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Board of Forestry and Fire Protection
1416 Ninth Street
Room 1506-14
Sacramento, CA 95814

Re: **Advice Regarding Board of Forestry's Regulatory Authority to Provide for the Restoration of Resources**

Dear Board Members:

The Forest Practice Committee of the Board of Forestry has requested advice from counsel regarding three questions relating to the Board's authority to include provisions for restoration of forest resources, in proposed regulations for threatened or impaired watersheds. Beginning in 1996, the California Fish and Game Commission and the National Marine Fisheries Service listed several species and under the state and federal endangered species acts. Additionally, the U.S. Environmental Protection Agency has listed nineteen North Coast streams as water quality limited under Section 303(d) of the federal Clean Water Act; many of the listings are for factors that can be affected by timber operations.[1] Following the species listings, a scientific review panel conducted a comprehensive review of the California Forest Practice Rules regarding their adequacy for the protection of the salmonid species. The report prepared for this Board in 1999 concluded that the Forest Practice Rules and their implementation through the THP's do not ensure protection of anadromous salmonid populations.[2]

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[1] Initial Statement of Reasons, January 20, 2000, "Protection for Threatened and Impaired Watersheds, 2000," Board of Forestry and Fire Protection, <http://www.fire.ca.gov/CDFBOFDB/pdfs/ISOR%20TI%202000.pdf> (as of January 4, 2009).

[2]The Board has stated that the proposed regulations are "specifically needed to clearly establish a performance standard or policy that timberland management objectives need to change depending on the condition of the water-related values they may affect. Consistent with the CWA [Clean Water Act], State and Federal ESAs [Endangered Species Acts], and the Porter-Cologne Water Quality Control Act, higher levels of protection are needed where water-related values are threatened. Consistent with the CWA and Porter-Cologne Act, insofar as feasible,

As the Board is well aware, regulations for the protection for threatened and impaired watersheds were proposed in 2000, and the Board has been working to adopt final regulations for this purpose. Interim regulations have been adopted and extended from year to year as the Board works to complete this regulatory process.

The Questions:

1. Does the Forest Practice Act authorize the Board of Forestry & Fire Protection to adopt regulations for the "restoration" of forest resources other than the productivity of timberlands? In answering this please provide the meaning of the phrase "productivity of timberlands" in Public Resources Code section 4513.

2. The Forest Practice Act speaks of "giving consideration" to: 1) natural resources values other than production of timber products (Pub. Resources Code, § 4513, subd. (b)), and 2) natural resource values and public needs other than timber and other forest products (Pub. Resources Code, § 4512, subd. (c)). Does the Forest Practice Act or any other statute constrain the weight that the Board can give to these needs and values when balancing them against the value of timber production?

3. The Forest Practice Act recognizes: 1) the value of forest resources, timberlands and other natural resources and the importance of using, maintaining, protecting and restoring them (Pub. Resources Code, § 4512, subd. (b)), and 2) the value of restoring, enhancing and maintaining timberland productivity (Pub. Resources Code, § 4513, subd. (a).) Does the Forest Practice Act or any other statute prohibit or constrain the Board from promulgating Forest Practice Rules designed to improve consistency with the goals and requirements of those other state or federal agencies that have the primary authority and responsibility for restoring or recovering natural resource values (such as the quality and beneficial uses of water and fish species) where they are formally recognized as impaired, degraded, threatened or endangered?

In that we understand that the proposed regulations are the source for the questions raised above, we look to the Initial Statement of Reasons for the proposed regulations as it states the setting for this regulatory activity:

> The Z'berg-Nejedly Forest Practice Act of 1973 established the legislature's intent to protect and give consideration to the public's need for long-term watershed protection, fisheries and wildlife, and it directed the State Board of Forestry (BOF) to adopt regulations to control unreasonable effects on the beneficial uses of the State's waters. It now appears appropriate to establish

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resource restoration is required where water-related values are impaired." Initial Statement of Reasons, January 20, 2000, "Protection for Threatened and Impaired Watersheds, 2000," p. 14.

> regulations that specifically address timber and harvesting operations in watersheds with threatened or impaired values. The changes in the Forest Practice Rules are necessary for maintaining the beneficial uses of water (which include aquatic habitat for threatened or endangered species) where they are in good condition, protecting them where they are threatened, and restoring them where they are impaired. This rulemaking package is intended to address the most immediately pressing issue; how to deal with timber operations in a watershed where populations of anadromous salmonids that are listed as threatened or endangered under the State or Federal ESAs (Endangered Species Acts) are currently supported or could feasibly be restored.

