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Tree Farm, and RPH Comptche Properties



9 BEFORE THE
10 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12 In the Matter of the Petition of Weger
Interests, Ltd., Parker Ten Mile Ranch, Bradford
13 Ranch, Miller Tree Farm, and RPH Comptche
Properties for Review of Action and Failure to
14 Act by North Coast Regional Water Quality
Control Board.

SWRCB/OCC File _____

PETITION FOR REVIEW; REQUEST
FOR CONSIDERATION OF
SUPPLEMENTAL EVIDENCE
[Wat. Code, § 13320]

16 Petitioners Weger Interests, Ltd., Parker Ten Mile Ranch, Bradford Ranch, Miller Tree
17 Farm, and RPH Comptche Properties (Petitioners), in accordance with section 13320 of the Water
18 Code and title 23 of the California Code of Regulations, section 2050 et seq., hereby petition the
19 State Water Resources Control Board (State Water Board) for review of the North Coast Regional
20 Water Quality Control Board's (Regional Water Board) adoption of a Categorical Waiver of
21 Waste Discharge Requirements for Timber Harvesting Activities on Non-Federal Lands in the
22 North Coast Region (Categorical Waiver) through Order No. R1-2009-0038, and its other actions
23 or inactions. The issues raised by the petition, a summary of the bases for the petition, and a
24 preliminary statement of points and authorities are set forth below as required by California Code
25 of Regulations, title 23, section 2050(a). Petitioners reserve the right to file a more detailed
26 statement of points and authorities in support of this petition once the administrative record
27 becomes available. The Petitioners also reserve the right to submit additional argument and
28

1 evidence in reply to the Regional Water Board's or other interested parties' responses to this
2 petition filed in accordance with title 23, section 2050.5(a) of the California Code of Regulations.

3 The Petitioners are landowners and/or private timberland operators who own and/or
4 operate non-industrial timber harvesting operations within the North Coast Region of the
5 Regional Water Quality Control Board. The Petitioners' timber harvesting operations are subject
6 to Non-industrial Timber Management Plans (NTMPs), issued and approved by the California
7 Department of Forestry and Fire Protection (CalFIRE) pursuant to the Forest Practice Rules. The
8 Petitioners' NTMPs are subject to terms and conditions contained in the Categorical Waiver. In
9 general, NTMPs are allowed for small, private landowners that agree to harvest timber in a
10 sustainable and environmental protective manner. (See Pub. Resources Code, § 4593.3.) In
11 allowing for NTMPs, the Legislature declared as follows:

12 (a) The Legislature finds and declares that a substantial acreage of timberlands of
13 the state are held by private nonindustrial owners and that it is the policy of the
14 state to increase the productivity of these timberlands under prudent management
15 plans to serve the public's need for timber and other forest products.

16 (b) The Legislature further finds and declares that minimal environmental harm is
17 caused by prudent management of nonindustrial timberlands because low volume
18 production and dispersion around the state of these small tracts reduces damage to
19 aesthetics, air quality, watersheds, and wildlife.

20 (c) The Legislature further finds and declares that it is the policy of the state to
21 encourage prudent and responsible forest resource management of nonindustrial
22 timberlands by approving nonindustrial timber management plans in advance and
23 withdrawing governmental discretion to disapprove nonindustrial timber harvest
24 notices submitted pursuant to the approved nonindustrial timber management
25 plans. (Pub. Resources Code, § 4593(a)-(c).)

26 Although Petitioners did not collectively or individually participate in proceedings before
27 the Regional Water Board, Petitioners are proper parties before the State Water Board. (See
28 section 2, *post*, discussing the lack of proper notice to the Petitioners.) Water Code
section 13320(a) states in relevant part, "[a]ny aggrieved person may petition the state board to
review that action or failure to act." The governing statute does not require Petitioners to exhaust
administrative remedies before the Regional Water Board before petitioning the State Water
Board. (See *Schutte & Koerting, Inc. v. Regional Water Quality Control Bd., San Diego Region*
(2007) 158 Cal.App.4th 1373, 1387 (*Schutte*).) In the *Schutte* case, the Court examined an

1 aggrieved person's duty to exhaust its administrative remedies before filing a writ of mandate in
2 Superior Court under Water Code section 13330. The Court found that "like *section 13330(b)*
3 . . . , *section 13330(d)* itself makes no express mention of any regional board hearing requirement.
4 Had the Legislature intended to require an aggrieved party to exhaust its administrative remedies
5 by seeking a hearing before a regional board, it could easily have so provided in section 13330."
6 (*Schutte* at p. 1387.) Based on the Court's rationalization in the *Schutte* case, the same would
7 apply to the almost exact same language in Water Code section 13320(a), which governs petitions
8 to the State Water Board. Thus, as long as the Petitioners comply with the time limits expressed
9 in Water Code section 13320(a), the Petitioners have properly complied with the express statutory
10 requirements. (See Wat. Code, § 13320(a); see also *Schutte* at p. 1387.)

