

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2004 - 0002

In the Matter of the Petitions of

**CALIFORNIA FORESTRY ASSOCIATION; AND ENVIRONMENTAL PROTECTION
INFORMATION CENTER, DELTAKEEPER, CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, SIERRA CLUB CALIFORNIA, and WATERKEEPERS
NORTHERN CALIFORNIA (collectively EPIC)**

For Review of Conditional Waiver of Waste Discharge Requirements
For Discharges Related to Timber Harvest Activities in the
Central Valley Region, Resolution No. R5-2003-0005
Issued by the
California Regional Water Quality Control Board,
Central Valley Region

SWRCB/OCC FILES A-1552 AND A-1552(a)

BY THE BOARD:

I. INTRODUCTION

On January 30, 2003, the Central Valley Regional Water Quality Control Board (Regional Board) adopted Resolution No. R5-2003-0005, which established a new conditional waiver from issuance of waste discharge requirements for discharges resulting from timber harvesting activities. On February 27, 2003, the Environmental Protection Information Center, DeltaKeeper, California Sportfishing Protection Alliance, Sierra Club California, and WaterKeepers Northern California (collectively referred to as "EPIC") filed a petition with the State Water Resources Control Board (State Board or Board) requesting review of the Regional Board resolution adopting the waiver.¹ On March 3, 2003, the California Forestry Association (CFA) filed a petition requesting review of the resolution on different grounds.²

¹ EPIC's petition also requested a stay of the Regional Board order pending the State Board's review of the petition on the merits. By letter dated May 27, 2003, the State Board advised that the request for a stay was denied.

² Water Code section 13320 requires a petition for review to be filed within 30 days of the regional board action or inaction. In this case, the thirtieth day fell on Saturday, March 1, 2003. CFA timely filed its petition on the next regular business day, Monday, March 3, 2003. Additionally, the State Board is reviewing the issues raised in both
[footnote continued next page]

On August 13 and 14, 2003, the State Board held a consolidated evidentiary hearing on the petitions in this matter and on similar petitions requesting review of waivers adopted by the Regional Water Quality Control Boards for the North Coast and Lahontan Regions.³

Based on our review of the record, we conclude that in adopting Resolution No. R5-2003-0005 establishing the categorical waiver for timber harvest activities, the Regional Board complied with the requirements of the Water Code and with the California Environmental Quality Act. However, this Order also concludes that certain provisions of the new conditional waiver should be stricken due to vagueness. We also find it appropriate to encourage Regional Board staff to participate in the cumulative effects workgroup to the extent that they have the resources to do so. Finally, per Regional Board request, we modify the terms of the waiver adopted by Resolution No. R5-2003-0005 to correct various clerical and terminological errors.

II. BACKGROUND

A. Regulation of Timber Harvesting by the California Department of Forestry and Fire Protection and the United States Forest Service

Timber harvesting activities on non-federal lands in California are regulated primarily by the California Department of Forestry and Fire Protection (CDF) and the Board of Forestry (BOF). CDF regulates timber operations pursuant to the Z'berg-Nejedly Forest Practice Act (Forest Practice Act),⁴ the California Forest Practice Rules (Forest Practice Rules),⁵ and the California Environmental Quality Act (CEQA).⁶ CDF utilizes an interagency review team process for the evaluation of proposed timber harvest plans (THPs). The THP review process

petitions pursuant to its authority to review actions of a regional water quality control board on its own motion. (Cal. Code Regs., tit. 23, § 2050.5(c).)

³ The issues raised in the petitions vary depending upon the region in question and the party filing the petition(s). Two petitions were filed concerning the waiver adopted by the Central Valley Regional Water Quality Control Board, one petition was filed concerning the waiver adopted by the Lahontan Regional Water Quality Control Board and another was filed concerning the waiver adopted by the North Coast Regional Water Quality Control Board. Although the hearing on the four petitions was consolidated for purposes of convenience and efficiency, the State Board's review of issues regarding the waiver adopted by each regional board is limited to those issues raised in the petition(s) filed concerning the waiver at issue.

⁴ Pub. Resources Code, § 4511 et seq.

⁵ Cal. Code Regs., tit. 14, § 895 et seq.

⁶ Pub. Resources Code, § 21000 et seq.

has been certified as functionally equivalent to the CEQA process governing preparation of negative declarations and environmental impact reports. (Cal. Code Regs., tit. 14, § 15251(a).)

In 1988, the State Board certified the “Water Quality Management Plan for Timber Operations on Non-Federal Lands,” which included those Forest Practice Rules selected as best management practices and the process by which those rules are administered. Also in 1988, the State Board designated CDF and the Board of Forestry (BOF) as joint Water Quality Management Agencies (WQMA) and executed a Management Agency Agreement with CDF and BOF for the purpose of implementing the certified plan. The Management Agency Agreement between the State Board, CDF and BOF required a formal review of the Forest Practice Rules and administering process no later than six years from the date of certification. To date, that review has not occurred. The United States Environmental Protection Agency (USEPA) has not approved the State Board’s certification of the Forest Practice Rules and administering processes for regulation of timber harvest activities on non-federal lands in California.

Timber harvesting activities on National Forest lands in California are regulated primarily by the United States Forest Service (USFS). In 1981, the State Board designated the USFS as the WQMA for timber harvest activities on National Forest System lands. The USFS implements certified “best management practices” and procedures for protection of water quality as identified in the document entitled, “Water Quality Management for National Forest System Lands in California” and the 1981 Management Agency Agreement between the State Board and USFS. The Management Agency Agreement with USFS contemplates that the regional water quality control boards (regional boards) will waive issuance of waste discharge requirements for USFS timber harvest activities that may result in nonpoint source discharges provided that the USFS designs and implements its projects to fully comply with State water quality standards. The environmental impacts of timber harvest activities on federal lands must be addressed and mitigated in accordance with the federal timber harvest planning process pursuant to the National Environmental Policy Act (NEPA). (42 U.S.C. §§ 4321 et seq.)