Initial Statement of Reasons, January 20, 2000, "Protection for Threatened and Impaired Watersheds, 2000," p. 9.

The answers to these questions are directly related to this Board's authority to include restoration activities in its proposed threatened and impaired watershed rules. The long-term restoration of salmonid habitat is addressed in these proposed regulations as a goal, and the regulations contemplate conditions on timber harvest plans (THPs) in order to fulfill this goal.[3] First, we look to the reasons behind the passage of the act, its explicit language and how the courts have interpreted the authority of the Board of Forestry. Second, we will examine other legislation that relate to the Board's authority, and, in conclusion, answer the questions put to us.

The Enactment of the Z'Berg-Nejedly Forest Practice Act of 1973 (Forest Practice Act)

The current Forest Practice Act (FPA) was enacted in 1973 in response to a California court decision (*Bayside Timber v. Board of Supervisors* (1971) 20 Cal.App.3d 1), as well as a growing awareness of the effects of forestry practices on California watersheds. In the *Bayside Timber* case, the court found that the Forest Practice Act in effect before the 1973 act was unconstitutional in its unlawful delegation of authority to an executive board without proper standards or safeguards to prevent the abuse of such authority. In so holding, the court specifically mentioned the negative impact of improperly regulated logging on the watersheds of the state. (20 Cal.App.3d at pp. 9-11.) As it was preparing to draft the new act in response to the California Court of Appeal's decision, the Assembly Committee on Natural Resources and Conservation commissioned a study by U.C. Davis to review the effect of timberland management on California watersheds. The Z'Berg-Nejedly Forest Practice Act of 1973 (FPA), Public Resources Code, section 4511 *et seq.*, followed.

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[3]Initial Statement of Reasons, January 20, 2000, "Protection for Threatened and Impaired Watersheds, 2000," p. 15.

Relevant Provisions of the Forest Practice Act

The Board's general authority to promulgate regulations is found in section 4551, which specifically defines the goals for the forest practice rules and regulations. It states (in essential part) that:

> The board shall adopt district forest practice rules and regulations . . . in accordance with the policies set forth in Article 1 (commencing with Section 4511) . . . to assure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, and wildlife, and water resources, including, but not limited to streams, lakes, and estuaries.

The language here is important. The rules and regulations are (1) to assure the continuous growing and harvesting of commercial forest tree species, and, (2) to protect the soil, air, fish, and wildlife, and water resources. Both parts of the mandate are equal: to assure timber growth and to protect the forest resources. Further, section 4551.5 requires the Board to adopt regulations that include, but are not limited to, measures for soil erosion control, water quality and watershed control, flood control, stocking, and protection against timber operations which unnecessarily destroy young timber growth or timber productivity of the soil, among other required subjects.

The Attorney General issued an opinion after the FPA was enacted, which specifically stated that the mandatory language of sections 4551 and 4551.5 require that Board regulations "must provide for the protection of the soil, air, fish and wildlife and water resources." (58 Ops.Cal.Atty.Gen. 250 (1975).) In reaching this conclusion, the Attorney General specifically rejected the argument, based on Public Resources Code sections 4512, subdivision (c) and 4513, subdivision (b), that the Board "need only consider recreational opportunities, watershed protection, fisheries, wildlife, range, forage, and aesthetic enjoyment." (*Id.* at p. 251.) The Attorney General opined that this interpretation "would improperly leave the protection of the enumerated resources to the uncontrolled discretion of the Board" when it adopts regulations and would render ineffectual sections 4551 and 4551.5 of the Public Resources Code. (*Ibid.*) Thus, the Board is required by an integrated reading of sections 4512, 4513, 4551 and 4551.5 to provide for the protection of those public resources when it adopts forest practice rules. (*Ibid.*) In sum, the plain intent of the Legislature in enacting the FPA was to require the Board to view the forests of the state as a complete working ecosystem, and not only as a producer of high-quality timber, but also as forest lands valuable in their own right as a public resource.