11 In the alternative, should the State Water Board determine that Petitioners are not proper
12 parties because they have failed to properly exhaust their administrative remedies, the Petitioners
13 respectfully request that the State Water Board take this matter up on their own motion for the
14 compelling reasons provided further below. (See Cal. Code Regs., tit. 23, § 2050.5(c).)

15 1. NAMES, ADDRESSES, TELEPHONE NUMBERS, AND EMAIL ADDRESSES OF
16 PETITIONERS

17 The Petitioners are Weger Interests, Ltd., Parker Ten Mile Ranch, Bradford Ranch, Miller
18 Tree Farm, and RPH Comptche Properties. Petitioners' addresses are as follows:

19 Weger Interests, Ltd.
20 c/o Lisa Weger
21 2742 Treetops Way
22 Santa Rosa, CA 95404
23 Phone: (707) 538-1332
24 Email: lisweger@sonic.net

25 Parker Ten Mile Ranch
26 c/o Nan Deniston and Peter Parker
27 1950 Primrose Drive
28 South Pasadena, CA 91030
Phone: (626) 441-3335
Email: ndeniston@earthlink.net

1 Bradford Ranch
2 c/o Peter Bradford
3 P.O. Box 629
4 Boonville, CA 95415
5 Phone: (707) 895-3428
6 Email: BradfordRanch@wildblue.net

7 Miller Tree Farm
8 c/o Wayne and Joan Miller
9 10 Highland Court
10 Orinda, CA 94563
11 Phone: (925) 254-3984
12 Email: Ernie2@aol.com

13 RPH Comptche Properties
14 c/o Eugenia Herr
15 P.O. Box 446
16 Philo, CA 95466
17 Phone: (707) 895-3112
18 Email: eandrherr@dishmail.net

19 In addition, the Petitioners request that all materials in connection with the petition and
20 administrative record be provided to the Petitioners' counsel:

21 Theresa A. Dunham, Esquire
22 Somach Simmons & Dunn
23 813 Sixth Street, Third Floor
24 Sacramento, CA 95814
25 Phone: (916) 446-7979
26 Email: tdunham@somachlaw.com

27 2. PETITION SHOULD BE REMANDED FOR LACK OF PROPER NOTICE

28 As a preliminary matter, the Petitioners and many other landowners and/or operators with
approved NTMPs were unable to provide testimony and evidence before the Regional Water
Board because of inadequate notice to them as affected persons.

The Regional Water Board is subject to certain procedures and requirements. (See
Cal. Code Regs., tit. 23, § 647 et seq.) More specifically, the Regional Water Board is subject to
specific notice procedures for proposed actions. The Regional Water Board's governing
regulations, as adopted by the State Water 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 Water Board provided

1 “public” notice to a list of 153 interested parties on or about April 9, 2009. (See Exhibit 1.)
2 However, the notice provided fails to comply with all of the notice requirements expressed in the
3 applicable regulation because all “persons directly affected by the proceedings” were not given
4 notice.

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

15 Considering the fact that NTMPs are plans adopted by CalFIRE and the Board of
16 Forestry, and that the Regional Water Board reviewed the NTMPs as a responsible agency under
17 the California Environmental Quality Act (CEQA), the Regional Water Board is clearly aware of
18 the individual landowners (i.e., persons) that will be directly affected by the Categorical Waiver.
19 At the very least, the Regional Water Board could easily have identified those affected by these
20 provisions and provided them notice by obtaining names and addresses from CalFIRE. However,
21 the Regional Water Board failed to provide notice to those directly affected by its action. In light
22 of the lack of notice, the State Water Board should remand the Categorical Waiver in its entirety,
23 or at least the provisions applicable to NTMPs, to the Regional Water Board with specific
24 direction regarding the need for adequate notice and opportunity to be heard by persons directly
25 affected.

26 3. REQUEST FOR CONSIDERATION OF SUPPLEMENTAL EVIDENCE

27 If the State Water Board determines that it is not appropriate to remand the Categorical
28 Waiver to the Regional Water Board for further consideration based on notice violations, the

1 Petitioners hereby request that the State Water Board grant the Petitioners leave to submit
2 supplemental evidence concurrently with this petition pursuant to title 23 of the California Code
3 of Regulations, title 23, section 2050.6(a). The evidence for which Petitioners' request leave for
4 consideration is monitoring data of stream temperature conditions for three of the Petitioners'
5 timber harvest operations, and cost information with respect to the new requirements being
6 imposed through the Categorical Waiver. The temperature monitoring data provides proof that
7 timber operations subject to NTMPs do not significantly change or alter stream temperature, and
8 that stream temperature conditions remain cold and in support of anadromous fisheries. (See
9 Declaration of Lisa Weger in Support of Request for Consideration of Supplemental Evidence
10 (Weger Decl), Exhibit A; Declaration of Peter Parker in Support of Request for Consideration of
11 Supplemental Evidence, Exhibit A; Declaration of Wayne Miller in Support of Request for
12 Consideration of Supplemental Evidence, Exhibit A.) This evidence calls into question the
13 Regional Water Board's reasoning for applying increased shade canopy requirements to those
14 timber harvest operations subject to NTMPs.

