



Keeping Northwest California wild since 1977

Delivered via e-mail to: james.burke@waterboards.ca.gov on date shown below

April 1st, 2014

To: Mr. Jim Burke
North Coast Regional Water Quality Control Board
5550 Skylane Blvd Suite A
Santa Rosa, CA 95403

Re: EPIC Comments Regarding Order No. R1-2014-0011-- Categorical Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities on Non-Federal Lands in the North Coast Region

Dear Mr. Burke:

The Environmental Protection Information Center (EPIC) presents the following comments regarding Order No. R1-2014-0011--North Coast Regional Water Quality Control Board (Regional Board) Waiver of Waste Discharge Requirements (categorical waiver) for private timberland operations in California's North Coast Region. EPIC very much appreciates being afforded the opportunity to comment on this categorical waiver.

Summary

EPIC, in general, supports the Regional Board's approach as outlined in the categorical waiver. However we do have several general, as well as specific, concerns that need to be addressed before the Regional Board acts. These concerns are outlined as follows:

- 1) Over-reliance on CAL FIRE as "lead agency" to ensure that planning documents are adequately evaluated to ensure compliance with the provisions of the Regional Water Quality Control Plan (Basin Plan);
- 2) Over-reliance on existing California Forest Practice Rules (FPRs) to ensure attainment of water quality objectives;

Environmental Protection Information Center

145 G Street, Suite A, Arcata, CA 95521

(707) 822-7711

www.wildcalifornia.org

- 3) Over-reliance on a programmatic approach that fails to incorporate adequate site-specific consideration and review;
- 4) Lack of effective measures to deal with climate change, water scarcity, and drought conditions;
- 5) Application of a negative declaration process to comply with CEQA; and
- 6) Over-broad reach of waiver Category F.

While we recognize that some of these issues remain from past Regional Board action which you may believe have been previously expressed, EPIC believes it is important for the Regional Board to understand the implications of the existing, as well as the categorical waiver for the attainment and maintenance of water quality objectives on the north coast.

Over-Reliance on CAL FIRE to Implement and Enforce Basin Plan Water Quality Objectives

In finding #12, on page 3 of 22 of the categorical waiver, the Regional Board describes existing Forest Practice Rules that are intended to protect, enhance and restore beneficial uses of water and water quality. The finding also refers to 14 CCR 896(a), which provides that the FPRs shall be applied so that they are consistent with other existing laws, including the Porter-Cologne Water Quality Control Act. In addition, this finding also mentions the stated intent of the FPRs. Finally, this finding refers to 14 CCR 898.2(h), which prohibits CAL FIRE from approving a plan that would violate a Basin Plan.

CAL FIRE has repeatedly stated in THP Official Responses to public concerns that it is not responsible for enforcing provisions related to timber harvest plans that may affect water quality or violate the Basin Plan. CAL FIRE instead claims that it is the Regional Board's responsibility to enforce these provisions. To our knowledge, CAL FIRE has never disapproved a plan that might violate the Basin Plan. Reliance on CAL FIRE to enforce the Basin Plan is akin to asking CAL FIRE to enforce the federal or state Endangered Species Act, which, as the Department has explained, it does not have the authority to do. The authority and responsibility to enforce the provisions of this Draft Order clearly fall into the purview of the Regional Board, not CAL FIRE.

Moreover, in its Official Responses CAL FIRE has consistently claimed that the state and federal anti-degradation policies provisions, adopted in State Water Board Resolution 68-16, do not apply to impaired waters. CAL FIRE has no basis in law or regulation for this contention. It is important that the Regional Board ensure compliance with state and federal anti-degradation policies, and not delegate that duty to CAL FIRE.