In addition, as mentioned, the Board is required by statute to adopt regulations to protect water quality and watersheds, and restoration activities can be considered as part of the Board's responsibilities to protect water resources and watersheds. (Pub. Resources Code, § 4551.5.) Section 4562.7 of the Public Resources Code further requires the Board to adopt regulations to protect the beneficial uses of streams, and to control timber operations that result or threaten to

Board to adopt regulations to protect, among other things, soil resources and water quality during timber operations. Thus, the protection of California's watersheds and soils has been an important goal of the FPA since its enactment in 1973.

As stated above, the Board has authority to adopt regulations that comply with the policies set out in Article 1. These policies are explicit in the findings and declarations of Public Resources Code, article 1, sections 4512 and 4513. Section 4512 provides, in part:

> (a) The Legislature hereby finds and declares that the forest resources and timberlands of the state are among the most valuable of the natural resources of the state and that there is great concern throughout the state relating to their utilization, restoration, and protection.
>
> (b) The Legislature further finds and declares that the forest resources and timberlands of the state furnish high-quality timber, recreational opportunities, and aesthetic enjoyment while providing watershed protection and maintaining fisheries and wildlife.
>
> (c) The Legislature thus declares that it is the policy of this state to encourage prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations.

Thus, section 4512 explicitly declares that restoration of forest resources as well as timberlands is a matter of statewide concern for restoration (subdivision (a)), and that forest resources serve multiple functions, including providing watershed protection and maintaining fish and wildlife (subdivision (b)). Section 4512 (subdivision (c)) also is concerned with responsible forest resource management for future generations.

Section 4513 likewise articulates the goal of the act:

> It is the intent of the legislature to create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to assure that:
>
> (a) Where feasible, the productivity of timberlands is restored, enhanced, and maintained.

(b) The goal of maximum sustained production of high-quality timber production is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment.

As we can see, section 4513, subdivision (a) expressly declares that one of the fundamental goals of the FPA is to restore, enhance and maintain the productivity of timberlands. Logically speaking, the goals of productivity of timberlands and maximum sustained production of high-quality timber, as stated in section 4513, subdivision (b), can only be achieved by considering the protection of the natural resource values listed in that section.

It has been argued that the above sections 4551, 4551.5, 4562.5 and 4562.7 do not provide authority for restoration of forest resources because in that section 4513, subdivision (a), provides explicitly for restoration as a goal only for timberland productivity. However, as discussed above, the phrase "productivity of timberlands" is not limited to productivity for timber harvesting purposes, but logically also includes protection of other forest resources and values. This view is reinforced when section 4513 is read together with the entire FPA, including but not limited to sections 4512, subdivision (a), 4551 and 4551.5, and taking into consideration the Board's duties under other legislative acts, it becomes clear that such a narrow reading of the Board's authority under the FPA is not justified. There is no question that much of the FPA discusses timberlands and their productivity. But again, while timber harvesting is clearly an important focus of the FPA, it is not the exclusive focus: the FPA directly addresses the entire forest system, including forest resources.

The Board's Responsibilities Under the California Environmental Quality Act

In addition to the language of the FPA itself, the Board also has responsibility under the California Environmental Quality Act (CEQA). The Secretary of Resources has certified the regulation of timber operations, including the THP timber harvest plan review process under the FPA and the Forest Practice Rules by the Department and the Board as the functional equivalent of an environmental impact report (EIR) under CEQA. (Cal. Code Regs., tit. 14, § 15251(a).) As such, the Department must meet the requirements of CEQA while approving THPs and other plans to harvest timber. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1230.) In addition, the Board's regulatory program has been certified as a functional equivalent of an EIR under CEQA. (Cal. Code Regs., tit. 14, § 15251(e).)

It is the dual nature of the FPA, to protect the environment and to secure maximum sustained production of high-quality wood products, that permits the regulatory program under the FPA to function as functionally equivalent program under CEQA, Public Resources Code, section 21080.5. CEQA requires a regulatory program to meet specific requirements in order to be certified as the functional equivalent of CEQA's EIR process. First, the enabling legislation

for the program (in this case, the FPA) must include "protection of the environment among its principle purposes," and contain "authority for the administering agency [in this case, the Board] to adopt rules and regulations for the protection of the environment." (Pub. Resources Code, § 21080.5, subd. (d)(1).) These rules and regulations must provide, among other things, that an activity cannot be approved if feasible alternatives or mitigation measures exist that would substantially lessen any adverse impacts of the activity on the environment. (Pub. Resources Code, § 21080.5, subd. (d)(2)(A).)

