

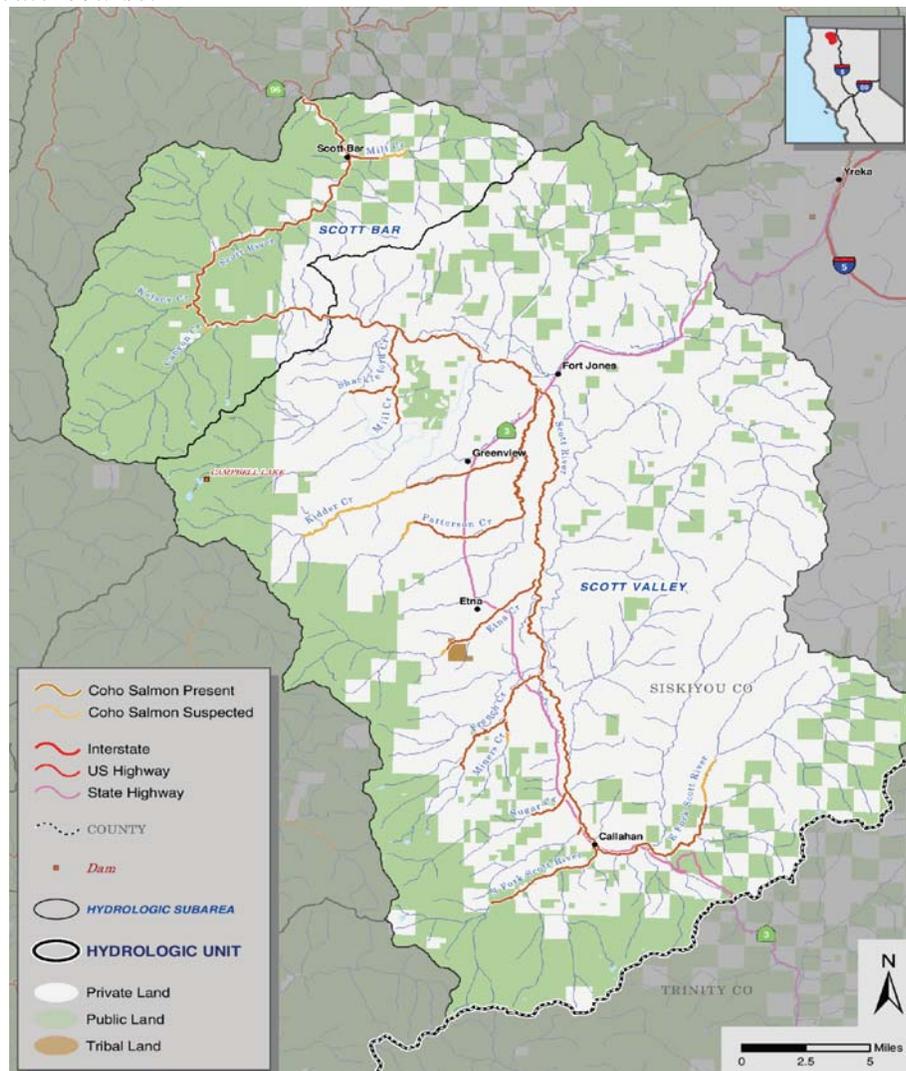
DRAFT

T/I Rule review

Are 895.1 definitions consistency with other agency policies and laws:

4. How do definitions, specifically the "watersheds with threatened or impaired values" definition, appropriately reflect relationship between TMDL impairment listings and CESA listing?(ref: L12-1).

- *This definition does not cover the areas listed in TMDL Impairment listings in for example the Scott and Shasta River TMDLs. The CESA listings are defined by the limits of coho anadromy and depends on presents/absence of coho. This basically limits coverage to about 10 to 15% of the streamside area in the Scott River compared to the current TMDL impairment listing of 100% of the basin, that drains to the watercourse.*



All areas in blue and additional Class III habitat would be protected in the TMDL for the Scott River, only the areas in brown and tan are protected under 2112.

5. Should the road decommissioning definition (adopted in coho rules 2007) add the phrase "to the extent feasible" and what is the legal or policy basis for this? (ref: L12-1).