15 The cost information is relevant for it provides specificity of actual costs. Regional Water
16 Board staff, on the other hand, declined to provide specific cost information to Regional Water
17 Board members after soliciting such information. "We have asked stakeholders for estimates of
18 what it will cost to comply with the conditions of the updated waiver and have attempted to solicit
19 an average cost of compliance by asking generalized questions with given acreages. We received
20 responses from three professionals, and are not including in the discussion any actual estimated
21 dollar amounts." (Staff Report Prepared the Revised Categorical Waiver of Waste Discharge
22 Requirements for Timber Harvest Activities on Non-Federal Lands in the North Coast Region,
23 Draft Order No. R1-2009-0038 (Timber Waiver Staff Report) at p. 21.) Petitioners have obtained
24 copies of the cost estimates provided by two of the three professionals to the Regional Water
25 Board staff as requested that was not put before the Regional Water Board for consideration.
26 (See Weger Decl. at ¶¶ 11, 12.) Because the Regional Water Board staff declined to provide
27 specific information to the Regional Water Board, Petitioners and others were prejudiced because
28

1 the Regional Water Board did not have sufficient information to make a well-informed decision
2 regarding the costs and implications of the Categorical Waiver.

3 As indicated in section 2, *ante*, Petitioners were unable to present the evidence discussed
4 herein to the Regional Water Board in conjunction with its consideration of the Categorical
5 Waiver because Petitioners did not receive notice of the draft Categorical Waiver, or the
6 scheduled hearing on this matter. Had the Petitioners received timely and/or proper notice of the
7 Regional Water Board's proposed action as well as notice regarding the availability of certain
8 documents such as the Timber Waiver Staff Report, Petitioners would have submitted the stream
9 temperature monitoring data, and the relevant cost information ignored by Regional Water Board
10 staff. Due to the Regional Water Board's lack of notice and the Petitioners' inability to submit
11 such evidence to the Regional Water Board, the State Water Board should allow Petitioners leave
12 to submit supplemental evidence concurrently with this petition.

13 4. REQUEST FOR CONSIDERATION OF HEARING

14 If the State Water Board determines that it is not appropriate to remand the Categorical
15 Waiver to the Regional Water Board for further consideration based on notice violations, the
16 Petitioners hereby request that the State Water Board conduct a hearing on this matter to consider
17 testimony, other evidence, and argument. (Cal. Code Regs., tit. 23, § 2050.6(b).) As indicated in
18 section 2 above, the Petitioners were unable to provide any testimony and/or evidence before the
19 Regional Water Board due to a lack of proper notice. Had the Petitioners received proper notice
20 and thereby been afforded the opportunity to participate fully in the Regional Water Board's
21 process, Petitioners would have provided additional information and evidence that questions the
22 studies and authority relied upon by the Regional Water Board. For example, the Timber Waiver
23 Staff Report cites to a number of different studies to support the findings in the Categorical
24 Waiver. However, it is the belief of the Petitioners and their experts that the cited studies do not
25 stand for in the proposition for which they are relied upon by the Regional Water Board. The
26 Petitioners therefore would like the opportunity to present evidence that questions the studies.

27 Furthermore, had the Petitioners been given proper notice and therefore the opportunity to
28 present evidence and information before the Regional Water Board, the Petitioners would have

1 prepared and presented cost information that includes an estimate of costs for all the new
2 requirements as they apply to NTMPs. Due to the Regional Water Board's lack of notice and the
3 Petitioners' inability to prepare and submit additional information and evidence as described
4 herein, the Petitioners request that the State Water Board conduct a hearing on this matter.

5 5. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL WATER BOARD
6 WHICH THE PETITIONERS REQUEST THE STATE WATER BOARD TO REVIEW

7 The Petitioners petition the State Water Board to review the Regional Water Board's
8 adoption of Order No. R1-2009-0038 as it pertains to NTMPs, and action or inaction related
9 thereto, as more fully described herein. A copy of Order No. R1-2009-0038 is attached as
10 Exhibit 2.

11 The specific determinations, designations and requirements of the Categorical Waiver that
12 the Petitioners request the State Water Board review are:

13 A. Finding No. 21, which states in part "[w]ith the addition of general and specific
14 conditions required for coverage under this Categorical Waiver, NTMPs are not expected to pose
15 a significant threat to water quality and therefore it is appropriate to conditionally waive waste
16 discharge requirements[];"

17 B. Section I, General Condition 7, which requires all dischargers subject to the
18 Categorical Waiver to notify the Regional Water Board in writing of any proposed aerial and/or
19 ground-based pesticide applications;

20 C. Section I, Categorical Waiver E for NTMPs, which includes the specific
21 conditions expressed in paragraphs 1 through 5;

22 D. Section II.C, which prevents the commencement of any timber harvest activity
23 subject to the Categorical Waiver until the discharger has received written notification from the
24 Executive Officer; and,

25 E. Section III in its entirety, which requires landowners and/or operators with
26 approved NTMPs to apply for coverage under the Categorical Waiver prior to the next notice of
27 timber operations submitted after June 4, 2010.