The Regional Board's intended reliance on an agency with no will or desire to enforce laws and regulations other than the Forest Practice Act and the FPRs, despite statutory and regulatory mandates, places our waters at risk and is fraught with peril for the Regional Board. In fact, years of evidence and experience have shown that CAL FIRE is incapable of disapproving plans that would violate the Basin Plan or the anti-degradation policy, as evidenced by continued degradation of the quality and beneficial uses of water from timber operations throughout the north coast. The mere fact that the Regional Board is still working to prepare TMDLs for north

coast streams, and that the Regional Board feels the need at all to promulgate WDRs for timber operations should be enough evidence as to the abject failures of CAL FIRE to prevent the degradation of the quality and beneficial uses of waters of the north coast.

In addition, finding #28 on page 8 of 22 states that, “further, subsequent CEQA review ensures site-specific mitigation and appropriate project planning to protect water quality.” EPIC disagrees with this sweeping conclusion. Compliance with CEQA can only be viewed on a case-by-case basis. The Regional Board is not actively participating in the CEQA review process for most THPs, so it is inconceivable that the Regional Board has a basis to make this finding. Moreover, CAL FIRE’s refusal to enforce the Basin Plan or implement the anti-degradation policy undermines a finding that the existing CEQA process is adequate to protect water quality.

Over-Reliance on Existing FPRs to Ensure Attainment of Water Quality Objectives

Finding 14 and page 4 of 22 of the categorical waiver states that the Anadromous Salmonid Protection Rules (ASP rules) contained in the FPRs (14 CCR 916.9) are generally protective of shade and water temperatures where they apply. This finding is not based on substantial evidence, as there has not been, to our knowledge at least, rigorous, peer-reviewed independent scientific review of the effectiveness of the ASP Rules. Instead, the Regional Board’s comments to the Board of Forestry regarding the impacts of timber harvesting on temperature objectives (McFadin 2009) during deliberations on the ASP Rules indicates a very different scenario. In his conclusion, McFadin (2009) advised that it is clear that the ASP Rules are not specifically designed to meet Basin Plan objectives. The stated purpose of the ASP Rules is to prevent significant adverse impacts to listed salmonids specifically. The ASP Rules are not designed to take into account other beneficial uses of water, which is a major deficiency of these Rules.

Furthermore, as noted in comments to the Board of Forestry by Regional Board staff, important provisions of the ASP Rules have been modified or deleted as a result of the Board’s deliberation on the so-called “Road Rules.” In particular, Regional Board staff has noted the deletion of 14 CCR 916.9(o), “erosion site identification and remedies.” The removal of this section from the ASP Rules leaves out essential requirements for identification of, and remediation of, potentially significant erosion sites not associated with roads.

Additionally, the so-called “Road Rules” will not even become effective until 2015, due to a Board of Forestry error in notice for modification of the previously-noticed regulatory language. The long-standing failure of the Board of Forestry to promulgate regulations to address significant impacts from roads, landings, and related infrastructure continues to be a primary weakness in the existing FPRs.

The Regional Board cannot reasonably rely on Rules that are not intended to address all beneficial uses of water, and are not designed to ensure attainment of water quality objectives. There is no research, monitoring, or other empirical evidence that independently supports the contention in finding #14 that the existing FPRs are adequate to protect water quality. The Regional Board, therefore, should take a precautionary approach to the promulgation of this categorical waiver and incorporate additional measures to ensure that the quality and beneficial uses of water are maintained, enhanced, and restored.

Programmatic Permitting versus Project-by-Project Review

Regional Water Board staff has been largely absent from the timber harvest plan review process over the last decade, participating in the review and decision process for projects on private timberlands on a very limited basis. Despite the increase in agency funding as a result of AB1492 funds, we have not seen any increase in Regional Board staff review and participation in the CAL FIRE review team process.

While a programmatic approach to permitting that seeks to address the protection, enhancement, and restoration of the beneficial uses of water and water quality may glean certain advantages, particularly offering the Regional Board its own ‘bite at the apple,’ this approach cannot and should not replace on-the-ground review of individual projects for compliance with Basin Plan water quality objectives. Simply relying on CAL FIRE’s individual project review to ensure protection of water quality and compliance with Basin Plan objectives cannot ensure compliance with either the Basin Plan, or the anti-degradation policy.

