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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Order No. R1-2009-0038 of the North Coast Regional Water Quality Board, Adopting A Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities On Non-Federal Lands in the North Coast Region	SWRCB/OCC File: _____ **PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION; and REQUEST FOR IMMEDIATE STAY** [Water Code § 13320]

In accordance with Water Code section 13320, California Farm Bureau Federation ("Farm Bureau"), Forest Landowners of California ("FLC"), The Buckeye Conservancy, California Licensed Foresters Association ("CLFA"), and Association of Consulting Foresters of American, California Chapter ("ACF") (collectively "Petitioners") hereby petition the State Water Resources Control Board ("State Board") to review the action by the North Coast Regional Water Quality Board ("Regional Board") in issuing Order No. R1-2009-0038, adopting a Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities On Non-Federal Lands in the North Coast Region ("Categorical Waiver").

A summary of the basis for Petitioners' Petition for Review and a preliminary statement of points and authorities are set forth in this Petition for Review in accordance with California Code of Regulations, title

23, section 2050(a). Petitioners reserve and request the right to file supplemental points and authorities in support of the Petition for Review once the administrative record becomes available. Petitioners also reserve the right to submit additional arguments and evidence responsive to the Regional Board's or other interested parties' responses to the Petition for Review, to be filed in accordance with California Code of Regulations, title 23, section 2050.5. Finally, in accordance with California Code of Regulations, title 23, section 2050(b), Petitioners request a hearing for the purpose of presenting additional evidence, which evidence was available and not presented to the Regional Board due to notice concerns expressed in Section 4.a below.

The Petitioners are organizations whose members are directly affected by the Categorical Waiver. As explained below, Petitioners' members are individuals engaged in the forest products industry within the North Coast Region of the Regional Water Quality Control Board.

California Farm Bureau Federation

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 32,000 farm families and more than 85,000 individual members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Many Farm Bureau members throughout the Regional Board's jurisdiction are timberland owners and/or operators who will be directly impacted by the Categorical Waiver. Furthermore, Farm Bureau members throughout California depend upon a healthy and vibrant wood products ecology and economy; both of which will be harmed by the Categorical Waiver.

Peter Bussman, Farm Bureau member, gave oral and written comments to the Regional Board at its April 23, 2009 meeting held in Fortuna. Mr. Bussman also owns lands whereon the timber harvest operations are subject to a Non-industrial Timber Management Plan ("NTMP") that will be directly impacted by the Categorical Waiver.

Forest Landowners of California

Since 1975, Forest Landowners of California has represented the interests of non-industrial private timberland owners who collectively own 4.6 million acres (twenty-three percent) of California's unreserved productive forestlands. FLC is affiliated with the American Forest Foundation that represents ten million small family forest landowners that own 60% of the forestland in the United States. Currently, 90,000 family forest landowners are certified under the American Tree Farm System ("ATFS"), a program of the American Forest Foundation. ATFS is the oldest forest certification program in the world, dating back to 1941, and has consistently enabled private non-industrial landowners to continue and grow in their commitment to sustainable forestry.

The NTMP was first proposed by FLC as a mechanism to encourage and promote sustainable management of family forests. The NTMP was adopted by the state legislature in 1989 "to increase the productivity of (private nonindustrial) timberlands under prudent management plans to serve the public's need for timber and other forest products" (Pub. Resources Code, § 4593(a)); and implementation rules were adopted by the Board of Forestry in 1981.) During the period from 1993 through March 2008, 722 NTMPs were submitted covering 315,197 acres. This calculates to an average size of 437 acres per NTMP. By the year 2020, these NTMPs are projected to contain more than nine billion board feet of standing timber and will have harvested over 3 billion board feet of saw timber.

John W. Williams, a member of the Board of Directors of Forest Landowners of California and its most recent past President, testified in person as a representative of FLC to the North Coast Regional Water Quality Control Board at its June 4, 2009 Public Hearing on Order No. R1-2009-0038 and presented for the public record a letter on FLC letterhead expressing FLC's concerns and objections to the proposed Order.

The Buckeye Conservancy

The Buckeye Conservancy is an organization with the mission to protect open space and family ranchland values on California's North Coast. The Buckeye Conservancy consists of about 150 family farm, ranch and forest landowners and resource managers. The Buckeye Conservancy is dedicated to the promotion, communication, and implementation of those ideals and policies that support the ecological and economic sustainability of natural resources and open space in family ownership.

The Buckeye Conservancy participated in the Regional Board's workshops and hearing on this

matter, including: on March 24, 2009 several representatives of the Buckeye Conservancy attended the public workshop held by Regional Board staff in Fortuna; on April 23, 2009 several representatives of the Buckeye Conservancy presented information to the Regional Board regarding overlapping state regulations and the basics of a NTMP at the Regional Board meeting held in Fortuna – these comments were included as part of the record for the Categorical Waiver; on May 9, 2009, the Buckeye Conservancy submitted a timely comment letter regarding the Categorical Waiver; on June 4, 2009, two representatives of the Buckeye Conservancy travelled to Santa Rosa from Humboldt County in order to present testimony at the Regional Board's Public Hearing to Consider Adoption of a Mitigated Negative Declaration and Order No. R1-2009-0038, Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvesting Activities On Non-Federal Lands in the North Coast Region.

California Licensed Foresters Association

The California Licensed Foresters Association, with a membership responsible for the sustained management of millions of acres of California forestland, represents the common interests of California Registered Professional Foresters. CLFA provides opportunities for continuing education and public outreach to its membership, which includes professionals affiliated with government agencies, private timber companies, consultants, the public and the academic community. Governed by an elected Board of Directors, CLFA was established in 1980 after the passage of the landmark California Professional Foresters Law.

CLFA supports this petition because it believes that the recent Regional Board action modifying its timber waiver is a serious threat to CLFA members' ability to practice their chosen profession in California. CLFA believes that the Categorical Waiver further destabilizes an already depressed resource sector, posing a serious threat to California's future quality of life by potentially forcing private forest landowners to cease management of timberlands as working forests, in favor of less environmentally desirable land uses.

CLFA's Vice President, Jason Poburko, provided written comments in opposition to the proposed action. Other CLFA members were also present and provided oral and written comments in opposition to the adoption of the Categorical Waiver.

Association of Consulting Foresters of America, California Chapter

The Association of Consulting Foresters of America, Inc. was founded in 1948 to advance the

professionalism, ethics, and interests of professional foresters whose primary work was consulting to the public. The ACF is the only national association for consulting foresters. Currently, there are more than 675 members in 38 states and 1 Canadian province. The ACF is organized into state or multi-state chapters located in most forested regions of the U.S. There are 26 chapters which hold regular meetings and pursue regional issues. A National Office is maintained in the Washington, D.C. area to pursue national level issues and interact with other organizations involved in forest management. ACF members operate in corporations, partnerships, and sole proprietorships with 1 to 100+ employees. Many are general foresters while others have professional specialties within forestry. Clients include landowners, forest industries, investment & financial industries, attorneys, government agencies, bankers, trusts, Native American corporations, and many others. Many operate within their own localities, while others consult worldwide.

ACF members Mitchell Haydon and Nick Kent provided oral comments to the Regional Board at its June 4 public hearing. James Able, Charll Stoneman, and Dan Cahoon presented comments at the March 24, 2009 workshop held by board staff in Fortuna. In addition, John W. Williams, also a member of ACF, presented testimony on behalf of FLC at the June 4, 2009 public hearing. All five ACF members identified here are also California Registered Professional Foresters.

Each of the Petitioners, through their members, participated in proceedings before the Regional Board expressing concerns in opposition of the Categorical Waiver. Water Code section 13320(a) provides in relevant part, "[a]ny aggrieved person may petition the state board to review that action or failure to act." Given that the adopted Categorical Waiver directly harms Petitioners and its members, Petitioners are proper parties before the State Water Board.

1. NAME, ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS OF PETITIONER:

All materials and documents generated in connection with this Petition for Review should be provided to Petitioners at the following addresses:

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2. SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

Petitioners seek review of the actions of the Regional Board in connection with the adoption of the Categorical Waiver of Waste Discharge Requirements For Discharges Related to Timber Harvest Activities On Non-Federal Lands in the North Coast Region ("Categorical Waiver"), Order Number R1-2009-0038, in its entirety, as discussed below. In adopting the Categorical Waiver, the Regional Board

acted in a manner contrary to law, and acted contrary to the public policy of the State of California. A true and correct copy of Categorical Waiver is attached to this Petition as Exhibit 1.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED:

The Regional Board adopted Order No. R1-2009-0038 on June 4, 2009. Unless otherwise provided, the Petitioners contend that all actions and inactions of the Regional Board challenged herein are not supported by adequate findings or evidence in the record and/or are inconsistent with applicable law.

4. STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR IMPROPER:

As foresters, timberland landowners and/or operators, and individuals reliant upon the ecological and economic health of forestlands, Petitioners are obligated to comply with the Forest Practice Act and Forest Practice Rules. Petitioners' members who hold NTMPs or develop NTMPs for clients, have made, and continue to make, long-term commitments to the State of California pursuant to the Forest Practice Rules ("FPRs") to sustainably harvest substantially less timber, maintain stand volume over time, and protect attendant public trust forest values. In exchange for these commitments, the Legislature specified that the obligations of the landowner (which were established at much higher standards than required in other forest practices) would be fixed at the time the NTMP was approved. (See Pub. Resources Code, § 4593 et seq.)

The Regional Board has an active role in the development of NTMPs and timber harvest plans ("THPs") as a responsible agency under the California Environmental Quality Act. (See *Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region*, Order No. R1-2004-0016 (Order No. R1-2004-0016), adopted on June 23, 2004, at p. 4; see also Pub. Resources Code, § 21069; Cal Code Regs., tit. 14 § 15381.) In this capacity, the Regional Board reviews NTMPs and THPs to ensure that activities covered by the NTMP or the THP comply with applicable water quality standards and provisions contained in the Water Quality Control Plan for the North Coast Region ("Basin Plan"). (*Ibid.*)

The State Board and the nine Regional Water Quality Control Boards also have primary responsibility for water quality control in California. (See Wat. Code, § 13000 et seq.) To implement water quality controls, the Regional Water Quality Control Boards may exercise discretion in developing and adopting water quality control plans, as well as adopting waste discharge requirements

for individual dischargers or groups of dischargers. (See Wat. Code, §§ 13243, 13260, 13263.) Water Code section 13269(a) provides that Regional Water Quality Control Boards may waive waste discharge requirements for specific discharges or specific types of discharges "if the state board or a regional board determines, after any necessary state board or regional board meeting, that the waiver is consistent with any applicable state or regional water quality control plan and is in the public interest." (Wat. Code, § 13269(a).) Adoption of waste discharge requirements, and by extension the adoption of conditional waivers from waste discharge requirements, is considered to be a quasi-judicial act.

Over the last several years, the Regional Board has adopted several Categorical Waivers for timber harvest activities on non-federal lands pursuant to its authority under Water Code section 13269. (See Order Nos. R1-2002-0109, R1-2003-0116 and R1-2004-0016.) With each Categorical Waiver, the Regional Board recognized that timber harvest activities covered by NTMPs were appropriately the subject of waivers from Water Code requirements for Reports of Waste Discharge and Waste Discharge Requirements. (See Wat. Code, §§ 13260, 13263, 13269; see also Order Nos. R1-2002-0109, R1-2003-0116 and R1-2004-0016.) To make such a determination, the Regional Board necessarily found that timber harvest activities specified in the waivers were consistent with the Basin Plan and in the public interest.

Lacking sufficient pertinent evidence to support its claims, the Regional Board nonetheless now finds that to be eligible for the Categorical Waiver, NTMPs and THPs must be subject to new general and specific conditions not required under previous waivers. For the reasons expressed more fully here, these costly new requirements are not supported by the evidence in the record and should be removed from the Categorical Waiver.

Furthermore, the California Department of Forestry and Fire Protection ("CAL FIRE") is in the process of adopting new science-based rules for protection of watersheds with anadromous salmonid species ("T/I Rules"). These rules will establish new requirements and operational practices in the FPRs for commercial harvest activities on private lands. The Regional Board should renew Categorical Waiver R1-2004-0016 at least until such time that CAL FIRE has adopted the T/I Rules, which are due for adoption in October of 2009.

A. The Regional Board's Action Was Not Adequately Noticed

Petitioners' members and many other landowners and/or operators were unable to provide testimony and evidence before the Regional Board because of inadequate notice to them as affected persons. Further, notice was not provided to many of the NTMP and THP holders who are directly affected by the Categorical Waiver. The problem of inadequate notice is greatly aggravated by the fact that NTMP holders held the expectation that the rules set forth in their adopted NTMPs, as approved by CAL FIRE and the Regional Board as a responsible agency, would not change. Consequently, without direct notification that the Regional Board was altering those conditions, they would not be aware of how this action could impact them.

With respect to notice, the Regional Board is subject to specific notice procedures for proposed actions. (See Cal. Code Regs., tit. 23 § 647 et seq.) More specifically, the Regional Board's governing regulations, as adopted by the State Board, state, "[n]otice shall be given to all persons directly affected by the proceedings on the agenda and to all persons who request in writing such notice. Notice shall also be given to any person known to be interested in proceedings on the agenda." (Cal.Code Regs., tit. 23, § 647.2) In this case, the Regional Board provided "public" notice to a list of 185 interested parties on or about April 9, 2009. (See Exhibit 2.) However, the notice provided fails to comply with all of the notice requirements expressed in the applicable regulation because all "persons directly affected by the proceedings" were not given notice.

In particular, the Regional Board failed to provide notice to the approximately 500 landowners and/or operators with NTMPs that are directly affected by new costly conditions and requirements in the Categorical Waiver, many of whom are members of groups represented by Petitioners. For example, the Categorical Waiver as noticed and adopted by the Regional Board requires landowners and/or operators with NTMPs to now submit more stringent Erosion Control Plans ("ECPs") with each submittal of a Notice of Timber Operations ("NTO"), and to submit a long-term management Road Plan. (Categorical Waiver at pp. 14-17.) Among other conditions, these provisions were not previously required under Order No. R1-2004-0016, or other applicable waivers. Without proper notice to the affected persons, they have no knowledge of the conditions and requirements that will be imposed when they file a NTO, which is a notice requirement specific to NTMPs.

Considering the fact that NTMPs are plans adopted by CAL FIRE and that the Regional Board reviews all NTMPs as a responsible agency under CEQA, the Regional Board is clearly aware and has first hand knowledge of the individual landowners (i.e., persons) that will be directly affected by the Categorical Waiver. At the very least, the Regional Board could easily have identified those affected by these provisions and provided them notice by obtaining names and addresses from its own database or from CAL FIRE. However, the Regional Board failed to provide notice to those directly affected by its action even though there was discussion at the June 4, 2009 Regional Board meeting that these NTMP holders would be affected.

Furthermore, the Categorical Waiver was substantively modified at the June 4, 2009 Regional Board meeting and should have been re-noticed and re-circulated for comment. Among changes made was the addition of language stating that the Categorical Waiver implemented TMDLs within the region. (*See* recording of June 4 meeting at approximately 3:24:00). The public notice did not indicate that the Categorical Waiver would implement TMDLs, and furthermore it is not clear which TMDLs will be implemented, and was therefore inadequate. As demonstrated by the change made at the meeting, one purpose of the Categorical Waiver is to now function as a TMDL implementation plan; it was even indicated that this is one reason the why ECPs are now extended to the entire NTMP area under the Categorical Waiver. (*See* recording of June 4 meeting at approximately 00:20:30). The fact that the Categorical Waiver no longer just "complies" with the TMDL, but serves as a TMDL implementation plan was not properly noticed.

In light of the lack of adequate notice, the State Board should remand the Categorical Waiver in its entirety to the Regional Board with specific direction regarding the need for adequate notice and opportunity to be heard by persons directly affected, and to allow for public comment on substantive changes that occurred without notice.

B. The Regional Board's Findings Are Not Supported by Evidence in the Record

In California, the Regional Board must support its decisions with specific findings based on evidence in the record. In particular, the Regional Board must "set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; see also *In Re Petition of the City and County of San Francisco, et al.* (Sept. 21, 1995) SWRCB Order No. WQ 95-4, at pp. 10, 13;

1995 Cal. ENV LEXIS 25, at pp. 13, 17.) Further, the findings must be supported by evidence in the record. (*Topanga Assn. for a Scenic Community* at pp. 514-515.) Notably, the Regional Board has adopted no findings to sufficiently explain why the new conditions and requirements in the Categorical Waiver for waiver categories E and F are necessary. At most, the Regional Board makes findings for both categories that merely state that with the additional conditions and requirements, NTMPs and THPs are not expected to pose a significant threat. (Categorical Waiver at p. 5-6.) However, nowhere does the Regional Board specifically state why such requirements are necessary, nor is there evidence in the record to support the application of such new requirements to NTMPs and THPs. (See Timber Waiver Staff Report at pp. 16-17, whereby it fails to include a rationalization or supporting basis for additional requirements on timber harvest activities subject to NTMPs and THPs.)