In addition, the California Supreme Court has found that the Board's environmental responsibilities go beyond the language of the FPA. (*Sierra Club v. State Board of Forestry, supra* at 7 Cal.4th at p. 1230 [the approval of timber harvest plans not exempt from CEQA]; accord, *Joy Road Area Forest and Watershed Assn. v. California Dept. of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 666 ["In approving a THP, CDF must comply not only with the provisions of the Forest Practice Act but also with 'those provisions of CEQA from which it has not been specifically exempted by the Legislature.'"].) These cases add authority for the Board's responsibilities towards protecting the forest environment.

The California Endangered Species Act

Besides the requirements of the FPA itself and CEQA, the California Endangered Species Act (CESA), Fish and Game Code section 2050 *et seq.*, prohibits any "person" from "taking" any fish, wildlife or plant species that is listed as endangered or threatened, or designated as a candidate for listing, under that statute. (Fish & G. Code, §§ 2080, 2085.) "Take" is defined as to "hunt, pursue, catch, capture, or kill," or to attempt to do any of these things. (Fish & G. Code, § 86.) The take prohibition applies to otherwise lawful activities that are the indirect and unintentional, as well as the direct and deliberate, cause of death of individual members of the species. (See e.g., *Dept. of Fish and Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 Cal.App.4th 1554, 1563-1564 [holding that irrigation district's killing of endangered Sacramento River winter-run chinook salmon fry through otherwise legal diversions and pumping activities was a prohibited taking under CESA].) No specific intent to take is required. (*Id.* at 1563.)

State agencies have a heightened obligation under CESA to protect state-listed species under that statute. Section 2052 of the Fish and Game Code provides that "it is the policy of this state to conserve, protect, restore and enhance any endangered species or any threatened species and its habitat." Section 2055 of the Fish and Game Code further states that "it is the policy of this state that all state agencies, boards and commissions *shall* seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter."[4] (Emphasis added.) CESA defines "conserve" broadly as "to use, and the use of,

[4] Two other legislative intent sections that apply to state agencies, Fish and Game Code sections 2053 and 2054, were keyed to the former state agency consultation process in CESA

all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," that is, to the point of recovery and delisting. (*Id.*, § 2061.) The foregoing policies of CESA further support the Board's authority to promulgate regulations pertaining to the restoration of forest resources.

Answer to Question No. 1:

Based upon the history and explicit legislative intent of the FPA, and the California courts' interpretation of the Board's responsibilities under the FPA, the Board has the authority to provide for the restoration of healthy forest lands and watersheds, in addition to promoting timber growth. The language of the FPA and its intent give the Board ample authority to issue regulations to protect and restore forest resources. In addition, it is plain that the FPA's twin goals of achieving maximum sustained production of high-quality timber production while considering other forest resources and values cannot be achieved without protecting and restoring those resources and values.

Answer to Question No. 2:

As stated above, the explicit language of the FPA requires that the Board balance timber production and protection and restoration of forest resources. However, the FPA does not require that this balance be affirmatively struck in favor of timber production or otherwise constrain the weight the Board may give to protection and restoration of other natural resource values provided by timberlands in the rules and regulations promulgated by the Board. Nor do CEQA, CESA or any other statute otherwise constrain the Board's discretion in this regard. Indeed, if anything, both CEQA and CESA assure that forest resources, including imperiled species and their habitat, be protected during timber operations and thus balance the Board's authority to weigh too heavily in favor of timber production.

(former Fish and Game Code section 2090 et seq.). Because the state agency consultation process sunset from the statute on January 1, 1999, the status and continued applicability of these legislative intent provisions is unclear.

Answer to Question No. 3:

As discussed, the FPA came into being in its current form in order to address the problems of impacted watersheds, and the overriding goals and other provisions of the FPA require this problem to be addressed through regulations. In addition, the requirements of CEQA, CESA, and the functional equivalent certification of the THP review process and process for promulgating Board regulations all require that the Board consider and mitigate for adverse environmental impacts when making its decisions. Potential environmental impacts clearly include impacts to imperiled listed species as well as impacts to streams and watersheds. Thus, in order to ensure that it is able to meet its own duties under the FPA, and satisfy the policies of CEQA and CESA, the Board has authority to promulgate Forest Practice Rules designed to improve consistency with the requirements of other state and federal agencies that have primary authority and responsibility for restoring and recovering fish and wildlife and other natural resource values.

Sincerely,

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