

## DEPARTMENT OF FORESTRY AND FIRE PROTECTION

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February 27, 1997

Received By  
BOARD OF FORESTRY

FEB 27 1997

Mr. Robert J. Kerstiens  
Chairman  
Board of Forestry  
1416 Ninth Street, Room 1506-14  
Sacramento, California 95814

Dear Mr. Kerstiens:

California Department of Forestry and Fire Protection (CDF) staff has reevaluated the need for the Sensitive Watershed Rules (14 CCR 916.8 936.8, 956.8). Based on that evaluation, CDF suggests the Board of Forestry (BOF) repeal the rules.

In 1993, BOF adopted rules for Sensitive Watersheds, along with Silviculture with Sustained Yield, and Late Succession Forests. Justification for the Sensitive Watershed Rule's package was to give more specific guidance for preventing significant adverse cumulative effects in watersheds designated as sensitive. The idea was to conduct a watershed level of analysis and adopt regulations specific to the watershed. This way, more effective mitigation could be tailored to the resources identified to be at risk. These rules constituted an additional element in BOF's approach to assess and mitigate the potential adverse cumulative effects of timber operations in selected basins. Decisions to classify watersheds as "sensitive" must be supported by substantial evidence that timber operations within the basin will create a reasonable potential to cause, or contribute to ongoing significant cumulative effects, and that mitigation requires the application of protection measures not required by other Forest Practice Rules.

BOF recognized the need for extra staffing and operating funds to implement the new rules. CDF, the Department of Fish and Game (DFG), and the State Water Resources Control Board prepared Budget Change Proposals (BCPs) for the extra costs associated with these rules. However, the BCPs have failed to make it through the budget process after several attempts to do so. CDF has redirected existing staff to handle the extra workload created by the Silviculture with Sustained Yield Rule and to review the Cohasset Sensitive Watershed nomination.

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The Cohasset Watershed nomination review was completed by volunteers and existing agency staff that were redirected from other tasks. CDF salutes the time commitment and effort for the persons who were involved in the process. However, CDF does not believe this is an appropriate or efficient way to administer this program. The overlap with other regulatory processes and lack of funding decreases the utility and eliminates the need for the Sensitive Watershed Rules.

#### Overlap With Federal Regulatory Processes

With the listing of coho salmon as a threatened species, the need for Sensitive Watershed Rules, at least within the coho's range, may be moot. When one considers the requirements for the federal Endangered Species Act (ESA), there is likely to be overlap between the "no take" mitigations and the thrust of the Sensitive Watershed Rules and other Forest Practice Rules. Mitigations provided for coho would act as an umbrella to protect other resources at risk, especially wildlife and water quality issues. The impending listing of steelhead could also complicate the regulatory framework and expand the range of influence beyond the coho's range.

Several timber companies are preparing multi-species plans that will meet the requirements of federal and state wildlife and water quality agencies. Some of the firms are blending the conservation plans with Sustained Yield Plans (SYPs). Currently, more than eight million acres of California's forest land is being analyzed for watershed and wildlife effects in Habitat Conservation Plans and/or SYPs. These documents will include specific mitigations or operating practices that could have, in some cases, the same effect as Sensitive Watershed Rules.

Besides the influence of the federal ESA, there are the federal Clean Water Act Total Maximum Daily Load (TMDL) standards under authority of the federal Environmental Protection Agency (EPA). The EPA has listed 17 north coast streams as having threatened or impaired beneficial uses of water. Implementation plans that will achieve water quality standards and restore beneficial uses would likely duplicate the requirements of any Sensitive Watershed Rules for these 17 streams.

#### Overlap with State Processes

CDF proposed amendments to the Watercourse and Lake Protection Rules in January 1997. The amendments are in response to CDF's January 1995 Report: "Implementation and Effectiveness of the Watercourse and Lake Implementation Rules". The proposed amendments will address rule and process shortcomings that were identified by review team agencies. Besides the suggested rule amendments, CDF forest practice inspectors will receive extra training on how to recognize and mitigate potential impacts by participating in the Watershed Academy.

The SYP Rules provide another avenue for watershed protection. Two sections, 14CCR 1091.5 Fish and Wildlife Assessment and 1091.6 Watershed Assessment and Planning, address the resources that are at the core of any sensitive watershed nomination. Both of the rules specify the impacts to be addressed and require feasible measures planned to avoid or mitigate potentially significant adverse environmental effects on fish, wildlife, and water quality.