For example, the studies relied upon by the Regional Board are not applicable to timberlands subject to NTMPs because the studies were done prior to the first NTMP coming into existence (1992), the studies were discussing streams adjoining clear-cuts and/or the studies reflect practices found in Washington or Oregon on lands not subject to the California FPRs. (See Timber Waiver Staff Report at pp. 9-21.) Further, there is no evidence in the record that supports the notion that current NTMPs or adopted THPs pose a significant threat to water quality. Consequently, the studies used as supporting evidence for the additional conditions of the Categorical Waiver should be completely disregarded, leaving no justification for the Categorical Waiver as it relates to NTMPs as well as THPs. Furthermore, there is no indication that the Categorical Waiver relied upon or even considered the scientific report developed by the California Board of Forestry and Fire Protection ("Board of Forestry") for purposes of the T/I Rules, which were brought to the attention of the Regional Board by CAL FIRE's May 8, 2009 letter.

The Petitioners' position with respect to NTMPs is further supported by comments submitted by CAL FIRE, which state "[i]t does not appear that Water Board staff has determined that operations conducted in conformance with approved NTMPs pose a threat to water quality." (Letter to Mr. Robert Klamt, May 8, 2009, from Mr. Crawford Tuttle, Chief Deputy Director, CAL FIRE, regarding Categorical Waiver for Discharges Related to Timber Harvest Activities on Non Federal land in the North Coast Region (CAL FIRE comments).) In response to CAL FIRE's comments, the Regional Board provides a lengthy explanation of its authority versus that of CAL FIRE's, but is unable to specifically respond as to why approved NTMPs are not protective of water quality. (See Response to

Comments at p. 21.) In fact, current field data from the Monitoring Study Advisory Group to the Board of Forestry reaches the opposite conclusion, namely that when the FPRs are implemented as prescribed (either under the NTMP or a THP), there is no significant increase in sedimentation in watercourses.[1]

In another example, there is no evidence to support the requirement in Category E of the Categorical Waiver (i.e. NTMPs) for upgrading culverts to the 100-year flood interval. Petitioners' culverts currently comply with the FPR and meet the 50-year flood level standard. The record contains no information to suggest why the current culvert standards are inadequate for the protection of water quality, and in particular for salmonid habitat. For all of these reasons, the Regional Board's adoption of the Categorical Waiver and its conditions are not supported by appropriate findings or substantial evidence in the record, and such provisions are therefore improper and unlawful.

In regards to the shade requirements that are applicable to both NTMPs and THPs, the deductive reasoning used by the Regional Board is unsupportable. (See Categorical Waiver at pp. 14-15, 18-19.) First of all, there is no connection made between the "natural levels of shade" and the impairment of watersheds. Although the staff report relies on the universal laws of thermodynamics to support its deductions, there is no relevant scientific evidence to explain this position or to explain why the most heavily logged watersheds (e.g., Freshwater Creek and Elk River) are not impaired for temperature. (Timber Waiver Staff Report at pp. 19-20.) Imposing onerous conditions based upon incomplete deductions is not appropriate.

With respect to the expanded ECP requirements for both THPs and NTMPs, the Regional Board apparently concluded that these changes were necessary to protect all watersheds in the North Coast Region. This conclusion is contradicted by statements within the economic analysis that indicate the region is "too diverse" to estimate the cost of implementing ECPs. (Timber Waiver Staff Report p. 21). If the Regional Board had sufficient evidence to justify the need for additional ECP requirements to be added to all THPs and NTMPs, then they must have a very good idea of how much benefit would be derived from these additional requirements. If this was true, then it would have been simple to provide a general assessment of the costs of implementing ECP requirements for NTMPs and THPs subject to

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[1] Pursuant to title 23 of the California Code of Regulations, section 648.2, the Petitioners hereby request that the State Water Board take official notice of the field data from the Monitoring Advisory Study Group of the Board of Forestry.

the Categorical Waiver. However, to the contrary, the staff report indicates that there is not sufficient information available regarding the prevalence and nature of the sites subject to remediation as identified in the ECPs to estimate economic costs, consequently there is not sufficient scientific justification for the additional conditions imposed by the Categorical Waiver. This logic belies the fact that the Categorical Waiver imposes conditions without having a clear idea of either the need for or the cost of these conditions.

C. Categorical Waiver Includes Requirements that Exceed the Regional Board's Authority

The Regional Board's actions in adopting the Categorical Waiver exceed its authority for a variety of reasons, including but not limited to the following: 1) Impinges on CAL FIRE's regulatory authority to dictate timber harvest operations; 2) Includes requirements that dictate the manner of compliance; 3) Includes conditions and requirements that are not necessary to ensure reasonable protection of beneficial uses; and 4) Requires pesticide use reporting in violation of the Food and Agriculture code.

First, the Regional Board has exceeded its authority to protect water quality by imposing requirements that are more closely related to timber operations versus those necessary to protect water quality. Public Resources Code sections 4551 and 4551.5 collectively state that the Board of Forestry has the legal mandate and requirement to adopt forest practice rules and regulations that govern conduct of timber operations, including measures to protect water quality. More specifically, Public Resources Code section 4551.1 states, "[r]ules and regulations *shall apply to the conduct of timber operations* and shall include, but shall not be limited to, measures for fire prevention and control, for soil erosion control, ... for water quality and watershed control, for flood control, ..." (emphasis added.) Although the Regional Board may have authority to adopt requirements pursuant to its water quality authority under Porter-Cologne, it does not have the authority to require or control timber operations that are unrelated to the protection of water quality. (See *Pacific Lumber Company v. State Water Resources Control Board* (2006) 37 Cal. 4th 921.) In its written comments and oral testimony, CAL FIRE raised many concerns with the Categorical Waiver, including that it attempted to govern the conduct of timber operations. (CAL FIRE comments at p. 2.) CAL FIRE recognized and clearly understands that the Regional Board has the authority to establish standards to prevent water quality degradation; however,

CAL FIRE further commented that the requirements contained therein surpassed the Regional Board's authority by governing the conduct of timber operations. (*Ibid.*)

For example, the ECP requirements for both NTMPs and THPs require plans for the entire logging area. (Categorical Waiver at pp. 14, 17.) Such a requirement exceeds the Regional Board's authority because not all areas covered by a NTMP or THP may be near a watercourse. Thus, it is not necessary to have ECPs to protect water quality for all areas subject to NTMPs and THPs.

In another instance, the Categorical Waiver provides the executive officer with discretion to modify an Erosion Control Plan and/or a Road Plan based on several enumerated factors including:

- Terms and conditions of the NTMP,
- Amount of total NTMP acreage,
- Existence of a Ranch or Road Plan prepared by a qualified professional,
- CESA compliance or acceptable CAL FIRE impaired or special watershed prescription or T/I rule,
- The need for fire reduction,
- Applicable Regional Board adopted sediment Best Management Practices for roads or ranches or,
- Other relevant characteristic of the hydrographic unit.

(Categorical Waiver at pp. 22-23.) Most of these factors are clearly not within the Regional Board's prescribed authority to protect water quality. In fact, several of them clearly impinge on the authority and expertise of CAL FIRE (e.g., need for fire reduction).

Second, when adopting waste discharge requirements or waivers from waste discharge requirements, the Regional Board is prohibited from specifying "the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner." (Wat. Code, § 13360(a).) The Categorical Waiver at issue here is unlawful as it clearly includes requirements that dictate the "manner of compliance." For example, to implement the Basin Plan's temperature objective, the Categorical Waiver specifies tree canopy requirements. (Categorical Waiver at pp. 14, 18-19.) The specific requirements associated with the road plan and stream culverts also dictate the manner of compliance. (Categorical Waiver at pp. 15-17.)

