WDRs and/or enforcement actions.

3. USFS should not be required to re-analyze OHV trail water quality impact beyond NEPA [#14]

The Proposed Statewide Waiver does not require USFS to analyze water quality impact beyond NEPA. It does require USFS to submit its NEPA documents to the affected Regional Water Board as part of an application for enrollment in this Waiver. This allows the Regional Water Board to make a reasoned determination as to whether the proposed OHV-related project (e.g., new trail or facility construction or reconstruction or major maintenance/restoration projects) qualifies for Waiver coverage.

4. Why is OHV recreation singled out, but not any other recreation activity? [#16]

USFS specifically requested that we address OHV recreation in WQMH BMPs and the statewide regulatory mechanism. Also, it was identified as one of the priority topics needing to

be addressed in the November 30, 2009 public workshop.

5. Implementation of an Erosion Control Plan (ECP) should not be required for all activities. It is overly burdensome and will reduce volunteer work (e.g., road and trail maintenance.) [# 137]

The Waiver does not require an ECP for any Category A activity, nor for any Category B activity that qualifies for the ECP exemptions in BMP 2.13. Effective erosion control is critically important for minimizing sediment discharges, and an ECP helps all participants to understand what needs to be done. Depending on the erosion risk of the project, ECPs can be very simple and are not expected to interfere with volunteer work. If it proves otherwise, such groups and USFS can request that the State Water Board address that matter.

Comments and Concerns Regarding Other Recreational Activities

1. Recreational activities other than OHV use also have water quality and other environmental impacts [#14].

The WQMH contains BMPs for other recreational activities, but such ongoing activities were not identified as a priority that needed to be addressed during this process. The Schedule of Future Actions (Attachment B) of the Proposed Statewide Waiver identifies those recreation BMPs to be updated during the life of the Waiver.

2. Snowmobile impacts on water quality warrants closing some water quality-sensitive NFS lands and monitoring of impacts. [#5, 26]

While water quality impacts from deposition of snowmobile exhaust onto snow banks are certainly possible, to our knowledge, none have been documented in California, and they are likely less than those from operation of street-legal vehicles along snow-plowed roads or those from far more numerous off-highway vehicles. This impact was not identified as a priority for corrective action during the November 30, 2009 public workshop, although it might be given consideration in the future.

Comments and Concerns Regarding Utility Operations

1. Implementation of the Proposed Statewide Waiver may interfere with utility access, right-of-way, infrastructure, operations, and emergency response [#18, 20]

The State Water Board consulted with the USFS on this comment, and neither the USFS nor Water Boards intend nor expect that the Waiver will have this effect.

2. Utilities want participation in watershed restoration prioritization and planning, travel management planning, riparian zone designation and operational limitations, wet weather operation standards [#20]

The Waiver does not constrain a utility company's ability to participate in these USFS processes. The utilities should consult with USFS.

3. Utilities concerned about who will bear burden of TMDL compliance [#20]

USFS will bear the primary burden of TMDL compliance. Provisions needed to achieve compliance may be incorporated into USFS permits or contracts with utility companies. USFS will have sole authority to determine whether a utility company is complying with permit or contract terms. However, if utility company activities are causing violation of water quality requirements, the affected Regional Water Board may take enforcement actions against the company under its independent authority.

4. Utilities activities should be exempt from Waiver if they are already covered by other Water Board permits, Department of Fish and Game 1602 permits, USFS Master Use or

Special Use Permits, or Right-of-Way Agreements [#120].

The Proposed Statewide Waiver exempts activities that are subject to other Water Board permits. The other types of permits mentioned by the commenters are not specifically designed to achieve compliance with Water Board requirements. Some utility activities may qualify for treatment as Category A activities. Of those that are Category B, only those for which a Regional Water Board has approved an application from USFS would be covered by the Waiver.

Comments and Concerns Regarding Monitoring and Reporting

1. Discharges from NFS land should be routinely monitored to ensure they meet water quality requirements [#24]

The Proposed Statewide Waiver incorporates a Monitoring and Reporting Program (See Waiver Attachment C) that is much broader and more robust than what is currently implemented.

2. The monitoring requirements prescribed by the Proposed Statewide Waiver, the WQMH, and the MND are inadequate. [#26]

Water Code section 13269 requires that the conditions of a waiver shall include “the performance of individual, group, or watershed-based monitoring.” These 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. In establishing monitoring requirements, the regional board may consider the volume, duration, frequency, and constituents of the discharge; the extent and type of existing monitoring activities, including, but not limited to, existing watershed-based, compliance, and effectiveness monitoring efforts; the size of the project area; and other relevant factors.

Additionally, CEQA requires the lead agency to adopt “a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to mitigate or avoid significant environmental effects.” (CEQA Guidelines, §15074d.) This requirement has been incorporated into the Monitoring and Reporting Plan with the requirement of the BMP checklist, as well as a certification at project completion (Attachment G) that all mitigation measures were implemented.

