



April 30, 2021

Matt Dias
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Re: Comments on Board of Forestry and Fire Protection RPF Guidance Regarding Botanical Surveys Involving Plant Species of Consequential Status Under the Forest Practice Act and CEQA

Dear Mr. Dias:

Thank you for the opportunity to comment on the draft Board of Forestry and Fire Protection RPF Guidance Regarding Botanical Surveys Involving Plant Species of Consequential Status Under the Forest Practice Act and CEQA, Item FPC 2a (“Draft Guidance”).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.

In 2018, the California Department of Fish and Wildlife (“CDFW”) requested that the Board of Forestry (“BOF”) consider new rules on how botanical resources are handled in timber harvest plans, non-industrial timber management plans, and other types of timber plans (referred to herein collectively as “THPs”). The need for clarity arose because botanical scoping and survey processes, and the application of protection measures to avoid significant adverse impacts to botanical resources had been – and continue to be – applied inconsistently in THPs. CNPS supports the creation of guidance that will lead to better documentation and protection of botanical resources.

In its current form, the Draft Guidance will not accomplish the goal of increasing consistency in how botanical resources are documented, analyzed, or protected. Instead of creating clear standards, the Draft Guidance defers determinations to the judgment of individual Registered Professional Foresters (“RPFs”). The Draft Guidance will create more work for RPFs, slow down the review and approval process, and could potentially make THPs more vulnerable to

legal challenges. CNPS provides the following comments and suggests the document be revised accordingly.

I. The Current Process for THP Review and Approval Is Not Consistently Equivalent to CEQA and Needs Improvement

The process for approving THPs is a certified regulatory program under the California Environmental Quality Act (“CEQA”), Public Resources Code Section 21080.5. As such, approving a THP does not require a typical CEQA document (e.g. Environmental Impact Report, Negative Declaration, etc.), but the process still needs to meet the substantive goals and requirements of CEQA. *Envtl. Protection Information Ctr. v. Johnson* (1985) 170 Cal.App.3d 604, 620. This means that THPs must analyze the environmental impacts of the proposed operations and mitigate adverse impacts to less than significant levels.

As pointed out by CDFW in their November 15, 2018 letter, the impetus for revised botanical resources guidance is the inconsistency with how botanical resources are handled in THPs. Routine botanical scoping, surveying, and protection is often inconsistently applied in THPs or is missing from plans altogether. These inconsistencies have led to significant adverse impacts to botanical resources that could have been avoided. In addition to harmful environmental impacts, the inconsistencies increase the time and effort necessary to complete the process, and leave THPs vulnerable to legal challenges stemming from inadequate documentation, analysis, and protection of botanical resources.

The BOF’s new guidance should be drafted so that RPFs, land owners, and timber harvesters can be confident that when they follow the guidance, they are in compliance with the law. The Draft Guidance as written does not accomplish this goal and may likely result in THPs that fail as CEQA-equivalent documents. Unless it is revised substantially, the Draft Guidance is not going to lead to more consistent plans and is not going to give RPFs clarity or assurance that they are providing what reviewing agencies need to approve the plans.

II. The Draft Guidance Mischaracterizes and Overstates the Role of Scoping

The Draft Guidance states, “Scoping is the critical first step in determining the need for and scope of a botanical survey,” and “[t]he primary purpose of the scoping process is the identification of plant species of consequential status under CEQA, which will need to be directly addressed in the Plan.” Both of these statements mischaracterize scoping’s function. Scoping is neither a process designed to determine whether a botanical survey is necessary, nor a replacement for botanical surveys. Rather, scoping is a pre-survey activity that helps inform and guide the survey process.

The purpose of scoping is to prepare for in-person surveys and inform the surveyor about the suite of plants they are likely to observe during the survey. Scoping allows the surveyor to

determine what time of year they should conduct surveys by giving them a sense of the types of plants and habitats that exist in the area. It also enables the surveyor to determine whether there has been adequate rainfall in the preceding months to allow the plants that are likely to occur in the survey area to be visible.

Scoping is not a replacement for field surveys. The referenced sources used for scoping (e.g. California Natural Diversity Database, CNPS Inventory of Rare Plants, etc.) are positive occurrence databases that identify *known* occurrences of a species, but cannot be used to verify the absence of a species from a given location. Furthermore, many parts of California have not been adequately surveyed, so existing resources should not be relied upon as a perfect representation of the plants that actually exist on the ground. The Draft Guidance should rework the definition and purpose of scoping to recognize that it is an important preparatory step, but not a replacement or means of ruling out the need for field surveys.

III. Field Surveys Must Be Required

As written, the Draft Guidance gives too much latitude to RPFs to skip botanical surveys. The Draft Guidance says, “A botanical survey can provide greater certainty as to the actual presence and precise location of plant species of consequential status within the Plan area.” A more accurate statement is that botanical surveys are the *only* way to provide certainty as to the actual presence or location of plant species. Moreover, botanical surveys can reveal the presence of special status plants that were not expected to occur because they did not appear in the scoping process. For these reasons, the Draft Guidance should be rewritten to require floristic surveys that document all plants present on the site in order to verify that no rare species will be impacted. The fact that floristic surveys are expensive or time consuming should not be a factor in determining whether they are performed, and this language should be removed from the Draft Guidance.

As discussed above, there is no replacement for in-person field surveys. The scoping process alone cannot provide information that obviates the need for surveys. The Draft Guidance implies that RPFs may gain “sufficient information from the scoping process to properly avoid or eliminate the potential for impact for plant species of consequential status without the need for a botanical survey.” On the contrary, field surveys are the only way of obtaining the information necessary to craft avoidance and mitigation measures, because it is simply impossible to know what is on the ground until in-person surveys are performed.

Guidance that endorses THPs lacking botanical surveys may result in THPs that are not CEQA-equivalent and are vulnerable to legal challenge. We are not aware of any CEQA case law where a court has upheld an agency’s decision to disregard surveys altogether. The Draft Guidance cites cases for the proposition that “[u]nder CEQA, an agency is not required to conduct all possible tests or exhaust all research methodologies to evaluate impacts.” *Save Panoche Valley v. San Benito County* (2013) 217 Cal. App. 4th 503, 524; *Association of Irrigated Residents v.*

County of Madera (2003) 107 Cal. App. 4th 1383, 1396. However, these cases do not state that surveys can be entirely ignored. The disputes in those cases surrounded the timing and/or methodology of the surveys, not whether surveys should be performed altogether.

THPs are the functional equivalent of EIRs, and the purpose of EIRs is 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. Informational documents like THPs must “reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them.” *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431 (internal citation omitted); *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118 (“When the informational requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by law’ and has therefore abused its discretion.” (internal citations omitted)). Surveys are the most basic information-gathering step that an RPF or agency can take. Neglecting surveys weakens the fundamental value of THPs as informational documents. A primary purpose of CEQA is to guarantee that agencies are informed and consider the environmental impacts of their actions, and with respect to botanical resources, that is impossible without field surveys. Improperly deferring surveys until after THPs are approved precludes CalFIRE as lead agency from making informed decisions about the plan, and completely omitting key information like botanical survey data is unacceptable.

In *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, the California Supreme Court found the Board of Forestry failed to proceed in the manner prescribed by CEQA (and by the Forest Practice Act) and rescinded its approval of THPs because the Board 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.*)

We recommend the BOF re-evaluate its recommendations regarding botanical surveys in light of *Sierra Club* and the basic informational function of THPs.

IV. The Draft Guidance Gives Significant Deference to the Determinations of Individual RPFs, Which Will Not Further the Objective of Consistency and Clarity.