The regional boards regulate possible water quality impacts of timber harvest activities by participating in the CDF and USFS timber harvesting review processes and by

exercising the independent authority granted under the Porter-Cologne Water Quality Control Act. (Wat. Code, §§ 13000 et seq.)⁷

B. Statutory Provisions Regarding Waivers of Waste Discharge Requirements Adopted by the Regional Water Quality Control Boards

The record includes extensive evidence demonstrating that timber harvesting and related activities can result in the discharge of sediment and other waste material into nearby streams and rivers. Water Code section 13263 provides that the regional boards shall prescribe requirements regulating waste discharges that implement the provisions of applicable water quality control plans. Since 1969, Water Code section 13269 has authorized regional boards to waive reports of waste discharge and issuance of waste discharge requirements for specific discharges or types of discharges if the waiver is not against the public interest. Waivers of waste discharge requirements for specific types of discharges are called “categorical waivers.” Section 13269 provides that waivers must not be against the public interest, that all waivers are conditional, and that waivers may be terminated at any time by a regional board. Subdivision (e) of section 13269 provides that the regional boards and the State Board “shall require compliance with the conditions pursuant to which waivers are granted under this section.” Water Code section 13350 authorizes the State Board, regional boards, or a court to impose civil liability upon anyone who discharges waste or causes waste to be deposited where it is discharged into waters of the State.⁸

In 1999, Water Code section 13269 was amended to provide that all waivers in effect on January 1, 2000, would expire on January 1, 2003, unless renewed by a regional board. Section 13269 further provides that categorical waivers may not exceed five years, but may be renewed in five-year increments. Subdivision (f) of section 13269 requires that, prior to

⁷ In addition to the regional boards’ authority under the Porter-Cologne Water Quality Control Act, beginning January 1, 2004, the regional boards also have authority to prevent approval of timber harvesting plans on non-federal land if: (1) the proposed timber operations will result in a discharge into watercourse that has been classified as impaired due to sediment pursuant to section 303(d) of the Clean Water Act; and (2) the discharge will cause or contribute to a violation of the Basin Plan. (See Pub. Resources Code § 4582.71, subd. (a), as added by Senate Bill 810, Stats. 2003, Ch. 900, § 3.)

⁸ Water Code section 13350 previously authorized assessment of civil liability on those who intentionally or negligently discharge waste or cause waste to be discharged into the waters of the State. The Legislature recently amended section 13350 to delete the requirement that a discharge be intentional or negligent in order for civil liability to be imposed. (Assembly Bill 897, Stats. 2003, ch. 683, § 4.)

renewing a categorical waiver, a regional board must determine whether the type of discharge covered by the waiver should be regulated under general or individual waste discharge requirements.

Section 13269 was amended again following the adoption of the Waiver. Effective January 1, 2004, waivers must be consistent with any applicable water quality control plans, and must include monitoring provisions. The amendment also authorizes the State Board to adopt annual fees for recipients of waivers. (See Wat. Code, § 13269, subd. (a)(4)(A), as amended by Senate Bill 923 [SB 923], Stats. 2003, Ch. 900, § 1.)

C. The Waiver of Waste Discharge Requirements for Timber Harvesting Adopted by the Central Valley Regional Water Quality Control Board

1. Procedural Background

In 1982, the Regional Board adopted Resolution No. 82-036 (1982 Waiver), which waived waste discharge requirements for twenty-three categories of discharges. “Timber harvesting” was included as one of these categories such that discharges associated with timber harvesting activities were waived if “operating under an approved timber harvest plan,” i.e., a CDF-approved timber harvest plan. The 1982 Waiver did not cover activities conducted under other discretionary or ministerial approval by CDF or the USFS. Pursuant to Water Code section 13269, the 1982 Waiver terminated at the end of 2002.

Prior to the termination of the 1982 Waiver, the Regional Board provided several opportunities for public comment and held a public workshop in September 2002. In general, the timber industry supported the adoption of a waiver that relied solely upon CDF to address discharges that could affect water quality on non-federal lands through implementation of the Forest Practice Rules. However, conservation groups and concerned citizens supported the implementation of a formal regulatory program through the issuance of individual, general or watershed-wide waste discharge requirements (WDRs). Several members of the Regional Board raised concerns that the existing CDF timber harvest regulatory program did not appear to adequately address water quality impacts. They were also concerned about the potential lack of public participation in planning and approving timber harvest activities on federal lands.

Staff from the Regional Board developed a draft waiver policy that addressed these issues in coordination with staff from other regions with significant timberland. On December 23, 2002, Regional Board staff incorporated specific waiver conditions and criteria

into a draft resolution and circulated it for public comment along with a draft Initial Study and Negative Declaration. On January 17, 2003, Regional Board staff circulated a revised draft resolution that incorporated minor revisions responding to the comments received.

On January 30, 2003, the Regional Board adopted a new conditional waiver for discharges from certain timber harvesting activities and approved the accompanying Initial Study and Negative Declaration. The waiver is contained in Attachment 1 to Resolution No. R5-2003-0005 (Waiver), and replaces the 1982 Waiver.