1 6. THE DATE ON WHICH THE REGIONAL WATER BOARD ACTED OR REFUSED
2 TO ACT

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

7 7. A STATEMENT OF THE REASONS THE ACTION OR FAILURE TO ACT IS
8 INAPPROPRIATE OR IMPROPER

9 As landowners and/or operators of timberlands subject to approved NTMPs, Petitioners
10 have made a long-term commitment to the State of California pursuant to the Forest Practice
11 Rules (FPRs) to sustainably harvest substantially less timber, increase timber stand volume, and
12 protect attendant public trust forest values. In exchange for these commitments, the Legislature
13 specified that the obligations of the landowner (which were established at much higher standards
14 than required in other forest practices) would be fixed at the time the NTMP was approved.
15 (Pub. Resources Code, § 4593(c).) The Regional Water Board has a role in the development of
16 NTMPs as a responsible agency under CEQA. (See *Categorical Waiver of Waste Discharge*
17 *Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the*
18 *North Coast Region*, Order No. R1-2004-0016, adopted on June 23, 2004 (Order No. R1-2004-
19 0016), at p. 4.) In this capacity, the Regional Water Board reviews NTMPs to ensure that
20 activities covered by the NTMP comply with applicable water quality standards and provisions
21 contained in the Water Quality Control Plan for the North Coast Region (Basin Plan). (*Ibid.*)

22 Further, the State Water Board and the nine Regional Water Quality Control Boards are
23 primarily responsible for water quality control in California. (See Wat. Code, § 13000 et seq.)
24 To implement water quality controls, the Water Boards may exercise discretion in developing and
25 adopting water quality control plans, as well as adopting waste discharge requirements for
26 individual dischargers or groups of dischargers. (See Wat. Code, §§ 13240, 13260, 13263.)
27 Water Code section 13269(a) provides that Water Boards may waive waste discharge
28 requirements for specific discharges or specific types of discharges “if the state board or a

1 regional board determines, after any necessary state board or regional board meeting, that the
2 waiver is consistent with any applicable state or regional water quality control plan and is in the
3 public interest.” (Wat. Code, § 13269(a).) Water Board adoption of waste discharge
4 requirements, and by extension the adoption of conditional waivers from waste discharge
5 requirements, is considered to be a quasi-judicial act.

6 Over the last several years, the Regional Water Board has adopted several Categorical
7 Waivers for timber harvest activities on non-federal lands pursuant to its authority under Water
8 Code section 13269. (See Order Nos. R1-2002-0109, R1-2003-0116 and R1-2004-0016.) With
9 each Categorical Waiver, the Regional Water Board recognized that timber harvest activities
10 covered by NTMPs were appropriately the subject of waivers from Water Code requirements for
11 Reports of Waste Discharge and Waste Discharge Requirements. (See Wat. Code, §§ 13260,
12 13263, 13269; see also Order Nos. R1-2002-0109, R1-2003-0116 and R1-2004-0016.) To make
13 such a determination, the Regional Water Board necessarily found that these timber harvest
14 activities are appropriately the subject of waivers from such requirements because activities are
15 consistent with the Basin Plan and in the public interest.

16 Now, in 2009, with no evidence to support its claims, the Regional Water Board finds that
17 to be eligible for the Categorical Waiver, NTMPs are subject to new general and specific
18 conditions not required under previous waivers. (Categorical Waiver at p. 6.) For the reasons
19 expressed more fully here, these costly new requirements are not supported by the evidence in the
20 record and should be removed from the Categorical Waiver.

21 A. The Regional Water Board’s Findings Are Not Supported by Evidence in
22 the Record

23 In California, the Regional Water Board must support its decisions with specific findings
24 based on evidence in the record. In particular, the Regional Water Board must “set forth findings
25 to bridge the analytical gap between the raw evidence and the ultimate decision or order.”
26 (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; see
27 also *In Re Petition of the City and County of San Francisco, et al.* (Sept. 21, 1995) SWRCB
28 Order No. WQ 95-4 at pp. 10, 13; 1995 Cal. ENV LEXIS 25 at pp. 13, 17.) Further, the findings

1 must be supported by evidence in the record. (*Topanga Assn. for a Scenic Community* at pp. 514-
2 515.) Notably, the Regional Water Board has adopted no findings to explain why the new
3 conditions and requirements applicable to NTMPs are necessary. At most, the Regional Water
4 Board makes one finding to state that with the additional conditions and requirements, NTMPs
5 are not expected to pose a significant threat. (Categorical Waiver at p. 6.) However, nowhere
6 does the Regional Water Board specifically state why such requirements are necessary, nor is
7 there evidence in the record to support the application of such requirements to NTMPs. (See
8 Timber Waiver Staff Report at pp. 16-17 whereby it fails to include a rationalization or
9 supporting basis for additional requirements on timber harvest activities subject to NTMPs.)

10 To the contrary, the studies relied upon by the Regional Water Board are not applicable to
11 timberlands subject to NTMPs because the studies were done prior to the first NTMP coming into
12 existence (1992), the studies were discussing streams adjoining clear-cuts and/or the studies
13 reflect practices found in Washington or Oregon on lands not subject to the California FPRs.
14 (See Timber Waiver Staff Report at pp. 9-21.) Further, there is no evidence in the record that
15 supports the notion that current NTMPs pose a significant threat to water quality. Consequently,
16 the studies used as supporting evidence for the Categorical Waiver should be completely
17 disregarded, leaving no justification for the Categorical Waiver as it relates to NTMPs.

18 The Petitioners' position is supported by comments submitted by CalFIRE, which state
19 "[i]t does not appear that Water Board staff has determined that operations conducted in
20 conformance with approved NTMPs pose a threat to water quality." (Letter to Mr. Robert Klamt,
21 May 8, 2009, from Mr. Crawford Tuttle, Chief Deputy Director, CalFIRE, regarding Categorical
22 Waiver for Discharges Related to Timber Harvest Activities on Non Federal land in the North
23 Coast Region (CalFIRE comments).) In response to CalFIRE's comments, the Regional Water
24 Board provides a lengthy explanation of its authority versus that of CalFIRE's, but is unable to
25 specifically respond as to why approved NTMPs are not protective of water quality. (See
26 Response to Comments Tentative Order No. R1-2009-0038 (June 4, 2009) (Response to
27 Comments) at p. 21.) In fact, current field data from the Monitoring Study Advisory Group to the
28 Board of Forestry reaches the opposite conclusion, namely that when the FPRs are implemented

1 as prescribed (either under the NTMP or a Timber Harvest Plan (THP)), there is no significant
2 increase in sedimentation in watercourses.¹

3 In addition, three of the Petitioners have maintained stream temperature data on their
4 properties over most of the last decade (copies of which are attached as Exhibit A to the
5 Declarations of Weger, Parker and Miller) verifying that the temperatures along harvested
6 watercourses remain enviably cold with no change in temperature pre- to post-harvest.² As the
7 only recent relevant data available, this data supports the conclusion that present practices under
8 the NTMP have not increased sedimentation and have maintained cold temperatures in
9 Petitioners' watercourses.

10 In another example, there is no evidence to support the requirement for upgrading culverts
11 to the 100-year flood interval. Petitioners' culverts currently comply with the FPR and meet the
12 50-year flood level standard. The record contains no information to suggest why the current
13 culvert standards are inadequate for the protection of water quality, and in particular for salmonid
14 habitat. For all of these reasons, the Regional Water Board's adoption of the Categorical Waiver
15 and its conditions as they pertain to NTMPs are not supported by appropriate findings or
16 substantial evidence in the record, and such provisions are therefore improper and unlawful.

17 B. Categorical Waiver Includes Requirements that Exceed the Regional Water
18 Board's Authority

19 When adopting waste discharge requirements or waivers from waste discharge
20 requirements, the Regional Water Board is prohibited from specifying "the design, location, type
21 of construction, or particular manner in which compliance may be had with that requirement,
22 order, or decree, and the person so ordered shall be permitted to comply with the order in any
23 lawful manner." (Wat. Code, § 13360(a).) The Categorical Waiver at issue here is unlawful as it
24 clearly includes requirements that dictate the "manner of compliance." For example, to
25 implement the Basin Plan's temperature objective, the Categorical Waiver specifies tree canopy
26

27 ¹ Pursuant to California Code of Regulations, title 23, 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.

28 ² See section 3, *ante*, for Request for Consideration of Supplemental Evidence.

1 requirements. (Categorical Waiver at p. 14.) The specific requirements associated with the road
2 plan and stream culverts also dictate the manner of compliance.

3 Further, the Regional Water Board has exceeded its authority to protect water quality by
4 imposing requirements that are more closely related to timber operations versus those necessary
5 to protect water quality. In its written comments and oral testimony, CalFIRE raised many
6 concerns with the Categorical Waiver, including that it attempted to govern the conduct of timber
7 operations. (CalFIRE comments at p. 2.) CalFIRE recognized and clearly understands that the
8 Regional Water Board has the authority to establish standards to prevent water quality
9 degradation; however, CalFIRE further commented that the requirements contained therein
10 surpassed the Regional Water Board's authority by governing the conduct of timber operations.
11 (*Ibid.*) In response to CalFIRE's comments, the Regional Water Board stated that it was adding
12 conditions "only as necessary to fully protect water quality." (Response to Comments at p. 22.)
13 The Regional Water Board's response here is inadequate for two reasons: (1) it fails to explain
14 how the conditions are necessary to protect water quality; and (2) the legal standard for protecting
15 beneficial uses is one of reasonableness, not "fully."