Third, many requirements imposed in the Categorical Waiver for category E and F activities, NTMPs and THPs respectively, are not necessary to provide for the reasonable protection of beneficial uses. The Porter-Cologne Act specifically provides that "activities and factors which may affect the quality of waters of the state shall be regulated to attain the highest water quality which is *reasonable, considering all demands being made and to be made on those waters* and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code, § 13000, emphasis added.) Thus, to the extent that the Regional Board is attempting to adopt conditions and requirements to address water quality issues, it must consider all demands and needs placed on North Coast waters – including timber harvest operations. Further, the legal standard for the protection of beneficial uses (e.g., endangered species) is "reasonable" protection, not "full" protection. (See *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 121-122 ["The Board's paramount duty was to provide 'reasonable protection' to beneficial uses, considering all demands made upon the water."].) The Regional Board, however, by its own admission adopted requirements to "fully" protect water quality. (See Response to Comments at p. 22 where in response to CAL FIRE's comments, the Regional Board stated that it was adding conditions "only as necessary to fully protect water quality.")

In its consideration of needing to reasonably protect beneficial uses, the Regional Board needs to evaluate the activities in question, including how the activities are already being governed by CAL FIRE pursuant to the FPRs. For example, timber operations that include uneven age selection of timber, and practices that include a high level of water course and lake protection. Due to the nature of NTMPs, water quality impacts associated with timber harvesting are not likely. Further, harvesting activities are unlikely to cause or contribute to a violation of the Basin Plan's temperature standard. (CAL FIRE comments at p. 4.) However, despite the reasonable protection of beneficial uses, the Regional Board found it necessary to adopt more stringent requirements without balancing all of the needs being placed on the water, including the need for sustainable timber practices. Considering the Regional Board's legal obligations to balance all demands being placed on the water, the Regional Board has exceeded its statutory legal authority by adopting unreasonable requirements for NTMPs and THPs.

Fourth, the Regional Board has exceeded its statutory authority by requiring all dischargers subject to the Categorical Waiver to "notify the Regional Board in writing at least 45 days prior to any proposed aerial application of pesticides and 30 days for any proposed ground-based application of pesticides." Pesticide use and regulation is subject to the sole jurisdiction and authority of the California Department of Pesticide Regulation. (Food & Ag Code, § 11501.1.) The Regional Board has no authority to require or request timber harvest operations to report pesticide uses to them in addition to and above the requirements set forth by the California Department of Pesticide Regulation. (Food & Ag Code, § 11501.1 et seq.)

In sum, the requirements imposed in the Categorical Waiver exceed the Regional Board's authority by requiring or specifying the manner of compliance, by interfering and dictating timber operations, by requiring pesticide use reporting in contravention of state law, and/or by "fully" protecting beneficial uses. As a result, the requirements at issue in the Categorical Waiver brought further in this petition are unlawful.

D. Petitioners Members are Substantially Harmed by Requirements in the Categorical Waiver

As a practical matter, Petitioners' members are harmed by the requirements in the Categorical Waiver because it creates new requirements and conditions above those required by the FPR, and above those that are required to protect water quality. In particular, NTMP landowners are substantially harmed by the Categorical Waiver as compared to other types of timber harvest operations due to the nature of NTMPs. As indicated previously, NTMP landowners agree to undertake uneven-aged management of their timber resources and employ selective harvest practices. (Rub. Resources Code, § 4593.3.) As a result, NTMP landowners forego the opportunity to harvest millions of board feet of timber in exchange for reliance on the certainty of the FPRs, which regulate Petitioners' harvest and land management operations. Landowners subject to NTMPs also incur substantially higher forestry and logging expenses, again in reliance on the certainty of the NTMP agreement. THP landowners are harmed by the inclusion of new costly requirements that provide no additional environmental benefit beyond what is already required by the FPRs, and the proposed T/I Rules, which are set for adoption in October of this year.

E. Regional Water Board has Failed to Properly Consider Costs of Implementing the Categorical Waiver

An important part of any policy decision by the Regional Board is the consideration of costs. As indicated previously, Porter-Cologne requires the Regional Board to regulate "to attain the highest water quality which is reasonable, considering all the demands being made and to be made on those waters and the total values involved, beneficial and detrimental, *economic* and social, tangible and intangible." (Wat. Code, § 13000, emphasis added.) To comply with this mandate, the Regional Board must consider costs associated with any water quality regulation, including the Categorical Waiver.

The Categorical Waiver includes substantially new requirements for timber harvest activities that fall within categories E and F (NTMPs and THPs respectively), all of which trigger new costs to timber operators. For example, landowners with NTMPs are subject to new costs associated with the preparation of ECPs and road plans, shade canopy requirements, new culverts, monitoring and costs associated with lost opportunities due to the new notice requirements. For landowners with THPs, there are new costs similar to those imposed on NTMPs, and there are also costs associated with the development of sediment prevention plans.

Although there are significant new costs for NTMP and THP landowners, the Timber Waiver Staff Report fails to include any actual cost estimates associated with the new requirements. For example, the Timber Waiver Staff Report concludes that the cost of preparing a long-term management Road Plan would range from "minimal to high." (Timber Waiver Staff Report at p. 23.) This is quite a large undefined range. By staff's own admission, they received cost estimates from three professionals, yet decided to not include any actual cost estimates. (Timber Waiver Staff Report at p. 21.) This lack of specificity is bewildering to Petitioners considering the fact that Regional Board staff had the information available.

In response to the Regional Board's questionnaire, one of the three respondents submitted planning costs associated with the new requirements for NTMPs. (Timber Waiver Staff Report at p. 21.)[2] Based on these costs, Petitioners estimate that it would cost them tens of thousands of dollars

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[2] Petitioners hereby incorporate by reference pursuant to title 23 of the California Code of Regulations, section 648.3 the cost information submitted by one registered professional forester to the Regional Board as requested by the Regional Board.

to prepare the necessary Erosion Control Plan and Road Management Plan. While for large industries and municipalities this cost may not be significant, it is substantial for small private timber landowners.

The cost of upgrading watercourse crossings (i.e., culverts) to the 100-year flood interval is of even larger concern. The Categorical Waiver requires the removal of properly sized and well-functioning culverts. Such culverts must then be replaced with new culverts that will cost tens of thousands of dollars per property. These costs are unnecessary and unreasonable. However, instead of estimating the costs associated with such requirements, the Timber Waiver Staff Report ducks the issue by stating: "We did not ask for the costs of implementing the waiver, such as installing culverts and upgrading roads, because ownerships within our region are too diverse to offer a generalized impression of these costs." (Timber Waiver Staff Report at p. 21.) Thus, by their own admission, staff did not attempt to estimate the costs of these upgrades to NTMP landowners.

The notification requirements set forth in the Categorical Waiver may also result in cost impacts to timber harvest operations approved by an NTMP. (See Categorical Waiver at pp. 21-22.) In particular, the new requirement for Regional Water Board executive officer approval prior to commencement of timber operations may cause unnecessary delays that result in lost opportunity and lost income. Currently, NTMP landowners are able to harvest timber under the terms of their NTMP within three days of sending a NTO to CAL FIRE. This allows a landowner to quickly respond to timber markets and manage operational costs through timely planning. The Categorical Waiver requires that the NTO be sent to the Regional Board five days in advance of planned operations, and be accompanied by the updated ECP. However, harvest activities may not commence until the Regional Board's executive officer has approved the ECP and provided the landowner with written notification that coverage under the Categorical Waiver is appropriate. (Categorical Waiver at pp. 21-22.) The Categorical Waiver fails to include any time limit for response by the Regional Board's executive officer. Further, upon receipt of an ECP and/or road plan, the executive officer may modify the ECP and/or road plan without consideration of cost. Due to these restrictive notification requirements that are inconsistent with the FPR, it is possible that timber harvest operations could be delayed for days, weeks or longer. Thus, the Categorical Waiver potentially deprives the landowner of the surety of timely planning and operations.

Finally, the Regional Board's inclusion of shade canopy requirements is a numeric interpretation of the Basin Plan's temperature objective, which in effect creates a de facto new water

quality objective. Water Code section13241 requires the Regional Board to consider a number of different factors, including economics, when establishing water quality objectives. (Wat. Code § 13241.) Thus, to the extent that the shade canopy requirements create a new interpretation of a water quality objective, the Regional Board must consider all factors required by section 13241. Clearly, that has not occurred.

Petitioners are amazed that the Regional Board would impose additional new requirements without consideration of the actual costs. To do so violates the spirit and intent of Porter-Cologne, which is to regulate to the highest level of water quality that is reasonable, considering a number of factors including economics. Until the costs are actually estimated and put before the Regional Board for consideration, the adoption of the Categorical Waiver and its requirements is unlawful.