While we continue to support the Regional Board in promulgating WDRs and WDR waivers to establish its own regulatory process, such a process cannot and should not exist alone in a vacuum, and must be augmented by on-the-ground review of projects to ensure compliance with the Basin Plan and the anti-degradation policy.

Need to Effectively Deal with Climate Change/Drought, and Its Effects on Water Quality and Quantity

The categorical waiver is devoid of any mention of the realities of climate change and how they are playing out on the North Coast. This is particularly keen this year, as California is experiencing a drought emergency. Rainfall levels for water year 2013/2014 are some of the lowest ever. The Regional Board must incorporate effective science and consideration of the effects of climate change in development of WDRs and WDR waivers. This requires new consideration of how to protect the quality and quantity of water. In this time of extreme water scarcity, the Regional Board must consider enhancing provisions of this order to ensure forest management activities do not contribute to or exacerbate the impacts of climate change. Additional consideration must be given to how our private land forested watersheds must be secure and well-maintained to address the water needs in our state as the predictable consequences of climate change occur.

2009 Mitigated Negative Declaration Approach

Findings #34-36 on pages 9-10 state that the Regional Board intends to rely on a 2009 Mitigated Negative Declaration in reviewing this categorical waiver, and that it will issue a notice of determination within five days of the issuance of the order. Is this what the Regional Board intends, or is this language left-over from the last order? We are unclear whether the Regional Board intends to rely on the 2009 Mitigated Negative Declaration for the promulgation of this Draft Order or not. Clarification on this point would be greatly appreciated. EPIC maintains that reliance on proceedings from 2009 is inappropriate, and the Regional Board needs updated CEQA and public review for its proposed categorical waiver.

Over-broad Reach of Category F

Category F on page 13 of 22 refers to a categorical waiver for ‘other projects.’ It is unclear what is the scope and type of “other projects.” While it “includes” THPs or other timber harvesting activities, it is not limited to those categories. To the extent there is to be a Category F, it should be limited to THPs and those THP-related activities, and should not extend beyond timber harvest plans. As above, EPIC must challenge the characterization of THPs as “in compliance with CEQA,” as we believe that determination can only be made on a case-by-case basis. Lacking a change, EPIC questions the need for Category F.

Conclusion

The findings for the categorical waiver are based on false hopes and presumptions that are not based in reality of the existing available evidence. Reliance on CAL FIRE and existing FPRs to ensure that the state’s mandates to protect, enhance, and restore the beneficial uses of waters of the state fails to take into account the reality that CAL FIRE is unwilling to discharge these duties, and that history has shown that the CAL FIRE has perpetually failed in this regard. Lacking a lead agency willing to ensure compliance with applicable laws and regulations, the Regional Board must build into the categorical waiver enhanced provisions to ensure it is effective. In particular, additional measures should be considered in waters listed as impaired, where the provisions of the anti-degradation policy must be applied, as well as applicable TMDLs. Finally, given the reality that the Regional Board is not participating on a regular basis in the day-to-day review and approval process for private lands timber harvesting plans, it is even more critical to build even more stringent protective measures into this categorical waiver.

We remain supportive of the Regional Board’s authority to promulgate WDRs and WDR waivers for private forestland harvesting activities on the north coast. However, the proposed categorical waiver, as it reads today, is based on hope and expectation more than prescriptive measures, and thus is not adequate to obtain the objectives of the Regional Basin Plan, applicable TMDLs, or the state and federal anti-degradation policies.

We appreciate the Regional Board for including EPIC in this development process from the beginning and soliciting our input. Please do not hesitate to contact me at the number provided below as necessary or desirable if there are questions or points of discussion.

Sincerely,



Rob DiPerna
California Forest and Wildlife Advocate
Environmental Protection Information Center
145 G Street, Suite A
Arcata, California 95521
Office: (707) 822-7711
Email: rob@wildcalifornia.org