2. The Terms of the Waiver⁹

The Waiver waives the requirement to submit reports of waste discharge and to obtain waste discharge requirements for most timber harvesting activities on non-federal and federal lands. THPs, Non-Industrial Timber Management Plans (NTMPs), Emergencies, Exemptions and any other project consisting of “timber operations” as defined by the Forest Practice Act are potentially eligible for coverage under the Waiver, as are silvicultural activities on federal lands managed by the USFS.

The Waiver is a significant change in the manner of regulating discharges from timber harvesting activities. It divides timber harvest activities into categories that contain specific eligibility criteria an applicant must meet in order to gain coverage under the Waiver. By contrast, the 1982 Waiver simply waived waste discharge requirements for CDF and USFS-approved silviculture activities.

The Waiver became effective on January 30, 2003, and expires on January 30, 2005. However, dischargers who gain eligibility prior to the expiration date may continue to discharge under the Waiver through December 31, 2007, unless the Regional Board formally

⁹ The waivers adopted by the Central Valley and Lahontan Regional Boards are identical in most respects, except for a few differences. Some of the key differences are itemized herein. First, the Central Valley Regional Board’s waiver indicates that its staff will meet periodically with major stakeholders to address water quality issues on a watershed basis. (Resolution No. R5-2003-0005 at p. 5, ¶ 13.) No such provision is included in the Lahontan Regional Board’s Waiver. Second, the Central Valley Regional Board’s Waiver expires on January 30, 2005, while the Lahontan Regional Board’s waiver expires on December 31, 2007. Third, the definition of “Timber Harvest Activities” in the Lahontan Regional Board’s waiver includes “herbicide application” while the definition in the waiver adopted by Central Valley Regional Board does not. Fourth, the Central Valley Regional Board included a General Condition indicating that its waiver does not apply to discharges requiring NPDES permits under the Clean Water Act. No such express provision exists in the waiver adopted by the Lahontan Regional Board. Finally, the eligibility criteria and conditions for each category in the waivers vary in some respects.

terminates the waiver for that discharge or the Regional Board's Executive Officer terminates the Waiver's applicability to a specific discharge.

The Waiver regulates earthen materials, including soil, silt, sand, clay, rock; organic materials, such as slash, sawdust or bark; and silvicultural pesticides that enter or threaten to enter into waters of the State. Wastes not covered include petroleum products, hazardous materials, and human wastes. The Waiver does not apply to discharges requiring a National Pollutant Discharge Elimination System permit (NPDES permit) under the Clean Water Act, including silvicultural point sources as defined in 40 Code of Federal Regulations part 122.27.

a. "Pre-Conditions"

The Waiver for non-federal lands is effective only if two initial conditions are met. The first condition is that the State Board continues to certify the "Water Quality Management Plan for Timber Operations on Non-Federal Lands in California," including those Forest Practice Rules selected by the State Board as best management practices, and continues to designate CDF and BOF as the joint management agencies. The other condition is that the BOF and CDF adopt and implement a water quality regulatory program consistent with the Central Valley Region's Water Quality Control Plan (Basin Plan) as well as a timber harvest verification system with inspection, monitoring, surveillance, and enforcement.

Likewise, the Waiver for federal lands is effective only if two conditions are met. The first is that the State Board continues to certify and the USEPA continues to approve the "Water Quality Management for National Forest System Lands in California" including the designation of the USFS as the management agency. The second is that the USFS maintain a water quality program consistent with the Central Valley Region's Basin Plan and the requirements of all other applicable water quality control plans, and maintains a program to monitor the implementation and effectiveness of best management practices.

b. General Conditions

Eight General Conditions apply to each of the five waiver categories. Generally, these conditions require that the Discharger¹⁰ comply with all applicable water quality control plans; conduct timber harvest activities in accordance with the approved Plan;¹¹ refrain from creating pollution, contamination, or nuisance; refrain from discharging waste that is not specifically regulated by the waivers; allow Regional Board staff reasonable access onto the affected property in order to perform inspections and conduct monitoring whenever requested; and file the applicable eligibility documents with the Regional Board. (See Waiver at p. 3.)

c. The Five Categories of Timber Harvesting Activities Covered Under the Waiver

Following the General Conditions is a section entitled “Category-Specific Conditions.” Each category contains a section describing the eligibility criteria for qualifying under that category as well as a section describing the conditions a Discharger must meet to receive a waiver. Categories 1 through 4 apply to timber harvest activities on nonfederal lands and Category 5 applies to activities on USFS lands.

(1) Category 1: Minor Timber Harvest Activities on Non-Federal Lands

THPs may obtain coverage under Category 1 if they satisfy sixteen eligibility criteria consisting of various management practices. These management practices include: limiting timber harvesting and use of equipment on land with slopes exceeding a specified rating; prohibiting heavy equipment operations on unstable areas and in meadows or wetlands; prohibiting construction of logging roads and watercourse crossings; prohibiting timber harvest activities that may disturb, threaten, or damage aquatic or wetland habitat for rare, threatened, or endangered plants or animals; prohibiting timber harvest activities from October 15 through May 1 or when soil is saturated; and prohibiting timber harvest activities that are accompanied by prescribed burning or post-harvest applications of pesticides. (See Waiver at pp. 4-5.)

The Regional Board’s rationale for Category 1 is that a significant number of exemption notices, emergency notices, and minor THPs are submitted to CDF. If these

¹⁰ For non-federal land, the term “Discharger” includes the timberland owner and anyone working on behalf of the timberland owner. For federal lands, “Discharger” refers to the USFS and anyone working on its behalf. (Waiver at p. 2.)