F. Term is Greater Than Five Years

Section III of the Categorical Waiver provides that a NTMP-wide ECP must be completed and submitted "by the first NTO submitted after June 4, 2014." However, under Section IV H the Categorical Waiver is set to expire on June 4, 2014. This phased implementation imposes obligations after the Categorical Waiver is no longer in effect and is contrary to Water Code section 13269(a)(2), (f).

G. The Categorical Waiver Is Inconsistent With The State Water Resources Control Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program

The State Board's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Control Program) specifically provides for a Management Agency Agreement ("MAA") with other agencies to take the lead in implementing NPS pollution control "using their own regulatory process...to do so more efficiently." The Categorical Waiver fails to adequately consider the activities of CAL FIRE, particularly in developing the new T/I Rules, which are due to be adopted by October 2009. The Regional Board received specific comments from the California Forestry Association that specifically requested the Regional Board to refrain from adopting the Categorical Waiver until such time that the Board of Forestry could complete its science-based review and amendment to the FPRs. (See Letter to Robert Anderson, Chair of the North Coast Regional Water Quality Control Board from Michele Dias, Vice President for Environmental and Legal

Affairs (May 8, 2009) regarding Categorical Waiver of Waste Discharge Requirements Related to Timber Harvesting Activities on Non-Federal Lands.) In response, the Regional Board declared that there was no conflict and that the current waiver was going to expire. (Response to Comments at p. 19.) However, at no time did the Regional Board consider extending the existing waiver (Order No. R1-2004-0016) to allow the Board of Forestry time to complete its process. Considering the imminent adoption of the new T/I rules by the Board of Forestry, the Regional Board's failure to wait clearly violates the intent of the State's NPS Control Program, which is to avoid duplicative regulatory efforts by state agencies. This is even more troubling in light of the State's economic crisis. With the adoption of the Categorical Waiver, the Regional Board is duplicating functions currently being conducted by the Board of Forestry and Cal FIRE, as well as the California Department of Fish and Game in the Streambed Alteration Agreement process.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

The Petitioners and their members are aggrieved by the conditions and limitations contained in the Categorical Waiver, which are more stringent or onerous than required by or provided for under current law and establish a parallel set of requirements with which Petitioners and their members must comply. These requirements will threaten the economic survival of many timber lands owned or operated by Petitioners and their members in the region. The Petitioners' members will or may be required to spend limited private resources to comply with inappropriate or unlawful Categorical Waiver conditions. Alternatively, the Petitioners' members may not longer be able to maintain economically viable timber harvest operations. In that case, the Petitioners whose members include registered professional foresters will be harmed because their services will no longer be required. Given that the resources of private landowners are limited and the wood products resource market is significantly depressed already, Petitioners are aggrieved when forced to comply with requirements that are arbitrary, unnecessary, unlawful and not required by law. This harm is exacerbated by the fact that these additional efforts being required are not likely to provide for measurable betterment to the water quality of the receiving water. The Petitioners are further aggrieved by the inclusion of each of the unlawful and excessive Categorical Waiver conditions with which they cannot now, or in the immediate future, comply, because they may be subject to penalties in accordance with the California Water Code.

6. SPECIFIC ACTION BY THE STATE BOARD WHICH THE PETITIONER REQUESTS:

A. Based on the foregoing, the Petitioners request that the State Board modify, or order the Regional Board to modify, Order No. R1-2009-0038 with direction for revisions, as follows:

(i) Rescind Order No. R1-2009-0038 in its entirety;

(ii) Renew Order No. R1-2004-0016; and,

(iii) Issue an immediate stay of Order No. R1-2009-0038. (See Request for Immediate Stay following this Petition)

B. Request for Hearing

In the event that the State Board determines that it is not appropriate to remand the Categorical Waiver to the Regional Board for further consideration, in accordance with California Code of Regulations, title 23, section 2050(b), Petitioners request a hearing for purpose of presenting additional evidence, which evidence was available and not presented to the Regional Board due a lack of notice to many of Petitioners' members.

7. STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

A Statement of Points and Authorities in support of this petition is set forth in section 4 above. The Petitioners reserve the right to supplement this statement.

8. STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD:

In accordance with title 23, section 2050(a)(8) of the California Code of Regulations, the Petitioners mailed a true and correct copy of this petition by First Class mail on July 6, 2009, to the Regional Board at the following address:

Catherine Kuhlman, Executive Officer
North Coast Regional Water Quality Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403-1072

9. THE SUBSTANTIVE ISSUES OR OBJECTIONS WERE RAISED BEFORE THE REGIONAL BOARD, OR THE PETITIONERS WERE UNABLE TO RAISE THESE SUBSTANTIVE ISSUES OR OBJECTIONS:

The substantive issues and objections raised in the petition above, were raised before the Regional Board in written comments submitted to the Regional Board in response to the Tentative Categorical Waiver, and in testimony provided to the Regional Board at public workshops held on March 24, 2009 and April 8, 2009, and at a hearing on the Tentative Categorical Waiver on June 4, 2009.

To the extent that the petition includes arguments not raised before the Regional Board, Petitioners hereby request that the State Board consider the arguments pursuant to title 23 of the California Code of Regulations, section 2050(a)(9) because many of Petitioners' members were unable to participate in the proceedings before the Regional Board due to a lack of proper notice; many of Petitioners' members who are holders of NTMPs relied upon the legislature's declaration that the purpose of the NTMP program was to provide regulatory certainty and thereby did not apprehend that the Categorical Waiver would change the conditions imposed by the Categorical Waiver; and substantive changes were made at the June 4, 2009 meeting which should require that the Categorical Waiver be renoticed. (See section 4 A., *supra*.)

10. STATEMENT OF ADDITIONAL EVIDENCE

If the State Board determines that it is not appropriate to remand the Categorical Waiver to the Regional Board for further consideration based on notice violations, failure to adequately address economic impacts, or any other reason described herein, the Petitioners hereby request that the State Board grant the Petitioners leave to submit supplemental evidence concurrently with this petition pursuant to title 23 of the California Code of Regulations section 2050.6(b). The evidence for which Petitioners' request leave for consideration is cost information with respect to the new requirements being imposed through the Categorical Waiver, evidence about the condition of watersheds in the region, and other evidence challenging the requirements being imposed by the Regional Board.

The cost information is relevant for it provides specificity of actual costs, which is necessary to ensure that the Regional Board adequately consider the economic impact of the Categorical Waiver as required by Water Code section 13000. Without sufficient cost information, Petitioners and their members

were prejudiced because the Regional Board did not have sufficient information to make a well-informed decision regarding the costs and implications of the Categorical Waiver.