- *Adding "to the extent feasible" is both redundant and openly starts the process of setting up the feasibility argument first before the concept of decommissioning is even clearly vetted. It is obvious that if a section of road can not be removed because it is not feasible both technologically, or economically, that no one has ever has to do a project. The problem is THPs propose to log but then when a mitigation that should be employed to remove a sediment source from an old road is shown to be infeasible the decommissioning is not required but the THP is still allowed to be approved. No THP to date has ever stopped because it can't perform mitigation on a legacy road that has been a serious source of pollution in the past and will continue after the plan is approved. It is time to look at not approving plans if it can not feasibly remove a pollution source that is a cumulative impact.*

6. Does the "watersheds with threatened or impaired values" definition reflect geographic scope consistent with your agency's laws and policies?"

- *The short answer is no, it is limited to streams with listed anadromous species. The North Coast Regional Water Quality Control Board has a much broader approach to protect all the tributaries (waters of the state) that are within an impaired water body and is not limited to anadromous streams as many other beneficial uses are considered and protected by our mandate and authority under Porter-Cologne. Our comments stand from other requests for review of T&I rules: the geographic scope of the rules is not consistent with our laws or policies. The area covered by stream protections must be applied watershed wide and on all watercourses regardless of anadromy or "listed species". This present definition ignores the effects of upstream disturbance on downstream coho habitat which must be recognized. Protections must affect the entire area that can influence coho habitat to have a realistic chance of restoring coho salmon populations and meeting beneficial use protection requirements. Water that enters a coho habitat needs to be cool, sediment inputs controlled, and large wood inputs enhanced as an integral part of any project.*
- *In essence, this definition of streams with "Threatened and Impaired Values" ignores any attempt to correctly address "Impaired" streams and conflicts with Section 303(d) listed impaired waterbodies. Many streams that are listed as impaired by the EPA and are subject to TMDLs will never receive protection under Threatened and Impaired rules. Additional protections are given only to streams that have fish present that are "listed as endangered, threatened or candidate," which covers a very limited subset of impaired waterbodies. So this definition is in conflict with the Clean Water Act for defining impaired water bodies. The use of "Impaired" in the title of Threatened and Impaired reflects the*

NCRWQCB

May 5, 2008

Group #1 Responses

original intent to protect 303(d)-defined impaired waterbodies with this rule package and ignores removal of those specific protections long ago. The root problem is this definition ignores that water flows down hill and the interconnection between headwaters/tributaries and their role in improving and impacting downstream waters and fisheries. This means that many listed impaired watercourses do not receive As a protection for sediment or temperature impairment, and as a consequence, no FPR requirements no matter how effective will be employed in numerous streams or in major upstream headwaters or tributaries.

- *Additionally this points to a major problem in the T&I Rules where additional protections are applied below where fish are “endangered” and not above where problems are coming from. Salmon biology is also being ignored when protections are only applied to troubled stocks of fish and other meta populations are ignored and allowed to collapse. This process has lead to a total collapse of coho populations in areas of good habitat. Populations with low numbers of coho have been left unprotected and damaged while other areas have lost their runs. Through this process recovery has been hampered and populations lost that could have been sources populations for later reseeding of habitats. . Coho protection rules must apply to all watershed areas that historically had coho salmon and to all watershed areas that drain to those habitats.*

8. Should "channel zone" definition delete bankfull stage, and floodplain references? (ref L6-3)

- *Bankfull stage is a integral part of defining a channel zone, removing that term will leave the term ill defined. Removing those terms only leaves the definition with “includes a watercourses channel encompassing the area between the watercourse transition lines. This limits the channel zone to only the active 1 ½ yearly flow area of a stream channel which is not a good representation of what needs to be protected within streams zones. The channel zone without the bankfull stage and flood plain references is an extremely limited definition not typical of any jurisdiction.*

8. 14CCR916.2 Subsection (a)(3) specifies that protection of riparian habitat. Given this is an undefined term, how far from the wetted channel does this extend? (ref L6-14).

- *It should extend to top of the inner gorge or to the outermost extent where vegetation may be influenced by elevated water tables, flooding, or the ability of soils to hold water. or two site potential tree heights or to the outer edges of the 100 year flood plain whichever is greatest. (Northwest Forest Plan)*

§ 916 Intent of Watercourse and Lake Protection

Consistency with BOF policy, FPA, and other agency policies and laws

12. Should term at "native aquatic and riparian species" be defined for clarity of intent and if so, what should the definition be? What is the legal, policy, or science basis for this? (L6-5).