¹¹ The Waiver’s definition of “Plan” includes Timber Harvest Plans (THP), Non-Industrial Timber Management Plans (NTMP), or other discretionary permits issued by CDF. (Waiver at p. 2.)

operations meet the eligibility criteria, they can receive coverage under the Waiver without additional consideration since discharges from such timber activities are not likely to violate Basin Plan requirements. (CVRB Exhibit A at p. 6.) Of note, the Category 1 eligibility criteria exempt FireSafe treatments conducted under California Code of Regulations, title 14, section 1038(c). (Waiver at p. 4.)

Dischargers may obtain coverage under Category 1 by submitting a copy of a CDF-approved Plan or a CDF-accepted exemption or emergency notice that adopts the sixteen criteria listed in the Waiver. The landowner also must submit a notice certifying that the timber harvest activities will comply with these criteria. (*Id.* at p. 5.)

(2) Category 2: Exempt or Emergency Timber Harvest Activities on Non-Federal Lands that Do Not Qualify for Waiver Under Category 1

Under Category 2, the Discharger must hire a Registered Professional Forester (RPF) to conduct a comprehensive field review of the proposed timber harvest activities. (Waiver at p. 5.) Where timber harvest activities may impact aquatic or wetland habitat for rare, threatened or endangered species, a scientist experienced in aquatic systems must conduct additional field review to determine if the Plan could adversely affect the species or its habitat. (*Id.* at p. 6.) Category 2 also requires that certain management practices be included in the THP, such as an Equipment Limitation Zone for Class III and IV watercourses. (*Ibid.*) The Regional Board asserts that these criteria are similar to those required of THPs not reviewed by Regional Board staff. (CVRB Exhibit A at p. 7.)

To obtain coverage under Category 2, the Discharger must certify that the timber harvest activities will comply with all applicable conditions, notify the Regional Board of any proposed application of pesticides, comply with a monitoring program when directed by the Executive Officer, and submit a final certification to the Regional Board after completion of the timber harvest activities. (Waiver at p. 7.)

(3) Category 3: Timber Harvest Activities on Non-Federal Lands that Receive Discretionary Approval from CDF and For Which Regional Board Staff Has Fully Participated in the Interdisciplinary Review Team Process

Timber harvest activities qualify for coverage under Category 3 where Regional Board staff has participated in CDF's interdisciplinary review process and onsite pre-harvest inspection and CDF has approved the THP. This category applies to thirty percent or less of the THPs submitted in the Central Valley Region. (CVRB Exhibit A at p. 7.) Category 3 essentially grants a waiver based upon the Discharger's acceptance of the management practices and protection measure identified during the review and the pre-harvest inspection. (*Ibid.*) Where necessary, additional management practices and/or water quality protective measures beyond those identified in the Forest Practice Rules must be included in the THP. (Waiver at p. 8.)

The conditions for obtaining coverage under Category 3 are similar to those under Categories 1 and 2. However, in addition, the Discharger must submit a Notice of Timber Operations within 30 days of the commencement of timber harvest activities. The Discharger also must submit a final certification to the Regional Board after completion of the timber harvest activities, as well as copies of annual or completion reports filed with CDF. (*Id.* at p. 9.)

(4) Category 4: Timber Harvest Activities on Non-Federal Lands that Receive Discretionary Approval from CDF and For Which Regional Board Staff Has Not Fully Participated in the Interdisciplinary Review Team Process and Which Are Not Eligible for a Waiver Under Category 1

Approximately seventy percent of the THPs submitted in the Central Valley Region will fall under Category 4. (CVRB Exhibit A at p. 12.) As with Category 2, coverage under Category 4 requires that the Discharger hire an RPF to conduct a field review of the proposed timber harvest activities. (Waiver at p. 9.) Likewise, Category 4 requires additional field review by a scientist where timber harvest activities may impact aquatic or wetland habitat for rare, threatened or endangered species. (*Id.* at p. 10.) The Plan must include any relevant technical reports and must incorporate additional management practices and/or water quality protection measures beyond the requirements of the Forest Practice Rules, necessary to comply with the Basin Plan. The intent of this section is to require the submission and approval of THPs that contain measures and practices similar to those that would have resulted from participation by Regional Board staff in the CDF review team process. (CVRB Exhibit A at p. 11.)

The conditions for obtaining a Category 4 waiver are identical to those for Category 3.

(5) Category 5: Timber Harvest Activities on Federal Lands Managed by the USFS

To meet the eligibility criteria for a Category 5 waiver, the proposed Plan must be the product of the USFS multi-disciplinary review process. Additionally, the USFS must conduct a cumulative watershed effects analysis, include specific measures to reduce the potential for such effects, and provide a reasonable opportunity for public participation and comment. The conditions for obtaining coverage under Category 5 are similar to those described above.

D. Summary of Petitions for Review

1. Petition Filed by EPIC

EPIC (and the other environmental petitioners) allege that the Regional Board has unlawfully attempted to waive permits for point sources of pollution created by some aspects of timber operations; that the Regional Board committed several procedural and substantive violations of CEQA; that the management practices required by the Waiver do not address cumulative watershed effects; and that the Waiver is contrary to the public interest.

2. Petition Filed by the California Forestry Association

CFA alleges that the Waiver is inconsistent with applicable State Board rules and policies, including the state's Nonpoint Source Pollution Control Program, and that the Regional Board exceeded its statutory authority.

III. CONTENTIONS AND FINDINGS¹²

A. Applicability of National Pollution Discharge Elimination System (NPDES) Permitting System to Timber Operations

Contention: EPIC contends that the Regional Board resolution unlawfully waives permits for point source discharges of pollutants. EPIC argues that discharges from all man-made conveyances associated with logging are point source discharges of pollutants rather

¹² This Order does not address all of the issues raised by the Petitioners. The Board finds that the issues that are not addressed are insubstantial and not appropriate for State Board review. (See *People v. Barry* (1987) 194 Cal.App.3d 158 [239 Cal.Rptr. 349], Cal. Code Regs., tit. 23, § 2052.)

than natural runoff. Consequently, the contention is that those discharges must be regulated under the NPDES permit system rather than through issuance of a waiver.

Finding: In addition to felling trees, timber harvesting often involves construction and maintenance of logging roads and watercourse crossings as well as installation and maintenance of culverts and drainage ditches. The applicability of the NPDES permit system to discharges that occur as a result of silvicultural activities is addressed in part 122.27 of 40 Code of Federal Regulations. The regulation provides that silvicultural point sources include several types of specified facilities from which pollutants are discharged into waters of the United States. Silvicultural point sources include “any discernible confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States.” (40 C.F.R. §122.27(b).) The regulation also identifies several other activities such as site preparation, reforestation, thinning, prescribed burning, and road construction and maintenance that are not considered to be point sources.

Petitioners cite *Wilderness Defenders v. Forsgren* (9th Cir. 2002) 309 F.3d 1181, which held that the list of silvicultural point source activities in the 40 Code of Federal Regulations part 122.27(b) is not exhaustive, that the NPDES regulations exclude only natural runoff, and that aerial spraying of pesticide in silvicultural operations was subject to regulation as a point source discharge of pollutants. (*Id.* at pp. 1186, 1188, and 1190.) However, *Forsgren* does not resolve the issue of whether ditches and culverts that channel natural run-off for a short distance within timber harvesting areas result in that run-off becoming subject to regulation as a point source discharge for which an NPDES permit is required.

The subject of regulation of discharges associated with timber operations is addressed in the recent Court of Appeal decision in *Environmental Defense Center v. United States Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832. The decision discusses the obligation of the USEPA to regulate discharges from various sources, including forest roads, as part of the “Phase II” rule-making proceeding for discharges of stormwater pursuant to section 402 (p) of the Clean Water Act. (33 U.S.C. § 1342(p).) The court remanded the rulemaking proceeding to USEPA for several purposes, including directing USEPA to consider the plaintiffs’ contention that section 402(p)(6) requires USEPA to regulate discharges from

forest roads. Prior to concluding that USEPA must consider regulating discharges from forest roads pursuant to the mandate of section 402(p) to regulate stormwater discharges, the court addressed the contentions of the parties regarding the effect of 40 Code of Federal Regulations part 122.27(b) on classification of discharges from forest roads as either point source or non-point source discharges. (*Environmental Defense Center v. United States Environmental Protection Agency, supra*, 344 F.3d at pp. 861-862.) The discussion of those arguments in the decision reflects the court’s recognition that applicability of the NPDES permits to discharges associated with forest roads remains an unresolved issue.

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

¹³ By letter dated October 15, 2003, following submission of legal briefs, counsel for the environmental petitioners advised the State Board of an October 14, 2003, opinion issued by the U.S. District Court for the Northern District of California in *Environmental Protection Information Center v. Pacific Lumber Company, et al.* (Civil Action No. C 01-2821.) The opinion concluded that ditches, culverts, channels and gullies that would be within the definition of “point source” under section 501(14) of the Clean Water Act cannot be removed from that classification by any provision or interpretation of 40 Code of Federal Regulations part 122.27(b). The environmental petitioners argue that, since ditches, culverts and other discrete conveyances are employed as a matter of course by almost all logging operations, compliance with the Clean Water Act requires all logging operations to obtain NPDES permits. However, the opinion is not a reported decision, the case in which it was issued is not yet resolved, and as such has no legal effect on the resolution of the petitions currently before the State Board.

B. The Regional Board Complied With CEQA

Contention: EPIC asserts that the scope of the “project” is the entire approval process for proposed silvicultural activities.

Finding: We take note of the unique nature of the THP approval process. CDF is the lead agency for approving THPs for non-federal lands and USFS is the lead for approving THPs for federal plans. While the Regional Board was the lead agency for adoption of the Waiver, its role in the THP review process as a whole is that of a responsible agency. (See *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 972-973.) As such, CEQA provides that the environmental documents prepared by CDF must be conclusively presumed adequate and relied upon by the Regional Board in meeting its CEQA obligations. (Pub. Resources Code, § 21167.2, Cal. Code Regs., tit. 14, § 15231.) Therefore, the Regional Board properly limited the scope of the “project” to the impacts of CDF and USFS approved silvicultural activities.

Contention: EPIC asserts that the Initial Study’s finding of no significant impacts is unsupported by the record. EPIC further contends that the Negative Declaration incorrectly assumes the Waiver’s conditions and mitigation measures will be effective and that the Regional Board should have prepared an environment impact report (EIR).¹⁴

Finding: We have reviewed the administrative record to determine whether the Regional Board prejudicially abused its discretion. (*Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277, citing *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116-117.) Generally, an agency abuses its discretion only if it does not proceed in a manner required by law or if its determination or decision is not supported by substantial evidence. (*Ibid.*; Pub. Resources Code § 21168.) The test is whether the Regional Board made an objective, good faith effort to comply with the CEQA Guidelines. (*Fat v. County of Sacramento, supra*, 97 Cal.App.4th at p. 1277, citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 305.) Because the Regional Board’s factual

¹⁴ Unless a proposed project is exempted by statute or regulation, CEQA requires that the lead agency prepare an EIR if there is substantial evidence in light of the whole record that the project may have a significant effect on the environment. Subdivision (b) of Public Resources Code section 21080 specifies several types of activities that are statutorily exempt from CEQA. In addition, the California Code of Regulations lists several categories of activities that the Resources Agency has determined do not have a significant effect on the environment and ordinarily will be exempt from CEQA. (Cal. Code Regs., tit. 14, §§ 15300 et seq.)

determinations are subject to deferential review and because we find nothing in the record to call those determinations into question, we find the Regional Board acted properly and did not abuse its discretion in its CEQA findings.

The critical issue in determining compliance with CEQA is the “baseline.” Pursuant to CEQA, an EIR is required where a project may have a significant adverse effect on the environment. (Cal. Code Regs., tit. 14, §§ 15002 and 15064.) The CEQA regulations address the appropriate baseline to be used in considering whether a project may have a significant adverse effect on the environment.¹⁵ The baseline is the environment as it exists at the time the environmental analysis is performed. (*Id.* at §§ 15125 and 15126.2.) We have previously held that, “The baseline refers to the point of reference, also referred to as existing physical conditions or the existing environment, against which changes are measured to determine if a project may have a significant adverse effect.” (Order WR 2001-07 at p. 3.) In this case, then, the baseline is the set of conditions that existed when the Regional Board began work on the Waiver and accompanying environmental documents.

EPIC essentially alleges that the evidence in the record concerning serious impacts to water quality for existing timber harvest activities is a basis for requiring an EIR. However, the court in *Fat v. County of Sacramento* rejected a similar claim against the adoption of a negative declaration. (*Fat v. County of Sacramento, supra*, 97 Cal.App.4th at pp. 1280-1281.) In that case, the court held that the county properly used the environmental setting that existed at the beginning of the environmental review in determining an EIR to be unnecessary. (*Ibid.*) In this matter, the Regional Board determined the current Waiver, which includes much more stringent management practices than the Forest Practice Rules and 1982 Waiver, would result in an improved water quality as compared to the environmental conditions under the prior waiver. Because the additional management practices were designed to prevent discharges that would cause significant environmental effects and because the Waiver only applies to such projects, we find it was reasonable for the Regional Board to adopt a negative declaration.

¹⁵ The lead agency is required to prepare an Initial Study, which includes a description of the “environmental setting.” (Cal. Code Regs., tit. 14, § 15063, subd. (d)(2).) The Initial Study is used to determine whether an EIR is required or whether a Negative Declaration will suffice. (*Id.* at § 15070.)

C. The Waiver Is Not Against the Public Interest

Contention: EPIC alleges that the waiver is against the public interest because it does not assure compliance with water quality objectives.

Finding: The 1982 Waiver covered only those silvicultural activities subject to THPs and did not contain additional conditions. In contrast, the more recently adopted Waiver applies to THPs, NTMPs, Exemptions, and Exceptions and contains significant conditions that are enforceable by the Regional Board. It is tailored to complement the regulatory programs implemented by CDF and the USFS and to assure that relevant water quality objectives of the Basin Plan are met. The Executive Officer is authorized to terminate the Waiver for a specific discharge at any time. The Regional Board may enforce the Waiver by imposing an administrative civil liability for violations.

In Resolution No. R5-2003-0005, the Regional Board found that the Waiver would not be against the public interest where dischargers: (a) complied with the conditions set forth in the Waiver; (b) filed applicable eligibility documents with the Regional Board to demonstrate that compliance with the conditions would be achieved; and (c) complied with all applicable State Board and Regional Board plans and policies. (See Resolution No. R5-2003-0005 at p. 4, ¶ 5.) Considering the detailed and specific terms of the Waiver, this finding was reasonable.

Contention: EPIC asserts that the Regional Board should have adopted waste discharge requirements and collected the accompanying fees, which would have provided more funding for regulation of silvicultural activities.

Finding: As previously noted, after the Regional Board adopted the Waiver, the Legislature enacted SB 923. SB 923 is effective January 1, 2004, and allows for the collection of fees in order to obtain coverage under a waiver. This Board may consider revising its fee schedule to include waiver fees during the coming year.

The subject of fees for a particular waiver involves consideration of several factors including the costs of overseeing the waiver program and the availability of funds from other sources to cover those costs. In this instance, there is insufficient evidence in the record to establish that the public interest requires payment of fees in order for timber harvesting to qualify for coverage under a waiver adopted pursuant to Water Code section 13269.

Further, in light of the current spending restrictions to which all State agencies are subject, even if fees were imposed the State and Regional Board would not be able to hire additional staff for the purpose of regulating timber harvest activities. The fact that the Regional Board chose to issue a waiver in lieu of waste discharge requirements does not prevent the funding of the regulatory program through fees.

D. The Waiver Is An Appropriate Step In Addressing Cumulative Watershed Effects

Contention: EPIC contends that the Waiver was inappropriate because it fails to address cumulative watershed effects. EPIC further asserts that the Regional Board should have adopted watershed-wide waste discharge requirements.

Finding: Water Code section 13263 grants regional boards authority to adopt waste discharge requirements and section 13269 authorizes regional boards to issue waivers of waste discharge requirements. Accordingly, the Regional Board has discretion in determining whether to adopt waste discharge requirements or a waiver. Both waivers and waste discharge requirements are fully enforceable.

We find that the Regional Board acted within its discretion in adopting a waiver that includes conditions protective of water quality and is consistent with the Basin Plan. In fact, the Waiver may be more prescriptive than waste discharge requirements because a Discharger must agree to implement certain management practices in order to obtain coverage under the Waiver. It is arguable that such management practices could not have been included in a permit for waste discharge since section 13360 prohibits regional boards from specifying the means of compliance.

The essence of EPIC's argument is that harvest rates should be adjusted to assure compliance with water quality objectives. However, CDF, the BOF, and the USFS are the agencies primarily charged with controlling harvest rates. EPIC further states that where silvicultural activities are causing violations of water quality objectives, the Regional Board should issue "discharge prohibitions." (Environmental Petitioners' Closing Brief at p. 9.) We note that the Waiver does not prevent the Regional Board from issuing waste discharge requirements where appropriate. Indeed, the Regional Board presented evidence that demonstrated a readiness and willingness to do just that.

EPIC also asserts that the Waiver is inadequate because it fails to provide for watershed-based monitoring. Again, Water Code section 13269 was amended to include a provision mandating the “performance of individual, group, or watershed-based, monitoring” unless the Regional Board determines that the discharge does not pose a threat to water quality. (SB 923 at subd. (a)(2) - (3).) It is appropriate, then, for the Regional Board to amend the Waiver in a manner that is consistent with SB 923. However, because SB 923 was enacted after adoption of the Waiver, we cannot conclude that the Regional Board’s failure to require watershed-based monitoring was an abuse of discretion.

EPIC claims that there is no evidence that the conditions in the Waiver will be effective in addressing cumulative watershed effects. While EPIC presented evidence indicating that timber harvest activities cause environmental impacts, such evidence, where it pertained to the Central Valley Region, was gathered while the 1982 Waiver was in effect. EPIC asserts that even the most well implemented BMPs result in cumulative watershed effects. However, the Waiver conditions require management practices that go beyond those contained in the Forest Practice Rules. EPIC did not present evidence sufficient to show that these additional conditions would result in significant environmental impacts. On the other hand, the Regional Board presented evidence showing that the Waiver’s management practices were the same or were better than those that Regional Board staff would require after full participation in the interdisciplinary review team process. Accordingly, we find that substantial evidence exists to conclude that the Regional Board’s adoption of the Waiver was not an abuse of discretion. However, we find it appropriate to order that Regional Board staff regularly participate in the interagency cumulative effects workgroup.

E. The Waiver Is Consistent With State Board Rules and Policies

Contention: CFA contends that the Waiver is inconsistent with the State Board’s rules and policies, specifically the Plan for California’s Nonpoint Source Pollution Control Program (NPS Plan). CFA further asserts that the NPS Plan requires that the principal means of controlling NPS pollution is the development, implementation, and monitoring of Best Management Practices (BMPs) through the “Three-Tiered Approach.” The Three-Tiered Approach uses progressively more stringent regulatory options.

Finding: It appears that many of CFA's contentions are based upon the 1988 version of the NPS Plan, rather than the more current version adopted in the year 2000. CFA asserts that Tier Two of the Three-Tiered Approach requires either the adoption of waivers of waste discharge requirements conditioned upon BMPs *or* entering into a Management Agency Agreement where the Managing Agency has authority to adopt and enforce BMPs. Since the State Board has entered into Management Agency Agreements with CDF, BOF, and the USFS, CFA contends that the Regional Board should have adopted a waiver that relies solely upon these agreements and the Forest Practice Rules. We disagree.

The NPS Plan provides a recommended regulatory approach, but does not disturb the Regional Board's discretion to choose the appropriate course of action. (See NPS Plan at p. 55 ["In practice, the [regional boards] will determine which or what combination of the three options will be used to address any given NPS problem."].) Further, in adopting the NPS Plan, we recognized that the Forest Practice Rules should be improved to address discharges from certain aspects of silvicultural operations. (NPS Plan at pp.112-116.)

Additionally, the Forest Practice Act does not limit the authority of the regional boards or any other state agency. (See Pub. Resources Code, § 4514, subd. (c) ["No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on . . . the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized to enforce or administer."].) Therefore, the Regional Board may properly require the implementation of management practices above and beyond those contained in the Forest Practice Rules.

Extensive evidence exists to indicate that the Regional Board's adoption of the Waiver was appropriate. Impairment of various water bodies in California has occurred under the previous regulatory scheme that generally did not require implementation of management practices beyond those by the Forest Practice Rules for timber harvesting on non-federal lands. USEPA has declined to approve the Forest Practice Rules as BMPs in California, stating that "the continuing impacts of timberland management lead us to conclude that the [State Board] and [regional boards] should not automatically waive direct regulation of silvicultural activities." (Correspondence dated July 11, 2002, to State Water Resources Control Board from USEPA, Region IX.) Many of the management practices incorporated into the Waiver are of the type that

Regional Board staff would recommend to be incorporated into a THP when fully participating in the interdisciplinary review team process.

In light of the staff limitations and evidence that the Forest Practice Rules alone are not sufficiently protective of water quality, we find the Regional Board's adoption of a waiver requiring the implementation of management practices that go above and beyond those required under the Forest Practice Rules was reasonable.

Contention: CFA contends that the Waiver violates the prohibition on specifying the means of compliance contained in Water Code section 13360.

Finding: This argument ignores the fact that the Waiver is optional and no discharger is required to obtain coverage. We also have stated that a regional board has the authority to specify the management practices necessary to qualify for a conditional waiver. (See NPS Plan at p. 57 ["[Regional Boards] have discretion in deciding what BMPs to encourage through conditional waiver of [waste discharge requirements].) Therefore, we find this argument to be without merit.

F. The Regional Board Did Not Exceed Its Statutory Authority

Contention: CFA asserts that the Waiver unlawfully expands the Regional Board's authority under section 13267 of the Water Code, which provides that a regional board may require technical or monitoring reports when investigating the quality of waters within its region. Conditions in the Waiver state "[t]he discharger shall comply with a monitoring program when directed in writing by the Executive Officer." Because there are no limitations, CFA asserts that this provision exceeds the scope of section 13267.