Dated: July 6, 2009

CALIFORNIA FARM BUREAU FEDERATION

/s/ for

By: CHRISTIAN C. SCHEURING
Attorney for California Farm Bureau Federation

Dated: _____

FOREST LANDOWNERS OF CALIFORNIA

_____

By: JOHN W. WILLIAMS

Dated: _____

THE BUCKEYE CONSERVANCY

_____

By: JULIE HOUTBY

Dated: July 6, 2009

CALIFORNIA LICENSED FORESTERS ASSOCIATION

/s/

_____

By: CASEY KELLER

Dated: _____

ASSOCIATION OF CONSULTING FORESTERS OF AMERICA, CALIFORNIA CHAPTER

_____

By: RANDY JACOBSZOON

Dated: _____

CALIFORNIA FARM BUREAU FEDERATION

_____

By: CHRISTIAN C. SCHEURING
Attorney for California Farm Bureau Federation

Dated: July 6, 2009

FOREST LANDOWNERS OF CALIFORNIA

John W. Williams

By: JOHN W. WILLIAMS

Dated: _____

THE BUCKEYE CONSERVANCY

_____

By: JULIE HOUTBY

Dated: _____

CALIFORNIA LICENSED FORESTERS ASSOCIATION

_____

By: CASEY KELLER

Dated: _____

ASSOCIATION OF CONSULTING FORESTERS OF AMERICA, CALIFORNIA CHAPTER

_____

By: RANDY JACOBSZOON

Dated: _____

CALIFORNIA FARM BUREAU FEDERATION

_____

By: CHRISTIAN C. SCHEURING
Attorney for California Farm Bureau Federation

Dated: _____

FOREST LANDOWNERS OF CALIFORNIA

_____

By: JOHN W. WILLIAMS

Dated: 7/6/2009

THE BUCKEYE CONSERVANCY

Julie Houtby

By: JULIE HOUTBY

Dated: _____

CALIFORNIA LICENSED FORESTERS ASSOCIATION

_____

By: CASEY KELLER

Dated: _____

ASSOCIATION OF CONSULTING FORESTERS OF AMERICA, CALIFORNIA CHAPTER

_____

By: RANDY JACOBSZOON

Dated: _____

CALIFORNIA FARM BUREAU FEDERATION

_____

By: CHRISTIAN C. SCHEURING
Attorney for California Farm Bureau Federation

Dated: _____

FOREST LANDOWNERS OF CALIFORNIA

_____

By: JOHN W. WILLIAMS

Dated: _____

THE BUCKEYE CONSERVANCY

_____

By: JULIE HOUTBY

Dated: _____

CALIFORNIA LICENSED FORESTERS ASSOCIATION

_____

By: CASEY KELLER

Dated: 7/6/09

ASSOCIATION OF CONSULTING FORESTERS OF AMERICA, CALIFORNIA CHAPTER

_____

By: RANDY JACOBSZOON

REQUEST FOR IMMEDIATE STAY

Pursuant to Water Code section 13321 and Title 23, California Code of Regulations section 2053, Petitioners request an immediate stay of Order No. R1-2009-0038. Concurrently with this request for immediate stay, Petitioners request the State Board take any action necessary to extend the 2004 Categorical Waiver at least until the State Board takes final action on this Petition in order to ensure that timber harvest activities are covered. Under section 2053 of the State Board's regulations (Cal. Code Regs., tit. 23, § 2053), a stay of the effect of an order shall be granted if petitioner shows:

(a) There will be substantial harm to the Petitioner or to the public interest if a stay is not granted;

(b) There will be no substantial harm to other interested persons and to the public interest of a stay is granted;

(c) There are substantial questions of fact or law regarding the disputed action.

The requirements for the issuance of a stay are clearly met in this case and are further supported by the Declaration of John W. Williams attached as Exhibit 3.

A. Petitioners will suffer substantial harm if a stay is not granted.

If Order No. R1-2009-0038 is not stayed, Petitioners and their members will suffer substantial harm because of the obligation to comply with the additional conditions imposed by the Categorical Waiver. In general, Petitioners and their members will be harmed by increased costs and additional obligations that must be incurred in order to comply with the Categorical Waiver. Although some of the obligations specific to NTMPs will be delayed, other requirements, such as shade retention, are effective immediately for both NTMPs and THPs. These harms to Petitioners and their members are explained above in this Petition and are hereby incorporated by this reference.

B. Interested Persons and the Public Interest will not be substantially harmed if a stay is granted.

Interested persons and the public interest will not be substantially harmed if a stay is granted and Order No. R1-2004-0016 (the 2004 Categorical Waiver) is extended because Order No. R1-2004-0016 was protective of water quality while also allowing economic viability of timber harvest. The adequacy of

Order No. R1-2004-0016 is explained in this Petition above, which are hereby incorporated by this reference.

C. Substantial Questions of Law and Fact Exist.

As explained in detail above and hereby incorporated by this reference, there are substantial questions of both law and fact regarding the Regional Board's adoption of Order No. R1-2009-0038.

FOR ALL THE FOREGOING REASONS, Petitioners respectfully request that the State Board grant a stay of the effect of Order No. R1-2009-0038 until such time as final action is taken on this Petition. Petitioners also request that the State Board take any action necessary to extend Order No. R1-2004-0016 while the stay is in effect.

PROOF OF SERVICE

I, **PAMELA K. HOTZ,** declare as follows:

At the time of service I was at least 18 years of age; not a party to the within action; and employed in the County of Sacramento at 2300 River Plaza Drive, Sacramento, CA 95833.

On this date, I served the following document(s) in the manner set forth below:

PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION; REQUEST FOR IMMEDIATE STAY

☒ **UNITED STATES MAIL [C.C.P. § 1013]** I enclosed the documents in a sealed envelope addressed to the following persons and

☐ deposited the sealed envelope with the United States Postal Service with postage thereon fully prepaid at Sacramento, CA addressed as follows:

☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collection processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid at Sacramento, CA address as follows :

Catherine Kuhlman, Executive Officer
North Coast Regional Water Quality
Control Board
5550 Skylane Blvd., Suite A
Santa Rosa, CA 95403-1072

☐ **OVERNIGHT DELIVERY [C.C.P. § 1013(c)]** I enclosed the documents in a sealed envelope provided by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope for collection at a regularly utilized drop box of the overnight carrier addressed as follows:

Tracking No:

☒ **EMAIL [C.C.P. § 1010.6]** Based on a court order or an agreement of the parties to accept service by email, I caused the documents to be sent to the following persons at the following email address, and did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful:

Email: jwilliams@eresourcesolutions.com; buckeye@humboldt1.com; clfa@volcano.net; forestry@pacific.net

☐ **PERSONAL DELIVERY [C.C.P. § 415.10]** I personally delivered the documents as follows:

☐ deposited the sealed envelope with the U.S. Postal Service with postage thereon fully prepaid at Sacramento, CA.

Person:
Address:
Date & Time:

☐ **[C.C.P. §§ 415.20; 1011(a); 1011(b)]** I left the documents with or in the presence of the above person, who was at least 18 years old and apparently in charge. I informed him or her of the general nature of the papers.

Executed at Sacramento, CA.

Dated: July 6, 2009

PAMELA K. HOTZ

EXHIBIT 1

California Regional Water Quality Control Board
North Coast Region

ORDER NO. R1-2009-0038

Categorical Waiver of Waste Discharge Requirements
For
Discharges Related to Timber Harvest Activities
On Non-Federal Lands in the
North Coast Region

The California Regional Water Quality Control Board, North Coast Region, (hereinafter Regional Board) finds that:

1. California Water Code section 13260(a) requires that any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the state, other than into a community sewer system, shall file with the appropriate Regional Board a Report of Waste Discharge (ROWD) containing such information and data as may be required.

2. Pursuant to Water Code section 13260, regional boards prescribe waste discharge requirements except when it finds, pursuant to Water Code section 13269 that a waiver of waste discharge requirements (WDRs) for a specific type of discharge is in the public interest.

3. The State's Policy for Implementation and Enforcement of the Nonpoint Source Pollution Control Program (NPS Implementation Policy) requires that "all current and proposed nonpoint source discharges must be regulated under WDRs, waivers of WDRs, a basin plan prohibition, or some combination of these tools" (2007 Basin Plan, 4-33.00).

4. In the North Coast Region, discharges of waste resulting from timber harvest activities that pose a low or insignificant threat to water quality are regulated by conditional waivers of WDR. Individual or general WDRs are required for discharges of waste from all other timber activities.

5. In addition, the following waste discharge prohibitions from the Water Quality Control Plan for the North Coast Region (Basin Plan) pertain to timber harvest activities, including; logging, road construction, and associated activities in the North Coast Region:

   Prohibition 1: The discharge of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature into any stream or watercourse in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.

   Prohibition 2: The placing or disposal of soil, silt, bark, slash, sawdust, or other organic and earthen material from any logging, construction, or associated activity of whatever nature at locations where such material could pass into any stream or watercourse in the basin in quantities which could be deleterious to fish, wildlife, or other beneficial uses is prohibited.

6. On June 23, 2004, the Regional Board adopted Order No. R1-2004-0016, Categorical Waiver for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region, and superseded the previous Categorical Waiver (Order No. R1-2003-0116, Interim Categorical Waiver for Discharges Related to Timber Operations in the North Coast Region). This Order will supersede Order No. R1-2004-0016 consistent with the transition provisions in section III. This Categorical Waiver is similar to the existing 2004 waiver but makes both minor and substantial revisions and is structurally reorganized for clarity and usability. As described in more detail below, this Categorical Waiver adds conditions designed to meet Basin Plan temperature objectives.

7. This Categorical Waiver defines five categories of timber harvest activities, detailed in the Forest Practice Rules, and establishes general and specific conditions and eligibility criteria for each category for which WDRs can be waived. Implementation and compliance with the general and specific conditions result in timber harvesting projects that are considered to be low impact, and therefore pose no significant threat to water quality.