16 First, as part of its reasoning for protecting water quality, the Regional Water Board
17 claims that its actions with respect to NTMPs are necessary to protect anadromous fish habitat.
18 However, this argument is unsupportable because CalFIRE, in the adoption of its Threatened and
19 Impaired Rules (T/I Rules), requires higher standards for anadromous fish habitat. With the
20 listing of the coho salmon, the Petitioners and all coastal NTMPs will ultimately be subject to the
21 T/I Rules, which require increased stream protection along all watercourses. Therefore,
22 anadromous salmonids have already been addressed within the confines of the FPR, and
23 consequently by NTMPs as they exist today. Further, it is the opinion of CalFIRE that timber
24 harvest operations subject to NTMPs are done in such a controlled manner that water quality
25 impacts are unlikely.

26 Given the uneven age selection silviculture associated with these plans, the
27 generally light touch on the landscape, and the high level of water course and lake
28 protection that have been incorporated into the approved NTMPs; water quality
impacts associated with timber harvesting are not likely. Temperature regimes will
not exceed Basin Plan standards. Sediment is unlikely from silviculture application,

1 and monitoring and research has shown sediment to be more closely associated
2 with roads and crossings. Existing sources of sediment associated with crossings
are dealt with at the time of NTMP approval. (CalFIRE comments at p. 4.)

3 Thus, the requirements being imposed by the Regional Water Board "to protect water quality" are
4 not necessary because the FPRs and the content of NTMPs already adequately protect beneficial
5 uses.

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

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

18 (Categorical Waiver at pp. 22-23.) Most of these factors are clearly not within the Regional
19 Water Board's prescribed authority to protect water quality. In fact, several of them clearly
20 impinge on the authority and expertise of CalFIRE (e.g., need for fire reduction). Considering the
21 Regional Water Board's lack of authority for most of these requirements, the provision is
22 unlawful.

23 Second, with respect to "fully" protect water quality, the Porter-Cologne Water Quality
24 Control Act (Porter-Cologne) specifically provides that "activities and factors which may affect
25 the quality of waters of the state shall be regulated to attain the highest water quality which is
26 *reasonable, considering all demands being made and to be made on those waters* and the total
27 values involved, beneficial and detrimental, economic and social, tangible and intangible."
28 (Wat. Code, § 13000, emphasis added.) Thus, to the extent that the Regional Water Board is

1 attempting to adopt conditions and requirements to address water quality issues, it must consider
2 all demands and needs placed on North Coast waters – including timber harvest operations.
3 Further, the legal standard for the protection of beneficial uses (e.g., endangered species) is
4 “reasonable” protection, not “full” protection. (See *United States v. State Water Resources*
5 *Control Bd.* (1986) 182 Cal.App.3d 82, 121-122 [“The Board’s paramount duty was to provide
6 ‘reasonable protection’ to beneficial uses, considering all the demands made upon the water.”].)
7 Considering the Regional Water Board’s legal obligations to balance all demands being placed on
8 the water, the Regional Water Board has exceeded its statutory legal authority by adopting
9 unreasonable requirements for NTMPs.

10 In another example, the Regional Water Board has also exceeded its statutory authority by
11 requiring all dischargers subject to the Categorical Waiver to “notify the Regional Board in
12 writing at least 45 days prior to any proposed aerial application of pesticides and 30 days for any
13 proposed ground-based application of pesticides.” Pesticide use and regulation is subject to the
14 sole jurisdiction and authority of the California Department of Pesticide Regulation. (Food &
15 Agr. Code, § 11501.1.) The Regional Water Board has no authority to require or request timber
16 harvest operations to report pesticide uses to them in addition to and above the requirements set
17 forth by the California Department of Pesticide Regulation. (*Ibid.*)

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

23 C. NTMP Landowners are Substantially Harmed by Requirements in the
24 Categorical Waiver

25 As a practical matter, NTMP landowners are substantially harmed by the Categorical
26 Waiver as compared to other types of timber harvest operations due to the nature of NTMPs. By
27 agreeing to harvest timber pursuant to a NTMP, a landowner is agreeing to undertake uneven-
28 aged management of its timber resources and employ selective harvest practices. (Pub. Resources

1 Code, § 4593 et seq.) As a result, landowners that voluntarily subject themselves to NTMP
2 requirements forego the opportunity to harvest millions of board feet of timber in exchange for
3 reliance on the certainty of the FPRs, which regulate Petitioners' harvest and land management
4 operations. Landowners subject to NTMPs also incur substantially higher forestry and logging
5 expenses, again in reliance on the certainty of the NTMP agreement.