- *The term "native" excludes extending unwarranted protection to invasive or noxious non-native species.*
- *In common definition, the term "aquatic species" means one that lives in or on water. (In DFG terminology, "fish" includes amphibians.)*
- *The term "riparian" is defined in §895.1. A riparian zone is defined in several ways, depending on the scientific subject under consideration. It is not defined in the FPRs, but following the logic of the FPR definition, it would be a zone having the characteristics set forth in the definition. Science widely recognizes that riparian zones have a wide variety of unique and/or beneficial ecological functions, and so warrant increased protection.*
- *A "riparian species" would one that lives largely within (or depends for a part of its life cycle on) a zone having riparian characteristics.*

13. Is the term "feasible measures", as used in the Forest Practice Rules, consistent with the phrase "maintain where they're in good condition, protect where they are threatened and insofar as feasible, restore where they are impaired"? In the same phrase does the term threatened and impaired mean dictionary or legal definition? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L6-6)

- *No this is not consistent with the phrase, maintain... and protect... do not appear to be limited by feasibility and for a good reason. To maintain can be to just leave alone not harvest which is always feasible, to protect is also accomplished by not harvesting which is always feasible. Only restoration which is an action is covered by feasibility as some restoration of roads for example may not be feasible by technological economic or physical means. . The fact that the rules state maintain where they are in good condition, protect where they are threatened before the "insofar as feasible" comes in, means that they are only supposed to worry feasibility for restoration where they are impaired. One can always argue that protection is not economical, but if there is an endangered species then*

NCRWQCB

May 5, 2008

Group #1 Responses

the economic argument is not a protection against doing the work under CESA or the ESA.

17. Should application of protection measures (based on conditions of resource values) be expanded to appurtenant roads, including those roads outside of the watershed or outside of the THP boundary? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L6-11)

- *Protection measures should be extended to any road within the affected watershed, in the context of applying the rules to a "T&I" watershed. The scientific and policy/legal bases are explained above in the discussions on TMDLs and geographic extent of application of the rules.*
- *In the CEQA context, cumulative effects of the "project" is the legal mandate to require the extension of the rule outside the watershed for roads used in the THP. CEQA expects that mitigations should be employed to limit the impacts of the project regardless if it crosses over a watershed divide.*
- *From a scientific hydrologic perspective, appurtenant roads outside the THP that have the potential to impact the same watercourse as the THP should be subject to the T&I Rules.*

§ 916.2 Protection of the Beneficial Uses of Water and Riparian Functions

Review for Consistency
with BOF policy, FPA, and other agency policies and laws

19. What should be the basis for determining where values need to be restored? Is the term "where needed" too vague? Should language used in section 916 be used instead? From your agency's perspective, what is the legal, policy, or science basis for this? (ref L12-3)

- *Section 101 of the CWA (33 USCA 1251) states the national goal of eliminating the discharge of pollutants to navigable waters by 1985 and sets the "interim goal" of making all such waters fishable and swimmable by 1983.*

21. Do protection measures for restorable quality of beneficial uses of water go beyond water quality control plan requirements for existing and potential beneficial uses? (ref L6-13)

22. Should the term "minimum protection measures" be replaced with term "standard protection measures"? Use of the term minimum implies rules can only be increased and not decreased. Is this consistent with board policies, Forest Practice Act and other agency laws and policies? (L6-

(916.9 (a))

27. Have threatened or impaired rules created unintended consequences to biodiversity specifically to terrestrial wildlife species by retaining dense buffer strips? What is the science or policy basis for your agency's perspective?(ref L3-4, L4-6).

- *While we are not sure one can really tell across the landscape. However, if riparian zones are allowed to grow back to something approximating their original state then changes to the biodiversity are related to returning those areas more closely to the original terrestrial makeup.*

28. Has any monitoring been conducted related to effect on non-salmonid species due to implementation of the T/I rules and if so what are the finding and scientific robustness of the monitoring information? (ref L4-6).

- *Monitoring has been conducted on benthic invertebrates, but we are not aware of any studies specifically tied to the effect of implementation of T/I rules.*

Science basis consistency with BOF policy and other agency policies and laws

29. How should selection harvesting or other restoration practices promoting habitat conditions for non-salmonid species be considered? Should selection harvesting be permitted in riparian zones for purposes of improving habitat for other species? What is the legal, policy or science basis for your agency's perspective?(ref L4-6).