8. Pursuant to the Water Quality Control Plan for the North Coast Region (Basin Plan), including State Water Resources Control Board (State Water Board) Resolution No. 88-63, the existing and potential beneficial uses of waters potentially affected by the proposed activity include:

   a. Municipal and Domestic Supply (MUN)
   b. Agricultural Supply (AGR)
   c. Industrial Service Supply (IND)
   d. Industrial Process Supply (PROC)
   e. Groundwater Recharge (GWR)
   f. Freshwater Replenishment (FRSH)
   g. Navigation (NAV)
   h. Hydropower Generation (POW)
   i. Water Contact Recreation (REC-1)
   j. Non-contact Water Recreation (REC-2)
   k. Commercial and Sport Fishing (COMM)
   l. Cold Freshwater Habitat (COLD)
   m. Warm Freshwater Habitat (WARM)
   n. Wildlife habitat (WILD)
   o. Preservation of Areas of Special Biological Significance (BIOL)
   p. Rare, Threatened, or Endangered Species (RARE)
   q. Marine Habitat (MAR)
   r. Migration of Aquatic Organisms (MIGR)
   s. Spawning, Reproduction, and/or Early Development (SPWN)
   t. Shellfish Harvesting (SHELL)
   u. Estuarine Habitat (EST)
   v. Aquaculture (AQUA)
   w. Native American Culture (CUL)
   x. Flood Peak Attenuation/Flood Water Storage (FLD)
   y. Wetland Habitat (WET)
   z. Water Quality Enhancement (WQE)
   aa. Subsistence Fishing (FISH)

The Basin Plan contains water quality objectives developed to protect the above-listed beneficial uses of water. Economic considerations were evaluated as required by law during the development of these objectives. Prohibitions, provisions, and specifications contained in this Categorical Waiver implement these previously developed water quality objectives. Compliance with Water Quality Standards will protect these beneficial uses.

9. Populations of several species of anadromous salmonids listed as threatened or endangered under both the Federal Endangered Species Act or the California Endangered Species Act have declined significantly during the past half century in the majority of waterbodies in the North Coast Region. Degradation of freshwater habitat by land use activities is a major contributing factor to the decline in populations, with discharges of waste from timber harvesting and associated activities among the most significant factors.

10. Harvest methods resulting in intensive canopy removal, such as clearcutting, can cause impacts to water quality from higher and more intensive peak flows, increased surface erosion, and higher rates of mass wasting. Unevenaged management or evenaged management that retains a substantial overstory canopy is less likely to result in adverse impact to water quality. As such, harvesting methods that result in intensive canopy removal are limited under this Categorical Waiver. Intensive canopy removal, such as clearcutting, is allowed under this Categorical Waiver when buffers are provided for streams that are significantly larger than the minimum required under the Forest Practice Rules.

11. Timber harvesting activities on landslides, or on those portions of the landscape that are vulnerable to landsliding, can increase rates of sediment delivery from landslides. This increase in the rate of landslide related sediment delivery can be prevented or minimized by avoiding or minimizing ground disturbance and canopy removal on vulnerable areas, or implementing recommendations made as a result of site characterization by a licensed geologist experienced in slope stability investigations. As such, no timber harvesting activities may be conducted under THPs covered by this Categorical Waiver on landslides and geomorphic features related to landsliding without site characterization and input into Project design by a licensed geologist.

12. Sediment discharge sources, or threatened discharge sources, from past timber harvest activities are present throughout the north coast region and continue to pose risks to water quality. A condition of the Categorical Waiver requires timber harvesting proponents to prepare Erosion Control Plans, which identify controllable sediment discharge sources and implement prevention and minimization measures, thereby eliminating a significant pollutant source from those Project areas.

Impaired Waterbodies and TMDLs

13. Most water bodies in the North Coast Region are listed as impaired due to either excess sediment and/or elevated water temperature (Section 303(d) of the Clean Water Act). Discharges of sediment resulting from past land use activities, with timber harvest being one of the leading sources, are recognized as major contributing factors causing the impaired conditions. Federal regulations require that a total maximum daily load (TMDL) be established for 303(d) listed water bodies for each pollutant of concern.

14. The United States Environmental Protection Agency (EPA) has established sediment TMDLs for 19 watersheds in the North Coast Region. The majority of these TMDLs identified erosion from roads and timber harvest as major contributing factors to sediment discharge from anthropogenic sources and called for significant reductions in such discharges. The EPA includes recommendations to reduce sediment delivery from the major sources identified in those TMDLs. The Total Maximum Daily Load Implementation Policy Statement for Sediment Impaired Receiving Waters in the North Coast Region (TMDL Implementation Policy) provides that the Regional Board shall control sediment pollution by using existing permitting and enforcement tools. The goals of the Policy are to control sediment waste discharges to impaired water bodies so that the TMDLs are met, sediment water quality objectives are attained, and beneficial uses are no longer adversely affected by sediment.

15. The TMDL Implementation Policy also directed staff to develop the Staff Work Plan to Control Excess Sediment in Sediment-Impaired Watersheds (Work Plan) that describes the actions staff are currently taking or intend to take over the next ten years, as resources allow, to control human-caused excess sediment in the sediment-impaired water bodies of the North Coast Region. This Categorical Waiver furthers the objectives defined in the TMDL Implementation Policy and Work Plan. Conditions and eligibility criteria required for enrollment in this Categorical Waiver are intended to contribute to reductions in anthropogenic sediment discharges from the sources identified by EPA and constitute implementation of TMDLs, thus furthering the objectives contained in the Work Plan.

16. The temperature of a stream is significantly influenced by the amount of solar radiation the stream receives. Removing shade canopy in riparian zones can increase the amount of solar radiation that reaches a watercourse, potentially resulting in an increase in water temperature. Canopy retention standards above the minimums established in the Forest Practice Rules and restrictions on shade reduction required under this Categorical Waiver are necessary to meet the Basin Plan temperature objective.

17. The North Coast Regional Board has Temperature TMDLs for 12 watersheds in the north coast region of California. These watersheds include three of the major Klamath River tributaries: the Salmon, Scott, and Shasta River watersheds. The twelve temperature TMDLs have evaluated the effects of shade on stream

temperatures and have consistently reached the same conclusion regarding stream shade. These conclusions are consistent with published literature and temperature analyses conducted in the Pacific Northwest.

The Basin Plan contains the following temperature objectives, which apply to surface waters:

- The natural receiving water temperature of intrastate waters shall not be altered unless it can be demonstrated to the satisfaction of the Regional Board that such alteration in temperature does not adversely affect beneficial uses.
- At no time or place shall the temperature of any COLD water be increased by more than 5°F above natural receiving water temperature.
- At no time or place shall the temperature of WARM intrastate waters be increased more than 5°F above natural receiving water temperature.

18. Given the similarity among the majority of north coast watersheds and the universal nature of the laws of thermodynamics, the conclusions of shade-related analyses from previous temperature TMDLs apply region-wide, and especially to those tributaries not already assigned TMDL shade allocations. In order to protect, maintain, or restore natural water temperature, riparian shade controls are also needed in many watersheds not subject to an existing TMDL Action Plan or in watersheds that are not currently impaired due to elevated water temperatures.

19. The load allocation for excess solar radiation assigned in previous TMDLs is also an appropriate allocation for excess solar radiation to meet the Basin Plan temperature objective in watersheds throughout the North Coast Region. The load allocation for solar radiation is expressed as its inverse, shade. The load allocations for this source category are the shade provided by topography and full potential vegetation conditions at a site, with an allowance for natural disturbances such as floods, wind throw, disease, landslides, and fire. Riparian zone canopy and shade retention standards included as conditions of this Categorical Waiver are intended to preserve natural shade to meet the Basin Plan temperature objectives and constitute compliance with temperature TMDL implementation requirements.

Waiver Categories

20. The General and Specific Conditions of this Categorical Waiver limit the scope of impacts from timber harvesting plans (THPs) approved by CAL FIRE and other CEQA compliant timber harvesting activities so that discharges of waste will be minimized. Further, subsequent CEQA review ensures site-specific mitigation and appropriate project planning to protect water quality. As such, Projects that meet the eligibility criteria for Category F are not expected to pose a significant threat to water quality, and therefore, it is appropriate to conditionally waive waste discharge requirements.

21. Non-industrial Timber Management Plans (NTMPs), as defined in the Forest Practice Rules, are long term management plans, in which tree removal is limited to unevenaged management for small non-commercial timberland owners (2,500 acres or less). As a result, only partial harvesting of these types of timberlands occurs at any one time. With the addition of general and specific conditions required for coverage under this Categorical Waiver, NTMPs are not expected to pose a significant threat to water quality and therefore it is appropriate to conditionally waive waste discharge requirements.