The Proposed Statewide Waiver’s Monitoring and Reporting Plan (Attachment C) sets out an expanded monitoring and reporting program that allows for auditing of projects and activities through a BMP checklist, as well as random BMP implementation and effectiveness monitoring, retrospective monitoring to evaluate long-term performance of BMPs, and more focused monitoring for key sites in selected watersheds, for high risk activities, and for range allotments. It also requires that USFS annually report to the Water Boards and the public the results of its monitoring and any corrective actions that have been or need to be taken to ensure adequate water quality protection. This satisfies the standards set in 13269.

3. Whether and what monitoring should be required for grazing allotments.

A. The Proposed Statewide Waiver should not require additional water quality monitoring for grazing [#21]

Evidence provided by commenters demonstrates that there is cause for concern regarding water quality impacts of livestock grazing on NFS lands. As revised, the Proposed Statewide Waiver’s Monitoring and Reporting Program (Waiver Attachment C) requires monitoring of fecal indicator bacteria at select high-use recreation sites located within or immediately downstream of active grazing allotments.

B. Additional allotment monitoring should be minimized and performed only where there's impairment [#34]

Monitoring is needed to confirm or refute possible impacts or impairment. As revised, the Proposed Statewide Waiver and its Monitoring and Reporting Program is consistent with USFS' WQMH monitoring program and is designed to be feasible for USFS to implement within its existing programs and resources.

C. The Revised Statewide Waiver's Monitoring and Reporting Program (MRP, Attachment C) for fecal indicator bacteria (FIB) associated with grazing is insufficient to identify risks to public health [#127, 130].

The revised Waiver proposes to monitor FIB in locations where the potential risk to public health is highest, i.e., at high-use water recreation areas within or immediately downstream of active grazing allotments. If violations of water quality standards are detected, further monitoring will be conducted to determine the source of the bacteria, and if livestock on the allotments are found to be causing the violations, USFS must report the actions taken to correct them. The monitoring sites can be rotated annually to address more locations. The monitoring results are also intended to help inform future changes in both the monitoring program and in the grazing BMPs.

4. Whether and what monitoring should be done for OHV recreation

The Revised Statewide Waiver's MPR requirements addressing OHV recreation are inadequate to detect and correct many significant water quality impacts. In particular, USFS is not required to close or correct those trails that pose significant risk to water quality [#127]

The results of USFS monitoring of OHV trails must be reported annually to Water Boards and must include the corrective actions taken for identified problems. Problem correction will need to be prioritized and scheduled. Some of the needed correction of legacy OHV trail problems can be achieved through watershed restoration plans or project-specific remediation of legacy problem sites

2. Reporting requirements should be minimized to reduce unnecessary paperwork, and the reporting burden should be on the State Water Board, not USFS [#14, 21].

California Water Code section 13269(a)(2) requires that (with some exceptions) waiver conditions include monitoring that supports development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver's conditions. The NPS Policy requires that a NPS pollution control program include the process to ensure and verify proper implementation and sufficient feedback mechanisms so that the affected Water Board(s), dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required. Under the California Water Code, the discharger, not the Water Board, is held responsible for conducting monitoring. (See Wat. Code §§13267(b)(1), 13269(a)(2).) Therefore, both the USFS WQMH and the Waiver incorporate requirements for monitoring and reporting by USFS. USFS itself has not raised this objection.

3. The specific content, format, and distribution of the report should be specified [#12].

The Proposed Statewide Waiver's Statewide General Condition 19 and its Monitoring and Reporting Program (Attachment C) specify the report contents. Pursuant to the NPS policy, the report must be available to the public.

Adaptive Management

The Proposed Statewide Waiver's adaptive management strategy lacks specific project

objectives, measurable standards, triggers for corrective actions, and pre-defined management consequences with specific timelines for action [#35, 36, 136]

The Proposed Statewide Waiver requires implementation of the adaptive management approach set forth in the USFS WQMH, where it, as well as the USFS overall water quality objectives, is more fully set forth. More specific objectives for water quality are set forth in applicable Basin Plans and need not be reiterated in the adaptive management strategy or in the Waiver. In many cases, specific responses and action schedules related to adaptive management are best decided on a regional or local basis, as opposed to a statewide basis, as they are affected by local conditions and institutional resources. Any project enrolled under the Waiver will implement the adaptive management approach consistent with the framework of the Waiver's water quality requirements, which include the water quality standards of the individual Basin Plans. Violations of these standards are enforceable violations of the Waiver. The Proposed Statewide Waiver specifies that the State Water Board, an affected Regional Water Board, or USFS may terminate waiver coverage for any project, category of projects, or national forest where performance is inadequate.