6 The Categorical Waiver as it relates to NTMPs undermines the very nature of NTMPs as
7 set forth by the Legislature because it requires erosion control plans, road plans and upgrading
8 infrastructure on par with the standards set for THPs and ignores the harvest practices specific to
9 NTMPs. For example, landowners with THPs can, and do, harvest up to 70% (or more) of their
10 per acre volume at any given time, which allows for substantially lower logging costs.
11 Petitioners, on the other hand, harvest 25% of their per acre volume, which results in significantly
12 higher logging costs. Furthermore, landowners with NTMPs, and Petitioners in particular, agree
13 to maintain intact forests that will support an abundance of resource values (e.g., wildlife, reduced
14 stream temperatures, increased spotted owl habitat, increased carbon sequestration, and less
15 erosion potential because fewer trees are removed at any time). However, through the
16 Categorical Waiver, the Regional Water Board is unilaterally changing the nature of an NTMP by
17 requiring the same burdens on Petitioners as those that are placed on others with THPs. These
18 actions do not help to encourage sustainable forestry practices commonly associated with
19 NTMPs. To the contrary, the cost of implementing the requirements will drive NTMP land-
20 owners out of business. As a result, the Regional Water Board's actions unfairly harm NTMP
21 landowners that have prepared such plans in reliance on the certainty provided for by statute.

22 D. Regional Water Board has Failed to Properly Consider Costs of Implementing the
23 Categorical Waiver

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

1 mandate, the Regional Water Board must consider costs associated with any water quality
2 regulation, including the Categorical Waiver.

3 As specifically applied to timber harvest operations with NTMPs, there are at least four
4 new costs associated with the Categorical Waiver: (1) costs associated with preparing Erosion
5 Control Plans and the Road Plan; (2) costs associated with upgrading culverts and roads; (3) costs
6 of yearly monitoring and reporting; and (4) costs associated with delaying start of operations.

7 Although the Timber Waiver Staff Report includes a section titled "Economic
8 Considerations," the report fails to include any actual cost estimates associated with the new
9 requirements. For example, the Timber Waiver Staff Report concludes that the cost of preparing
10 a long-term management Road Plan would range from "minimal to high." (Timber Waiver Staff
11 Report at p. 23.) This is quite a large undefined range. By staff's own admission, they received
12 cost estimates from three professionals, yet decided to not include any actual cost estimates.
13 (Timber Waiver Staff Report at p. 21.) This lack of specificity is bewildering to Petitioners
14 considering the fact that Regional Water Board staff had the information available.

15 In response to the Regional Water Board's questionnaire, one of the three respondents
16 submitted planning costs associated with the new requirements for NTMPs. (See Weger Decl.,
17 Exhibit B.)³ Based on these costs, Petitioners estimate that it would cost them tens of thousands
18 of dollars to prepare the necessary Erosion Control Plan and Road Management Plan. While for
19 large industrial timber operators this cost may not be significant, it is substantial for small private
20 timber landowners.

21 The cost of upgrading watercourse crossings (i.e., culverts) to the 100-year flood interval
22 is even more egregious. The Categorical Waiver requires the removal of properly sized and well-
23 functioning culverts. Such culverts must then be replaced with new culverts that cost tens of
24 thousands of dollars per property. These costs are unnecessary and unreasonable. However,
25 instead of estimating the costs associated with such requirements, the Timber Waiver Staff Report
26

27 ³ Petitioners hereby incorporate by reference pursuant to California Code of Regulations, title 23, section 648.3 the
28 cost information submitted by one registered professional forester to the Regional Water Board as requested by the
Regional Water Board. A copy of the information is provided here for administrative ease.

1 ducks the issue by stating: “We did not ask for the costs of implementing the waiver, such as
2 installing culverts and upgrading roads, because ownerships within our region are too diverse to
3 offer a generalized impression of these costs.” (Timber Waiver Staff Report at p. 21.) Thus, by
4 their own admission, staff did not attempt to estimate the costs of these upgrades to NTMP
5 landowners.

6 In addition, NTMP landowners will face additional costs for implementing the annual
7 monitoring requirements, which entail two separate visits by registered professional foresters at
8 the landowners’ expense. Petitioners estimate that these costs would be approximately \$1,500 per
9 year of added expense and more paperwork. (See Weger Decl., Exhibit C.)

10 Finally, the notification requirements to the Regional Water Board before beginning
11 timber operations and the new requirement for Regional Water Board executive officer approval
12 prior to commencement of timber operations may cause unnecessary delays that result in lost
13 opportunity and lost income. Currently, NTMP landowners are able to harvest timber under the
14 terms of their NTMP within three days of sending a NTO to CalFIRE. This allows a landowner
15 to quickly respond to timber markets and manage operational costs through timely planning. The
16 Categorical Waiver requires that the NTO be sent to the Regional Water Board five days in
17 advance of planned operations, and be accompanied by the updated ECP. Harvest activities
18 under an approved NTMP may not commence until the Regional Water Board’s executive officer
19 has approved the ECP and provided the landowner with written notification that coverage under
20 the Categorical Waiver is appropriate. (Categorical Waiver at pp. 21-22.) The Categorical
21 Waiver provides no time limit or requirement for response by the Regional Water Board’s
22 executive officer. Further, upon receipt of an ECP and/or road plan, the executive officer may
23 modify the ECP and/or road plan without consideration of cost. Due to these requirements, it is
24 possible that the start of operations could be delayed for days, weeks or longer. Thus, the
25 Categorical Waiver potentially deprives the landowner of the surety of timely planning and
26 operations.