Finding: Monitoring is a reasonable requirement consistent with the Regional Board's objective of protecting water quality. The Waiver in no way requires monitoring universally. Rather, it provides the Executive Officer with discretion to require monitoring when appropriate.

CFA also cites *Pacific Lumber Company v. California State Water Resources Control Board* (2003) Case No. DR010860 in support of its assertion that the Waiver's monitoring provisions exceed the Regional Board's statutory authority. *Pacific Lumber Company* is an unpublished opinion of the Superior Court and is currently under appeal. Therefore, we do not rely on that decision in this order. We also note that the *Pacific Lumber*

Company opinion is arguably inconsistent with section 4514 of the Public Resources Code, which expressly preserves a state agency's statutorily prescribed authority.

Further, as previously stated, SB 923 specifically allows for monitoring requirements in waivers. Such monitoring requirements must be designed to support the development and implementation of the waiver program. We find that any requirement for monitoring imposed by the Regional Board must be consistent with the provisions of SB 923. Likewise, any such monitoring requirement must be consistent with Water Code section 13267, which provides that the costs of the monitoring be considered and bear a reasonable relationship to the need for the reports and benefits to be obtained.

Contention: CFA alleges that the Waiver exceeds the Regional Board's authority to enter and inspect private property. The Regional Board's existing authority is pursuant to Public Resources Code section 4604(b)(1) which provides that a regional board, if accompanied by CDF and after 24-hour advance notice, may enter and inspect land during normal business hours at any time after commencement of timber harvest activities.

Finding: The provision allowing inspection of property is standard in most regulatory actions by the State Board and regional boards. General Condition 5 requires the discharger to give Regional Board staff reasonable access onto the property for the purpose of performing inspection and conducting monitoring. (Waiver at p. 3.) A discharger who seeks a waiver of waste discharge requirements is appropriately expected to consent to reasonable access to its property.

Contention: CFA asserts that the Waiver exceeds Regional Board jurisdiction by directly regulating impacts on rare, threatened, or endangered species and their habitats.

Finding: This feature of Categories 2 and 4 is encountered in only ten percent of proposed THPs in the Central Valley Region, but poses some of the biggest concerns with respect to maintaining beneficial uses. (CVRB Exhibit A at pp. 9-10) The Forest Practice Rules specify that an RPF may determine the impacts on virtually any feature encountered in a THP, including impacts on the natural resources of the State. (Cal. Code Regs., tit. 14, § 1092.12.)

The Waiver does not regulate rare, threatened, or endangered species directly. Rather, it protects the aquatic habitat for such species, a beneficial use identified in the Basin

Plan. We find that the Regional Board may properly regulate impacts to the beneficial uses of water as identified in the Basin Plan.

Contention: CFA asserts that the Waiver exceeds Regional Board jurisdiction by directly regulating pesticide application.

Finding: The Waiver does not prohibit the use of pesticides, but requires notice of their application. The Regional Board has found that pesticides associated with silvicultural activities may result in impacts to water quality. Accordingly, it was reasonable to include a provision in the Waiver that requires Dischargers to notify the Regional Board of any proposed pesticide application.

G. Provisions To Be Stricken From the Waiver

The Waiver for non-federal lands is effective only if two initial conditions are met. The second of these conditions is that the BOF and CDF adopt and implement a water quality regulatory program consistent with the Basin Plan as well as a timber harvest verification system with inspection, monitoring, surveillance, and enforcement. Including this condition is problematic because it implies that the desired program is not now in effect, which makes whether or not the Waiver is currently operative unclear. Therefore, we hereby strike this condition from the Waiver.

H. Modifications to the Waiver.

At the January 7, 2004, workshop held on this matter, Regional Board staff requested that the State Board make modifications to Resolution No. R5-2003-0005 to correct various clerical and terminological errors. That request is granted.

IV. CONCLUSION

Based on the findings above, the State Board concludes that substantial evidence exists to support the Regional Board's adoption of the Negative Declaration for the interim categorical waiver. The Waiver includes specific criteria to ensure compliance with requirements of the Basin Plan and to prevent discharges that may substantially impact water quality. Further, the Regional Board's actions were consistent with State Board policies and procedures and the terms of the Waiver do not exceed the Regional Board's statutory authority.

However, the provision of the Waiver requiring that CDF and BOF adopt and implement a water quality regulatory program and a timber harvest verification system makes the

waiver for timber harvesting on non-federal land conditional upon future actions that are not under control of the Regional Board or potential dischargers, and which are not subject to verification in any apparent or specified manner.

V. ORDER

IT IS HEREBY ORDERED that:

1. Paragraph number 2 on Page 1 of Attachment A to Resolution No. R5-2003-0005 is stricken.
2. The Regional Board shall encourage its staff to participate in the interagency cumulative effects workgroup.
3. Resolution No. R5-2003-0005 and Attachment A are hereby modified as follows:
 - a. Resolution, Page 3, Item 15: the phrase “best management practices” is replaced with the acronym “BMPs”;
 - b. Attachment A, Page 4, Item 7: the word “Competed” is replaced with “Completed”;
 - c. Attachment A, top of Page 14: Item “e” is changed to item “f”;
 - d. The term “review team” is replaced throughout Attachment A with the term “Review Team”.

///

///

///

4. In all other respects, the petitions are denied.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 2004.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Richard Katz
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: None.

ABSTAIN: None.


Debbie Irvin
Clerk to the Board