In its 2018 letter, CDFW identified the problem that THPs often fail to include routine botanical information related to scoping, surveying, and protection. CDFW proposed that additional rules clearly outlining the botanical information required in THPs would solve this problem by providing clear instructions to RPFs about what they need to include in THPs. The Draft

Guidance, however, attempts to solve the problem by allowing individual RPFs to exercise their individual judgment to determine what botanical information needs to be included in THPs. This is counterproductive to the objectives of consistency and clarity that initiated this process in the first place. Professionals commonly reach different conclusions in their independent assessments, and under these guidelines there will be no predictability or consistency in what information ends up in THPs. Individual discretion by RPFs over routine information-gathering processes will lead to unnecessary work for the review team RPF and delay in the plan review process.

A. Size of the Geographic Scoping Region

The Draft Guidance puts the onus on the RPF to “exercise professional judgment to identify a sufficiently large geographic area to appropriately identify species that could be significantly impacted directly or indirectly by timber.” It would be simpler, less burdensome for the RPF and the reviewing team, and lead to more consistent results if the Draft Guidance recommended a 9-quadrangle scoping area across the board.

When individual RPFs have discretion to exercise their independent judgment, it will naturally create inconsistency in their conclusions. While it is entirely appropriate for an RPF to exercise their professional judgment over certain components of a THP (e.g. the analysis of impacts from the timber operation, appropriate mitigation measures specific to the project area and planned operations, etc.), routine botanical information like scoping and surveying should be standardized. Here, these guidelines create the potential for variance in the geographic scoping regions for similarly-sized timber operations as a result of the respective RPFs arriving at different conclusions.

Additionally, under the Draft Guidance, an RPF has to go through the analytical process of determining the appropriate scoping region, and then justify that determination in the THP. As stated on page 6 of the Draft Guidance, Plans “must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383,1398. Anytime the RPF makes a determination based on their professional judgment, their analytical reasoning should be detailed in the THP. This will result in much more work than simply standardizing the 9-quad search.

The Draft Guidance should recommend the 9-quad search to create an initial plant list. Without looking at the species in the surrounding 8 quads, the plan preparer is not capturing enough plant species to create a realistic list of what is likely to be found on the project site, and the resulting narrowed down plant list will not be sufficient to adequately address the impacts to plants. While we understand the motivation to scale scoping regions to the size of the project, especially for small landowners, eliminating the 9-quad search and instead leaving the scoping region to the discretion of the RPF is not an optimal solution.

B. Identifying Plants of “Consequential Status”

The Draft Guidance states, “Upon establishing the appropriate geographic area for scoping, the RPF must again exercise prudent professional judgement with respect to the depth of research necessary to identify all plant species of consequential status and suitable habitat that may be significantly impacted by the timber operations and should rely on a broad spectrum of informational sources.”

It is not clear why the term “consequential status plants” is used in the document to replace the term “special status plant species.” Footnote 4 of the Draft Guidance states that it “avoids use of the commonly used phrase ‘special status plant species’ because that phrase lacks legal definition. As a result, it is often used to refer to plants that do not necessarily enjoy protected legal status that warrants special consideration under CEQA.” However, the term “consequential status plants” similarly lacks a legal definition, and doesn’t seem to provide any additional clarity in the Draft Guidance. The term “special status plant species” is widely used and commonly understood throughout California, and introducing a new term that is not widely used is confusing. In practice, both terms encompass the same plant species, i.e. species that warrant consideration under CEQA. The Draft Guidance should be revised to use the commonly accepted term “special status plant species.”

For the reasons discussed above, allowing RPFs to exercise discretion in identifying special status plants on a case-by-case basis is not going to streamline the plan review process or lead to consistency in the content of THPs. The Draft Guidance should employ more systematic and clear-cut guidance for which plants RPFs should consider in THPs. As discussed below, the CDFW Special Vascular Plants, Bryophytes, and Lichens List is one such way of standardizing the process.

C. Determining Which Plants Need to Be Considered Under CEQA Guideline 15380(d)

The Draft Guidelines recognize that THPs need to consider “consequential status plants,” meaning plants that are endangered, rare, or threatened. The Draft Guidance also acknowledges the definitions of endangered, threatened, and rare provided by CEQA Guideline 15380. Section 15380(d) provides that non-listed species “shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria” of endangered, rare, or threatened in the guideline’s definition. This regulation, promulgated by the California Natural Resources Agency with the binding force of law, mandates that plants that meet the criteria for listing need to be included in CEQA review. Accordingly, THPs must consider plants that are not formally listed under the CESA or NPPA, yet still meet the criteria for listing.