- *Selection harvesting by itself is not a restoration practice, though the question implies that in "...selection harvesting or other restoration practices..." The first clarification question is "What other non-salmonid species?" The restoration of habitat for coho salmon is focused on restoring riparian habitats to their original state. When that is achieved then coho and all other aquatic and terrestrial riparian and stream dependent species will benefit. No restoration should be guided by any other principle.*
- *Selection harvest within the riparian zone can benefit the restoration of softwood species but consideration for other "limiting factors" must be prioritized. If water temperatures, shading, sediment/nutrient filtering capacity etc. are considered in relation to the need for more softwood and LWD then selection harvesting of hardwoods can be justified. As far as improving habitat for other species within the riparian zone it should be limited to riparian/aquatic native species that are limited in range and diversity and should consider impacts to other listed species. The science basis for this is basic restoration science that is well founded in the Northwest Forest Plan and the Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat, June 1999*

NCRWQCB

May 5, 2008

Group #1 Responses

30. Are the existing goals relevant to achieving conditions directly affected by forest regulation? To what extent should Forest Practice Rules contribute to larger agency goals of meeting the TMDL requirements or species recovery requirements? (ref L11-1).

- *California Water Code Section 13247. states that state offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans (Basin Plans) approved or adopted by the state board.*

31. How have threatened or impaired rule compliance met or not met TMDL requirements? (ref L8-1).

- *Compliance with the rules is not the term, rather implementation of the rules. The T&I rules partially fulfill TMDL requirements in those waters where applied (downstream of anadromy). For example, in the Scott and Shasta River TMDLs, the riparian standards set forth in the T&I rules are considered to be adequate for protecting Class I Watercourses downstream of anadromy, except they do not include provisions for protection of trees that shade the watercourse. Unfortunately the rules do not apply to all Class II streams where lesser protections are applied. If the new 2112 coho rules for Class II watercourses were applied to all Class II watercourses then they would be considered close to meeting the afore mentioned TMDLs where the species are present.*
- *The Garcia TMDL Action Plan seeks to address sedimentation through an ownership-wide programmatic approach which exceeds the standards of the T&I Rules when harvest planning activities do not cover an entire property. The Garcia River Management Plan requires landowners to avoid or minimize the use of skid trails on slopes greater than 40% within 200 feet of any watercourse. Where skid trails are used within this zone they must be existing, stable, and receive soil stabilization treatments. This restrictions on slopes greater than 40% within 200 feet of a watercourse exceed the standards of the T&I Rules.*
- *In the Garcia river TMDL for example the Action Plan requires the establishment of a Riparian Management Zone adjacent to all watercourses. For Class I and II watercourses, the Riparian Management Zone is a 100-foot strip of land on each side of, and adjacent to the watercourse. The Garcia River Management Plan requires a number of different restriction and activities within the Riparian Management Zone including: All roads within the Riparian Management Zone shall be surfaced with competent rock to a sufficient depth to prevent road fines from discharging to watercourses. Commercial and salvage timber harvest shall not occur within the first 25 feet of the Riparian Management Zone for Class I, II, III watercourses. Downed large woody debris shall*

Group #1 Responses

not be removed from watercourse channels unless the debris causing a safety hazard. On Class I and II watercourses, at least five standing conifer trees greater than 32 inches DBH shall be permanently retained per 100 linear feet of watercourse. There is no removal of trees from unstable areas within a Riparian Management Zone that have the potential to deliver sediment to a water of the State unless the tree is causing a safety hazard.

- *The Garcia River Management Plan restrictions on unstable areas are not met by the standards of the T&I Rules as The Garcia River Management Plan prohibits the following activities on unstable areas and may exceed the standards of the T&I Rules.*
 - a. *New road construction across unstable areas is prohibited without the field review and development of site specific mitigation measures by a Certified Engineering Geologist.*
 - b. *No more than 50% of the existing basal area formed by tree species shall be removed from unstable areas that have the potential to deliver sediment into a watercourse.*
 - c. *No concentrated flow shall be directed across the head, toe, or lateral margin of any unstable area.*
- *The new 2112 coho rules do not fully meet TMDL requirements in that they only provide protection in planning watersheds where the listed species is present as opposed to providing protection to streams that flow into planning watersheds with listed species. This is especially critical for temperature TMDLs.*

31. In watersheds that do not have adopted TMDLs, must operations be planned so they do not result in any measurable sediment load increase to a watercourse or lake? If so, this standard is greater than for watercourses within adopted TMDLs, which permit a specified sediment load increase. What is the policy or legal basis for your agency's perspective on this? (ref L12-4).