27 Considering the sustainable timber harvest values associated with NTMPs, Petitioners are
28 amazed that the Regional Water Board would impose additional new requirements without

1 consideration of the actual costs. To do so violates the spirit and intent of Porter-Cologne, which
2 is to regulate to the highest level of water quality that is reasonable, considering a number of
3 factors including economics. Until the costs are actually estimated and put before the Regional
4 Water Board for consideration, the adoption of the Categorical Waiver and its requirements is
5 unlawful.

6 8. THE MANNER IN WHICH PETITIONERS ARE AGGRIEVED

7 The Petitioners are aggrieved by the conditions and limitations contained in the
8 Categorical Waiver, which are more stringent or onerous than required by or provided for under
9 current law. The Petitioners will or may be required to spend limited private resources to comply
10 with inappropriate or unlawful Categorical Waiver conditions. Given that the resources of private
11 landowners are limited and that such landowners have prepared and obtained adoption of
12 NTMPs, said landowners are aggrieved when forced to use resources to comply with
13 requirements that are arbitrary, unnecessary, unlawful and not required by law. This harm is
14 exacerbated by the fact that these additional efforts being required are not likely to provide for
15 measurable betterment to the water quality of the receiving water. The landowners are further
16 aggrieved by the inclusion of each of the unlawful and excessive Categorical Waiver conditions
17 with which they cannot now, or in the immediate future, comply, because they may be subject to
18 penalties in accordance with the California Water Code.

19 9. THE SPECIFIC ACTION REQUESTED BY PETITIONER

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

23 A. Delete Finding No. 21, which states in part “[w]ith the addition of general and
24 specific conditions required for coverage under this Categorical Waiver, NTMPs are not expected
25 to pose a significant threat to water quality and therefore it is appropriate to conditionally waive
26 waste discharge requirements[];”
27
28

1 B. Delete Section I, General Condition 7, which requires all dischargers subject to the
2 Categorical Waiver to notify the Regional Water Board in writing of any proposed aerial and/or
3 ground-based pesticide applications;

4 C. Delete Section I, Categorical Waiver E for NTMPs, which includes the specific
5 conditions expressed in paragraphs 1 through 5;

6 D. Delete Section II.C, which prevents the commencement of any timber harvest
7 activity subject to the Categorical Waiver until the discharger has received written notification
8 from the Executive Officer;

9 E. Delete Section III in its entirety, which requires landowners and/or operators with
10 approved NTMPs to apply for coverage under the Categorical Waiver prior to the next notice of
11 timber operations submitted after June 4, 2010;

12 F. Adopt or renew Categorical Waiver E: Nonindustrial Timber Management Plan
13 requirements as contained in Order No. R1-2004-0016 at pages 11-12; and,

14 G. Make any necessary revisions consistent with the above terms and provisions of
15 this Petition.

16 10. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES
17 RAISED IN THIS PETITION

18 A Statement of Points and Authorities in support of this petition is set forth in section 6
19 above. The Petitioners reserve the right to supplement this statement.

20 11. A STATEMENT THAT THIS PETITION WAS SENT TO THE REGIONAL
21 WATER BOARD

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

25 Catherine Kuhlman, Executive Officer
26 North Coast Regional Water Quality Control Board
27 5550 Skylane Boulevard, Suite A
28 Santa Rosa, CA 95403-1072

1 12. A STATEMENT REGARDING WHETHER PETITIONERS RAISED THE
2 SUBSTANTIVE ISSUES OR OBJECTIONS IN THE PETITION TO THE
3 REGIONAL WATER BOARD

4 The substantive issues and objections raised in the petition above, were raised before the
5 Regional Water Board in written comments submitted to the Regional Water Board in response to
6 the Tentative Categorical Waiver, and in testimony provided to the Regional Water Board at
7 public workshops held on March 24, 2009 and April 8, 2009, and at a hearing on the Tentative
8 Categorical Waiver on June 4, 2009. To the extent that the petition includes arguments not raised
9 before the Regional Water Board, Petitioners hereby request that the State Water Board consider
10 the arguments pursuant to California Code of Regulations, title 23, section 2050(a)(9) because
11 Petitioners were unable to participate in the proceedings before the Regional Water Board due to
12 a lack of proper notice. (See section 2, *ante*.)

12 SOMACH SIMMONS & DUNN

13 DATED: July 6, 2009

14 By 

15 Theresa A. Dunham
16 Attorneys for Petitioners Weger
17 Interests, Ltd., Parker Ten Mile Ranch,
18 Bradford Ranch, Miller Tree Farm, and
19 RPH Comptche Properties

Exhibit 1

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EXHIBIT 1

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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.