The Draft Guidance identifies the problem that it is “less clear” for RPFs how to proceed with non-listed plants that meet the criteria for listing. The proposed solution is to defer to the RPF to

“exercise some professional discretion in determining the level of appropriate investigation and discussion in the Plan for nonlisted plants informally designated as ‘special status’ plant species.” Again, this framework is not going to lead to more consistency or clarity, and is going to slow the review process considerably. Each individual RPF is going to come to a conclusion based on their individual professional opinion as to what plants merit consideration under Guideline 15380. This will inevitably lead to prolonged discussions between the reviewing team and the RPF as to how they arrived at their conclusions, which data points they considered, and requests for additional information.

A simpler approach is to have RPFs use existing plant lists created and maintained by botanical experts. The CDFW Special Vascular Plants, Bryophytes, and Lichens List already contains categories of all “consequential status plants” that should be reviewed under CEQA. Requiring the use of this the list relieves RPFs of having to justify their determinations of what plants warrant review under 15380(d), and will lead to more consistent consideration of special status plants in THPs throughout the state.

The Draft Guidance impliedly raises concern about the Special Vascular Plants, Bryophytes, and Lichens List because “CDFW, CNPS, and other entities have relied on Guideline §15380(d) to informally designate nonlisted plant species as being ‘special status’ plant species for purposes of the CEQA review process,” and “[i]nformal and nongovernmental plant species rarity rating structures raise legitimate concerns about the extent to which such rankings are properly relied upon as a basis for compelling Plan applicants to engage botanical surveys.” This concern seems exaggerated and is not a legitimate reason to disavow a resource that is maintained by plant experts, not to mention a partner agency. To date, there have not been substantive complaints during BOF committee meetings on this topic about the scientific accuracy or validity of the CDWF Special Vascular Plants, Bryophytes, and Lichens List, or the CNPS rare plant rankings.

The Draft Guidance also complains that the CNPS California Rare Plant Ranking process “lacks transparency and the opportunity for meaningful public engagement,” but this is simply not true. 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>.

As a final note, the Draft Guidance includes the following statement:

The Board recognizes the position previously advanced by CAL FIRE and the regulated public that if a plant species objectively satisfies the criteria for legally protected status as rare, threatened, or endangered under statutory schemes like the ESA, CESA, or the CNPPA, then entities charged with their protection would presumably undertake the process to have these species formally listed.

We suggest removing this text from the document. First, it is unclear where this statement originated. Second, there are many reasons why plants that merit formal listing do not become listed, or have not yet been listed. The process takes a long time, can be highly politicized, and is overseen by under-funded, under-staffed agencies with limited resources. Many species that deserve listing do not receive formal designation. For example, 399 plants included on CRPR Ranks 1A, 1B, 2A, or 2B, not listed under CESA, FESA or NPPA, and tracked by the CNDDDB have five or fewer known occurrences. Excluding these plants and all other plants that meet the criteria of 15380(d) from THPs simply because they are not formally listed is poor practice and lacks any scientific or legal backing. In any case, the fact that a species is not listed is inconsequential for the purposes of the Draft Guidance, because Section 15380 requires that plants that aren't listed but meet the criteria of rare, threatened, or endangered be considered in the CEQA review process.

V. Conclusion

The BOF's first priority should be to revise the Draft Guidance to recommend complete floristic field surveys for every THP. The fundamental purpose of CEQA simply cannot be fulfilled if field surveys are not performed. The scoping and elimination process can help to narrow and scale the scope of the survey, ensuring that no undue burden will be imposed on RPFs or landowners from over-inclusive scoping or survey requirements. The BOF should also reconsider deferring to the independent professional judgment of RPFs on a case-by-case basis, when standardizing the resources and methods of scoping will create less uncertainty, more consistency, and a faster review 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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