22. Owners and operators of (THPs) in watersheds with approved Total Maximum Daily Load (TMDL) action plans must comply with the requirements of those plans. TMDL action plans are designed to restore the impaired beneficial uses of a polluted body of water. The TMDL process provides a quantitative assessment of water quality problems, contributing sources of pollution, and the pollutant load reductions or control actions needed to restore and protect the beneficial uses of an individual waterbody impaired from loading of a particular pollutant. THPs for which the Executive Officer of the Regional Board has determined to be in compliance with a TMDL Action Plan are not expected to pose a significant threat to water quality. The Garcia watershed is the only TMDL Action Plan that fits this category. Therefore, it is appropriate to waive waste discharge requirements for THPs in the Garcia watershed that meet the Categorical Waiver conditions.

23. Modified THPs, as defined by the Forest Practice Rules, are limited to timberland ownerships of 100 acres or less. The Forest Practice Rules for modified THPs includes restrictions on intensive silvicultural prescriptions, heavy equipment on steep slopes, construction of roads and skid trails, timber operations on unstable areas and riparian areas, and winter period operations. These restrictions are roughly equivalent to the eligibility criteria for THPs as set forth in this Categorical Waiver, and are expected to reduce the likelihood that such plans will pose a significant threat to water quality. Therefore, it is appropriate to waive waste discharge requirements for modified THPs meeting Categorical Waiver conditions.

24. California Code of Regulations, title 14, section 1052 allows timberland owners to submit a Notice of Emergency Timber Operations for a Fuel Hazard Reduction emergency when specified conditions are substantiated by the consulting forester. Operations conducted pursuant to an emergency must comply with all applicable Forest Practice Rules. In-lieu practices in riparian zones, exceptions to rules, and alternative practices are not allowed unless necessary to protect public health and safety. Due to the potential harm to public and private resources that could occur if fuel hazard reduction projects are not implemented in a timely manner when necessary, it is in the public interest to waive waste discharge requirements for Emergency Timber Operations.

25. California Code of Regulations, title 14, section 1038 exempts the following timber operations from the plan preparation and submission requirements:
    - Harvesting Christmas trees
    - Harvesting dead, dying or diseased trees in amounts less than 10 percent (%) of the average volume per acre
    - Cutting and removal of trees within 150 feet from an improved or legally permitted structure for the purposes of reducing flammable materials and maintaining a fuel break
    - Harvesting dead trees which are unmerchantable from substantially damaged timberlands.

    Such exemptions include restrictions on use of heavy equipment on steep slopes, construction of roads and skid trails, timber operations on unstable areas and riparian areas, and winter period operations. These restrictions are roughly equivalent to the eligibility criteria for THPs as set forth in this Categorical Waiver, and are expected to reduce the likelihood that such plans will pose a significant threat to water quality. Therefore, it is appropriate to waive waste discharge requirements for these exemptions.

26. California Code of Regulations, title 14, section 1104.1 exempts three categories of timberland conversion from THPs requirements, that when in compliance with all other permitting requirements of the Regional Board and other permitting agencies, are not likely to pose a significant threat to water quality. It is appropriate to waive waste discharge requirements for the following conversion exemptions:
    - Conversion of less than three acres in size in one contiguous ownership,
    - Construction or maintenance of right-of-way by a public agency on its own or other public property,
    - The clearing of trees from timberland by a private or public utility for construction of gas, water, sewer, oil, electric, and communications rights-of-way, and for maintenance and repair of the utility and right-of-way.

    However, higher potential impacts to water quality can result from conversion for vineyards, construction, and development projects that typically require waste discharge requirements and/or federal dredge and fill permits. These types of conversions are not covered by this Categorical Waiver.

27. Effective January 1, 2004, Water Code section 13269 requires that waivers include the performance of individual, group, or watershed-based monitoring. This monitoring requirement may be waived for discharges that the Regional Board determines do not pose a significant threat to water quality. The categorical waivers set out herein are only for Projects that do not pose a significant threat to water quality. Discharges that pose a significant threat to water quality are not permitted by this Order. Any project covered hereby that warrants it and meets the criteria of Water Code section 13267(b), however, will be subject to a monitoring program as directed by the Executive Officer.

Regional Board Waiver Fees

28. Pursuant to Water Code Section 13269, the Regional Board may include as a condition of a waiver the payment of an annual fee established in accordance with subdivision (f) of section 13260. Based on consideration of factors established in section 13269 (4)(C), it is appropriate to impose the following fees for the Categories established by this Categorical Waiver:

    Categorical Waiver B: Emergency, Exemptions, and 3-acre conversions. Fees are not appropriate for this category of waiver, as no effect on beneficial uses is expected.

    Categorical Waiver C: Projects in the Garcia Watershed. Fees are not appropriate because applicants enrolling in this Category participate in a watershed management program through a TMDL approved by the applicable Regional Board.

    Categorical Waiver E: Nonindustrial Timber Management Plan (NTMP). A one time application fee, in the amount of $250, is appropriate. This category requires review of enrollment applications and review of significant amounts of technical information.

    Categorical Waiver F: Other Projects (Timber Harvest Plans (THPs) and Other Timber Harvesting Projects). A one time application fee, in the amount of $250, is appropriate. This category requires review of enrollment applications and review of significant amounts of technical information.

Miscellaneous

29. Pursuant to Water Code section 13269, the waivers of waste discharge requirements for the categories of waste specified herein shall not exceed five years in duration; that this action waiving the issuance of waste discharge requirements for certain specific types of discharges (a) is conditional, (b) may be terminated at any time, (c) does not permit an illegal activity, (d) does not preclude the need for permits which may be required by other local or governmental agencies, and (e) does not preclude the Regional Board from administering enforcement remedies (including civil penalties) pursuant to the Water Code and other applicable law.

30. The Executive Officer or Regional Board shall terminate the applicability of this Order to any timber harvest activities at any time when such termination is in the public interest and/or the timber harvest activities could affect the quality or beneficial uses of the waters of the state.

31. This Order establishing a group of categorical waivers shall not create a vested right, and all discharges covered by it shall be considered a privilege, not a right, as provided under Water Code section 13263.

32. This Categorical Waiver is consistent with the provisions of State Water Resources Control Board (State Water Board) Resolution No. 68-16, "Statement of Policy with Respect to Maintaining High Quality of Waters in California." Both the state and federal antidegradation policies apply to surface waters in the North Coast Region. The antidegradation policies acknowledge that an activity that results in a minor water quality lowering, even if incrementally small, can result in a violation of antidegradation policies through cumulative effects, especially, for example, when the waste is a cumulative, persistent, or bioaccumulative pollutant.

33. On March 7, 2009, the Regional Board provided notice of intent to adopt a mitigated negative declaration (SCH No.2009042053) for the project. (Cal. Code Regs., title. 14, § 15072.) The mitigated negative declaration reflects the Regional Board's independent judgment and analysis. The documents or other material, which constitute the record, are located at 5550 Skylane Blvd, Suite A, Santa Rosa, CA 95403. The Regional Board will file a Notice of Determination within five days from the issuance of this Order.

34. The Regional Board conducted a public hearing on June 4, 2009 in Santa Rosa, California, and considered all evidence concerning this matter and adopted the Negative Declaration, a copy of which is attached hereto, and this Order, Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region.

35. Based on the Initial Study and Negative Declaration, the adoption of the waivers of waste discharge requirements for timber harvest activities in accordance with Order No. R1-2009-0038 will be consistent with the Basin Plan, and will be in the public interest.

THEREFORE, after considering the document and comments received during the public review process, the Regional Board hereby determines that the proposed project, with mitigation measures, will not have a significant effect on the environment. The Regional Board hereby approves and adopts the Negative Declaration and Initial Study prepared on this Order, and directs the Executive Officer to file all appropriate notices; and

Order No. R1-2004-0016 is hereby superseded except for application to Projects that have been accepted for filing but not yet approved by the California Department of Forestry and Fire Protection as of the adoption date of Order No. R1-2009-0038. Such Projects are eligible for coverage under Order No. R1-2004-0016 until October 15, 2009, should they qualify under the terms and conditions of that Order. All dischargers subject to categorical waiver of Waste Discharger Requirements (WDRs) under this Order shall comply with the following: