



August 13, 2021

Eric Hedge
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Submitted electronically to: Eric.Hedge@bof.ca.gov

Re: Comments on Board of Forestry and Fire Protection RPF Guidance Regarding Botanical Resource Scoping and Surveys for Plant Species of Consequential Status Under the Forest Practice Act and CEQA (July 2021 Version)

Dear Mr. Hedge:

Thank you for the opportunity to comment on the revised draft of the Board of Forestry and Fire Protection's RPF Guidance Regarding Botanical Resource Scoping and Surveys for Plant Species of Consequential Status Under the Forest Practice Act and CEQA, revised July 2021 (referred to herein as "Draft Guidance"). The following comments are submitted on behalf of the California Native Plant Society ("CNPS"), a non-profit environmental organization with over 10,000 members in 35 Chapters across California and Baja California, Mexico. CNPS's mission is to protect California's native plant heritage and preserve it for future generations through the application of science, research, education, and conservation. We work closely with decision-makers, scientists, and local planners to advocate for well-informed policies, regulations, and land management practices.

At the outset, CNPS would like to thank the Board of Forestry ("BOF") for the time it has allocated to this document. There have been marked improvements since earlier iterations. CNPS provides the following comments and suggestions for future versions of the Draft Guidance.

I. Process for Creating the List of Plant Species to Be Considered in Plans

A significant portion of the Draft Guidance describes the process for identifying the list of plant species that need to be considered in a Plan.¹ The Draft Guidance states that the first step of the

¹ For the purposes of this letter, "Plan" includes Timber Harvest Plans, Nonindustrial Timber Management Plans, Program Timber Management Plans, and Working Forest Management Plans, as defined in 14 C.C.R. § 895.1.

scoping process is “identification of plant species of consequential status under CEQA known to occur in the Plan Area and those which may be likely to exist in the Plan area.” (Draft Guidance, p. 2). During the July 13, 2021 Forest Practice Committee meeting, the BOF indicated that it would remove the term “plant species of consequential status” from the Draft Guidance. As such, CNPS will not address that point in this letter but supports the BOF’s decision to replace the phrase “consequential status”² with a more appropriate phrase. CNPS suggests reverting to the widely used and commonly understood phrase, “special status plant species.”

A. Identification of 15380(d) Plants

The BOF should revise how the Draft Guidance instructs RPFs to handle plant species under 14 C.C.R. § 15380(d). Section 15380(d) requires that plant species not formally listed under the federal or California Endangered Species Acts or California Native Plant Protection Act, but that nonetheless meet the criteria for designation as “endangered, rare or threatened” as defined in 15380(b), shall be treated as endangered, rare or threatened for the purposes of environmental review. As such, non-listed plants must be considered in Plans if they meet the criteria for listing. This is confirmed by Forest Practice Rule 1034(w), which requires that Plans include “Information on the presence and protection of known habitat or individuals of any Listed Species and information on the presence and protection of non-listed Species which may be significantly impacted by the Timber Operation.”

CNPS recognizes the problem that neither CEQA, the Forest Practice Act, nor the Forest Practice Rules provide a list of species that are captured by Section 15380(d). As such, the Draft Guidance needs to provide an instructional framework for how RPFs should determine which plants need to be included in the Plan pursuant to Section 15380(d). The ideal approach would be to instruct RPFs and plan preparers to use the existing CDFW Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities.³ Those protocols are used widely throughout California for projects reviewed under the typical CEQA process, and plan preparers can be confident that if they follow those protocols they will have adequately scoped and surveyed for plant species, including Section 15380(d) species.

As currently written, the Draft Guidance provides a fairly workable framework for RPFs to make a determination about Section 15380(d) species, but CNPS suggests the following revisions for additional clarity.

² As discussed in oral comments during the meeting, the phrase “plant species of consequential status” is likely to cause confusion and its utility as a replacement for the phrase “special status plant species” is minimal because it lacks a legal definition.

³ <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline>

B. Characterization of the California Rare Plant Ranks

CNPS supports the inclusion of California Rare Plant Ranks (“CRPRs”) in the Draft Guidance and agrees that RPFs and review teams should use CRPRs to identify plants to be considered in Plans. CRPRs are ubiquitous in the typical CEQA review process throughout California and provide an invaluable tool for assessing Section 15380(d) plants. CNPS agrees with and supports the statement in the Draft Guidance that, notwithstanding the lack of official legal status, CRPRs “*may still support the substantial evidence requirements for properly classifying non-listed species as a species of consequential status under Guideline §15380(d) and therefore should be considered as a valuable informational resource for RPFs to rely upon to inform scoping decisions.*” (p. 7-8). The Draft Guidance might also recommend that RPFs rely on the CNDDDB Special Vascular Plants, Bryophytes, and Lichens List.⁴

However, the Draft Guidance inaccurately describes the CRPRs as being solely “managed by CNPS” and that they “represent a nongovernmental assessment of plant species rarity.” (p. 6). The CRPR list is not created by CNPS in isolation but is created and maintained in close collaboration with CDFW, as well as many other botanical experts in academia, other NGOs, government, and the private sector. In March of 2010, CDFW and CNPS officially changed the name from “CNPS List” or “CNPS Rank” to “California Rare Plant Rank” with the intention of reducing confusion over the fact that rank assignments are the product of a collaborative effort and not solely a CNPS assignment.⁵ This change was made to demonstrate the collaborative nature of the list’s creation and maintenance, emphasizing the multitude of botanical experts that are involved in the ranking process, including CDFW as the trustee of California’s wildlife and native plant resources.⁶

CNPS and CDFW have a unique cooperative agreement that fosters data sharing between CNPS, CNDDDB, and others, to create a more thorough inventory of rare plants throughout the state. The cooperative agreement between CDFW and CNPS was entered into in 1981 and continues to the present. The agreement outlines the process of review, which heavily involves CNDDDB staff. Specifically, it requires collaboration between a professional CNDDDB Botanist and the CNPS Rare Plant Botanist. The process involves several weeks of expert review, a process that is open to all members of the public. Any member of the public is welcome and encouraged to join the Rare Plant Status Review Forum. Information on how to do so is publicly available on the CNPS website: <https://www.cnps.org/rare-plants/rare-plant-ranking-review/rare-plant-status-review-forum>. This collaboration creates a thorough system of checks and balances, that should relieve any concerns that the process is biased or not rigorous enough.

⁴ CNDDDB Special Vascular Plants, Bryophytes, and Lichens List, <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109383&inline>.

⁵ *Id.*, p. viii, footnote 1.

⁶ <https://www.cnps.org/rare-plants/cnps-inventory-of-rare-plants#:~:text=In%202010%2C%20the%20name%20of,not%20solely%20a%20CNPS%20assignment>.

While the CRPRs may not hold a formal legal status, this does not diminish their value as a resource in the environmental review processes. CNPS recommends a global modification to the Draft Guidance so that it more accurately describes the CRPR list and does not contain statements implying that it is created and managed solely by CNPS.

C. Determinations Regarding 15380(d) Plants Need to be Made in Consultation with CDFW and/or a Qualified Botanist.

The Draft Guidance needs to mandate that determinations regarding Section 15380(d) plants need to be made in consultation with CDWF and/or a qualified botanist. As currently written, the Draft Guidance gives considerable discretion to RPFs to dispute CRPRs, or independently weigh data to make the “*decision to not scope, survey, or mitigate potential impacts of the Plan on [a] plant species.*” (p. 8). While RPFs’ professional judgment is of course an important part of the Plan process, the question of whether certain species meet the criteria for being designated endangered, rare or threatened is a complex, data-driven inquiry based on biological factors, and is difficult to answer without requisite botanical knowledge and experience. Referring to the CRPR list or the CNDDDB Special Vascular Plants, Bryophytes, and Lichens List would be more efficient and would relieve RPFs from the arduous task of assessing each plant species that might potentially fall under Section 15380 and documenting their decision in the Plan.

The Draft Guidance needs to explicitly state that complex botanical questions, such as questions about Section 15380(d) plants, involve weighing scientific data and evidence and analyzing the unique biological factors of a plant species, and therefore need to be made in consultation with a qualified expert. Though the Draft Guidance encourages consultation with CDFW about non-listed species early in the plan preparation process (see p. 9), this language is not sufficient to ensure that adequate consultation will occur. Consultation with CDFW during the plan review process is required by the Forest Practice Rules,⁷ and the Draft Guidance should ensure that complex botanical questions are properly answered with oversight by a professional botanist and/or the trustee agency in charge of protecting botanical resources. The Draft Guidance also includes a footnote that states, “*RPFs must remain cognizant of their professional obligations under PRC § 752(b) to perform only those services for which they have expertise. It may be appropriate for an RPF to consult with a botanist or other qualified expert during the scoping process.*” (p. 4, footnote 9). This language should be in the body of the document, particularly in reference to the determination of Section 15380(d) plants.

⁷ 14 C.C.R. § 1037.5.

II. Botanical Surveys

A. Guidance Needs to Delineate Standards for How to Determine When Botanical Surveys Are Necessary.

The Draft Guidance needs to be revised to more accurately reflect the importance of botanical surveys in the Plan process, mandate appropriate timing for surveys, and outline clearer parameters for when an RPF may decide that a botanical survey is not warranted. CNPS's position is that each and every Plan needs to be based on botanical survey data, and that data must be submitted prior to plan approval to allow for consultation with CDFW and public review, as required by the Forest Practice Act and Forest Practice Rules.⁸ Botanical surveys are routine in typical CEQA review processes across California, and no amount of scoping or database research can lead to information that will eliminate the need for botanical surveys. For example, surveys can reveal the presence of rare or listed plants that were not expected to occur because they did not appear in the scoping process. There simply is no replacement for surveys. If the purpose of the Draft Guidance is to assist RPFs in preparing Plans that adequately analyze and mitigate impacts to botanical resources, it needs to be revised to promote surveys at a wider scale.

The Draft Guidance gives too much room to RPFs to decide whether botanical surveys are needed without providing any parameters for how they should make that determination. The document states, "*Whether a botanical survey is necessary, and in what form, may be determined by the RPF based on the circumstances of the individual Plan.*" (p. 9). However, the document never describes the circumstances that would warrant the elimination or inclusion of a botanical survey. If the Draft Guidance is going to give RPFs discretion to decide whether botanical surveys are needed, it should be able to answer these questions:

- How does an RPF know when they have enough information from scoping to forgo a botanical survey?
- What does that information entail? The number of species in the plan area? The number of documented occurrences of those species?
- What circumstances weigh in favor of eliminating surveys?
- When does an RPF have "*sufficient information to properly evaluate the significance of timber operation impacts on plant species of consequential status*"? (p. 9). What constitutes "sufficient information"?

The degree of vagueness surrounding surveys in this version of the Draft Guidance is not workable for RPFs and is not going to yield consistent results across the Plan process.

⁸ Cal. Pub. Res. Code § 21003.1; 14 C.C.R. §§ 1037.3, 1037.4.

The Draft Guidance also states that an “*RPF may have sufficient information from the scoping process to properly avoid or minimize the potential for impact for plant species of consequential status. In this respect, project design can be an effective tool for avoiding or minimizing significant impacts, thereby eliminating the need for surveys, as well as agency-recommended mitigation measures imposed as a condition of Plan approval.*” (p. 10). Again, the Draft Guidance fails to provide any standards or criteria for when information from scoping is sufficient to craft appropriate avoidance or mitigation measures. Instead, the document goes straight into describing what kind of avoidance and minimization strategies can be used to eliminate the need for surveys. This provides RPFs with zero guidance for how to tell when they need more information from scoping, when they can simply write generic avoidance measures not rooted in real data, and when botanical surveys are necessary.

Scoping alone will never result in sufficient information that will eliminate the need for surveys, therefore the Draft Guidance should not imply that RPFs can properly avoid or minimize potential impacts without first conducting surveys. It is impossible to design adequate avoidance or mitigation measures without survey data because conducting surveys is the only way to know the actual environmental conditions on the ground and how species and habitats will be impacted. RPFs cannot incorporate generic mitigation measures not based on actual evidence in lieu of developing site-specific mitigation measures based on actual information about the project site. Generic mitigation measures that are not site-specific are not appropriate. *See Sierra Club v. State Bd. of Forestry (Pacific Lumber Co.)*, 7 Cal.4th 1215, 1236-37 (1994) (failure to obtain necessary information regarding existing conditions made a meaningful assessment of impacts and development of site-specific mitigation measures impossible). An RPF’s determinations for project design, including mitigation measures, must be based on substantial evidence. Refusing to consider survey data, a necessary and key component of evidence, contravenes this requirement.

On page 11, the Draft Guidance states, “*Where the scoping process does not result in adequate information to inform questions of actual presence of habitat for or occurrences of plant species of consequential status or preemptive mitigation measures for potential presence of those habitat and species, then a botanical survey will be appropriate to ensure that CAL FIRE, as well as the review team agencies, have sufficient information to determine whether sufficient efforts have been undertaken to identify and mitigate environmental impact upon plant species in connection with Plan approval.*” Again, the Draft Guidance fails to explain what constitutes “adequate information,” and does not provide the RPF with any parameters for how to determine if the scoping process yielded adequate information.

Without clearer descriptions for how the RPF is supposed to make determinations regarding the need for botanical surveys, the likely outcome is that surveys will be improperly omitted from

Plans. There is no scenario in which a Plan should not be based on survey data, and so botanical surveys be required prior to plan approval across the board for every Plan undergoing the review process. The Draft Guidance needs to be revised to set clear standards and parameters for when botanical surveys are needed, and reflect the reality that an RPF cannot know with certainty how botanical resources will be impacted without survey data.

CNPS also recommends that the BOF consider *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215 (1994) as it contemplates botanical survey guidance. In *Sierra Club*, the California Supreme Court found the BOF failed to proceed in the manner prescribed by CEQA (and by the Forest Practice Act) and rescinded its approval of THPs because the BOF evaluated the plans without any site-specific survey data regarding the presence of four old-growth-dependent species, despite a determination by Fish and Game that the proposed timber harvest could have a significant adverse effect on old-growth-dependent wildlife. (*Id.* at 1236). Without information regarding the presence of old-growth dependent species on the site, the Court found that the Board could not identify the environmental impacts of the project or carry out its obligation to protect wildlife as required by the Forest Practice Act. (*Id.*) The BOF should consider whether the revised Draft Guidance is likely to result in outcomes consistent with the findings and conclusions in *Sierra Club*.

B. Timing of Surveys

Botanical survey data should be made available prior to plan approval so that it can be meaningfully considered and incorporated into the Plan. Too often, CDFW and the public are excluded from reviewing botanical data because the data is not provided until after Plans are approved and the review process is over. This practice precludes meaningful agency and public engagement that is required under CEQA and the Forest Practice Rules.

“By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process. . . . Environmental problems should be considered at a point in the planning process where genuine flexibility remains.” *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 307 (Cal. Ct. App. 1988) (internal quotations and citations omitted). As the functional equivalent of EIRs, THPs should be designed to “inform public agency decision makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project.” 14 C.C.R. § 15121. When survey data is withheld until after the approval process has concluded, the THP fails as an informational document and the public and reviewing agencies are deprived of their right to review and provide comment.

III. Text That Should Be Deleted Entirely

The following portions of text should be deleted from the Draft Guidance entirely for the reasons stated below.

- *Given the rigorous and transparent public process by which plant species are formally listed or designated as candidate species under the ESA or CESA, it makes sense that those official designations qualify for consequential status under CEQA. The public can have confidence in the propriety of these classifications as the basis for more detailed CEQA review. For the same reason, plant species formally designated as rare or endangered under the California Native Plant Protection Act (CNPPA) or identified for conservation pursuant to a CDFW agreement under the Natural Community Conservation Planning Act (NCCPA) also reasonably qualify as plant species of consequential status.* (p. 6).
 - This text is unnecessary. Section 15380(c) explicitly states that plants listed under the federal or California Endangered Species Acts and the California Native Plant Protection Act (14 C.C.R §§ 670.2, 670.5 and 50 C.F.R. §§ 17.11, 17.12) must be considered. There is little value in providing commentary on the logic or sensibility of a regulation when the regulation is clear and unambiguous.
- *Accordingly, if CDFW and other review team agencies wish to rely on rarity designations adopted by nongovernment entities, they should demonstrate their concurrence with those designations by formally recognizing them via the rulemaking process. Where an agency has undertaken such efforts to formally establish the rarity of a plant species, an RPF should respect those designations in the preparation of a Plan.* (p. 7).
 - First, this statement is flawed because CDFW and the review team are not relying on rarity designations adopted by non-government entities. As explained above, CDFW is deeply involved in the collaborative ranking process, thus it is not “non-governmental.” Furthermore, there are many reasons why rare species are not listed under the Endangered Species or other statutes even if they merit listing. The reasons why a rare species is not listed are irrelevant, because Section 15380(d) requires that they be considered regardless.
- *It would be inappropriate for a review team agency to condition Plan approval on an RPF’s commitment to conduct a floristic survey for a Rank 4 species simply to generate additional information that might allow CNPS or a review team agency to elevate a plant species’ rarity ranking for future Plans.* (p. 8).
 - This statement is not appropriate and mischaracterizes the purpose of floristic surveys. Surveys are not performed as a means of data collection, though it is valuable to submit survey data to CNDDDB. Rather, surveys are essential for assessing impacts to botanical resources and ensuring that necessary mitigation is incorporated into the Plan. If a survey is requested for a Rank 4 species or a non-ranked species, it is because the scientific data and evidence show that the species merits consideration under CEQA (e.g. if the species is newly described and not

yet ranked, locally rare in the region, recently documented in California for the first time, or at the edge of its range).⁹

- *This means that CDFW, if pressed to do so during the Plan review process, can likely substantiate the rarity of a Rank 1 or Rank 2 species as qualifying as a Guideline §15380(d) plant species.* (p. 8).
 - The “if pressed to do so during the Plan review process” portion of this sentence should be deleted. This language implies undue influence or that the determination that a CRPR 1 or 2 plant qualifies under Section 15380 is not based on objective, unbiased information.

IV. Sensitive Natural Communities

The Draft Guidance should encourage RPFs to consider impacts to sensitive natural communities (“SNCs”) in Plans. Though no formal regulations require that SNCs be included under CEQA, it is good practice and commonplace in the standard CEQA process to consider and mitigate impacts to them. SNCs are ecologically important and it is consistent with the purpose and intent of CEQA and the Forest Practice Act to consider them in the Plan process.

Thank you for the opportunity to comment on the Draft Guidance. Please feel free to contact me if you have any questions.

Sincerely,

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⁹ Technical Memorandum - Considerations for Including CRPR 4 Plant Taxa in CEQA Biological Resource Impact Analysis, https://www.cnps.org/wp-content/uploads/2020/02/crpr4_technical_memo.pdf.