- *California Water Code section 13263. "Requirements for discharge" states that "The regional board shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge with relation to the conditions existing in the waters into which the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241. A regional board, in prescribing*

NCRWQCB

May 5, 2008

Group #1 Responses

- requirements, need not authorize the utilization of the full waste assimilation capacities of the receiving waters. The regional board may prescribe requirements although no discharge report has been filed.”*
- *It should be noted that CWC section 13263(g) states the “ No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights.”*
 - ***CWC § 13264. Prerequisites to discharge:*** *states that no person shall initiate any new discharge of waste or construct prior to the filing of the report required by Section 13260 and no person shall take any of these actions before issuance of waste discharge requirements pursuant to Section 13263.*
 - *Our agency approach is to require what in our judgment is needed to protect, maintain, or restore beneficial uses of water. Differences among streams and watersheds consequently result in differences in protections on site-specific bases. TMDL development involves the application of scientific methods and analyses for source analysis, determination of assimilative capacity, and load allocations that are far more rigorous than evaluations made during the timber harvest plan development and review process.*
 - *The overall reduction from existing anthropogenic sources is often stated as the goal of sediment load reductions. For example, it may be stated that the intent of a TMDL implementation plan is to reduce existing anthropogenic sediment loads by 75% to bring it down significantly or 125% over background or natural sediment levels. This is similar to saying the natural sediment load historically was 100 cubic yards per acre per year and it is now 200 cubic yard per acre per year, and we need to bring it down to 125 cubic yards per acre per year. This reduction will be monitored to see if it is effective in improving instream conditions to the level where the capacity of the water body to assimilate pollutant loading (the loading capacity) is not exceeded. If the stream does not respond sufficiently then additional measures may be required.*
 - *That is not say a landowner is allowed to do a new project and release 25% more sediment than the site produced before the land was disturbed. New projects should be designed and implemented to prevent and minimize any sediment discharges. It is acknowledged in the sediment calculations that not all sediment associated with past anthropogenic activities will be able to be feasibly accessed and remediated, and calculations of past sediment loads have to account for wide variations in years. The 25% additional sediment load is allowed in part for those reasons. This does not equate to 25% additional discharges from “New*

NCRWQCB

May 5, 2008

Group #1 Responses

Projects” that can access all the ground they disturb and apply present day erosion control technology to their lands.

- *The legal basis has been well established in law and by the courts (Porter-Cologne Water Quality Control Act and the Clean Water Act). CWC Section 13247 of the Water Code specifically requires all "state offices, departments, and boards" to "comply with water quality control plans" in carrying out activities that may affect water quality.*
- *CWC § 13263.3. Legislative findings; definitions (a) “The Legislature finds and declares that pollution prevention should be the first step in a hierarchy for reducing pollution and managing wastes, and to achieve environmental stewardship for society. The Legislature also finds and declares that pollution prevention is necessary to support the federal goal of zero discharge of pollutants into navigable waters.”*

33. Should T/I rules in watersheds without a TMDLs be designed to be consistent with 303(d) goals? What is the policy or legal basis for your agency's perspective on this? Because T/I rules have a goal of preventing deleterious interference and TMDL/303(d) requires restoration, T/I rules are not consistent at 303(d) goals. (ref L16-1).

- *CWC § 13263.3. Legislative findings; definitions (a) “The Legislature finds and declares that pollution prevention should be the first step in a hierarchy for reducing pollution and managing wastes, and to achieve environmental stewardship for society. The Legislature also finds and declares that pollution prevention is necessary to support the federal goal of zero discharge of pollutants into navigable waters.”*
- *FPR 916.9 has numerous references to restoration in the goal section of the T/I rules. If the T/I rules are close to 303(d) goals then only one agency’s rules would need to be employed. That would be the simplest way for landowners to comply.*
- *If the regulation under T/I do not meet the requirement of a TMDL then our office will make the necessary permit conditions to make the THP come into compliance with the Basin Plan and TMDL implementation requirements. In watersheds without TMDLs we employ the mandates of the CWC section 13000 for protection, maintenance, and restoration. Again, incorporating full Basin Plan compliance into the Forest Practice Rules would be the least work intensive for staff and probably best for the landowner, too.*

34. Should threatened or impaired rules be required to restore conditions and comply with adopted TMDLs? What is the legal basis for requiring restoration through the threatened or impaired rules? (ref L17-1).

NCRWQCB
May 5, 2008
Group #1 Responses

- *CWC Section 13247 specifically requires all "state offices, departments, and boards" to "comply with water quality control plans" in carrying out activities that may affect water quality. It seems to make sense that the FPRs would be the mechanism for TMDL compliance from timber harvesting. However, what mechanism is used to comply with adopted TMDLs is the decision of the Board of Forestry.*

35. Should a more site-specific approach be developed for rule requirement, as opposed to one-size-fits-all? What is the legal, policy, or science basis for your agency's perspective? (ref L3-2, L4-12, L5-1)

- *As strongly recommended in the 1999 Scientific Review Panel report, the greatest deficiency the FPRs have in protecting ESA-listed anadromous salmonids is the lack of an effective watershed approach to address cumulative watershed effects. To address this deficiency, the North Coast Regional Water Board has promulgated watershed-wide general waste discharge requirements.*

39. Should rules state that small contributions to pre -project cumulatively considerable adverse conditions be avoided, minimized or mitigated? What is the legal, policy, or science basis for your agency's perspective?(ref L7-5).

- *Cumulative impacts must always be considered. CEQA is applicable to THPs. See EPIC v. Johnson.*

40. Should a 303(d) listed waterbodies or CESA listed species elevate the goal of restoring the listed entity above the goal of maximizing sustainable timber production per the FPA? Should such listings require evidence from project proponent for clearly demonstrating contribution towards recovery or conserving the listed entity? What is the legal, policy, or science basis for your agency's perspective? (ref L16-2, L16-3).

- *Both the ESA and 303(d) do not make a priority of economically sustainable projections There should not be a significant conflict with environmentally sustainable harvesting.*

41. What is the legal or policy basis for corrective or restoration actions being required on non-TMDLs water bodies which are approaching listings? Should separate corrective or restoration actions related to or separate from THP implementation be conducted by the BOF? (ref L16)

- *The CWA does not ignore restoration until the water body becomes impaired; it just doesn't create a vehicle until then. The basin plan will clearly state the target*

NCRWQCB

May 5, 2008

Group #1 Responses

goals for each water body in terms of beneficial uses and the anti-degradation rules come into play long before impairment is found.

43. What is the legal or policy basis for watershed restoration in 303(d) listed watersheds being on par or superseding maximum sustainable production mandates of the Forest Practice Act? (ref17-7).

- *In general the Clean Water Act as a Federal Law preempts the Forest Practice Act as a State Law.*
- *The first sentence of FPR § 916 [936, 956] puts maintenance, enhancement, and restoration of beneficial uses on a par with maintenance, enhance, and restoration of the productivity of timberlands. .*

46. CEQA guidelines for functional certification require enabling legislation for regulatory programs to contain authority for protection of the environment. Do other agency laws or policies that require more than protection of environment supersede CEQA guidelines? (ref 18-10)

- *Section 13247 of the Water Code specifically requires all "state offices, departments, and boards" to "comply with water quality control plans" in carrying out activities that may affect water quality.*

48. The APA requires consideration of performance standards. Should performance standards be established to meet other agency goals beyond the Forest Practice Act?(ref 18-13, 18-14, 18-15, 18-16)

49. Does the achievement of other agency goals, such as implementing restoration requirements, exceed regulatory functional certification requirements, where a regulation shall not be approved or adopted if there are feasible alternatives or mitigations available (PRC21080.5).(ref L18-13, 18-14, 18-15, 18-16, 18-18)

- *Certification of the Forest Practice Rules exempts the CalFire from some of the format and timing requirements of CEQA, CalFire is still bound to follow the substance of CEQA. See EPIC v. Johnson. In implementing CEQA, the lead agency is responsible for all the impacts of the approved project and, for seeing that the mitigation is carried out. CalFire may delegate such responsibility but must take responsibility for the whole project. (14 CCR 15097)*

NCRWQCB
May 5, 2008
Group #1 Responses

50. What are the limiting factors regional waterboards consider when adopting a TMDL? Did the water boards engage the BOF during the adoption and implementation of TMDLs strategies? (ref L18-21, 18-22)