The THP process incorporates professional judgment and interagency cooperation. Although it is often characterized as adversarial, we can point to many success stories where a submitter and state agencies have cooperated to develop plans that provide extra protection to resources at risk. CDF staff are confident that they can continue to solve many complex resource issues through this process. Sensitive Watershed Rules are not essential to the process. The existing rules and process allow CDF and other agencies to accomplish their respective missions.

The Sensitive Watershed Rules describe a process by which a person may petition the BOF for special rules. This process can be viewed as a refinement of Section 11340.6 of the Administrative Procedures Act (APA). The section allows a person to petition a state agency to adopt, amend, or repeal a regulation. The petition must state:

1. The substance or nature of the rule;
2. The reason for the request; and
3. Reference to the agency's authority to act on the request.

Although 14CCR 916.8 elaborates the nomination process, absent the rule, a person could still petition the BOF for special rules. The Natural Heritage Institute recently used this process to request special rules for exemptions and emergency notices in the Coast Forest District. This clearly demonstrates that 14 CCR 916.8 overlaps the APA.

Repeal of this rule is consistent with the Governor's Executive Order W-144-97. This order includes among other things a Sunset Review of Regulations. It requires agencies to:

- a. Examine the necessity and cost effectiveness of each rule;
- b. Update the cost estimate of the rule on government and the regulated community;
- c. Change rules to minimize overlap and conflicts with comparable federal rules; and
- d. Change rules to consider less intrusive or more cost effective alternatives.

### Process Weaknesses

The Sensitive Watershed Rules address just one piece of the puzzle. In some cases, degraded watershed conditions have resulted from timber harvests occurring before the 1973 Forest Practices Act and other land use activities. The causal relationship between degradation and harvesting is not always clear, and it is difficult to demonstrate that private logging is the causal agent for increased sediments above background levels. In some cases, it may be, and in other cases, different watershed activities (e.g. subdivision development, grazing, wildfire, recreation) may be the cause. Without long term baseline data on sediment discharge, it is difficult to interpret the significance of increased sediment levels. Various studies are underway to develop more meaningful measures. The petitions that BOF staff reviewed do not clearly link the Forest Practice Rules with the adverse impacts that are described.

The two petitions that have been received do point out that timber operations are just one of many land-use activities that may be contributing to watershed decline. A more comprehensive solution would be to take a watershed approach, such as the Governor's Watershed Initiative.

The Governor's Watershed Initiative seeks comprehensive, watershed-specific prescriptions that can be used by state and federal regulatory agencies to comprehensively mitigate the effects of adverse environmental impacts in key watersheds. In these watersheds, the Initiative will integrate water quality monitoring, standard setting, permitting and inspection, non-point source management, groundwater protection, and other programs across state government to promote more efficient use of personnel and fiscal resources. It will rely on prompt, but thorough, watershed and wildlife assessments to establish priorities and practices to protect all of the environmental assets in a given watershed.

A transition from time-consuming, costly, and burdensome project-by-project and species-by-species reviews to watershed-oriented environmental assessments can save time and money for landowners, permit holders, local governments, and the state. The Initiative utilizes an approach to improve the manner in which California's water quality and other environmental standards are met.

### Administrative Burden

One criticism of the Forest Practice Rules is their complexity. The Sensitive Watershed Rules create another subset of rules that straps the regulated public and increases the administrative burden for CDF staff.

### Insufficient Staff

The 1993 rule packages included the following fiscal request to implement the sensitive Watershed Rule:

	<u>PY</u>	<u>Total (including O&amp;E)</u>
CDF	2.5	\$260,000
DFG	3.0	\$335,000
SWRCB	3.0	\$280,000
Total	8.5	\$875,000

BCPs for this amount were submitted in FY 93/94, 94/95, 95/96, and 96/97. To date, there are no funds to implement the rule.

The extra staffing is needed to accomplish several tasks. Within CDF, expertise in forestry and engineering geology, with appropriate clerical staff, is needed to adequately review the nominations and give the BOF a recommendation on whether to approve or disapprove them. Additional specialized expertise is needed in the disciplines of economics, forest engineering, forest hydrology, and harvest scheduling. The most cost effective way to provide such expertise is through funding outside consulting and professional help. Combined with the staffs of DFG and SWRCB, this technical and professional expertise will be provided for the BOF.

The DFG must survey watersheds for biological habitat conditions and develop strategies for protection and recovery. This includes aquatic population surveys, water quality analysis, physical habitat typing, and mapping keystone problem areas (both natural and management related). If threatened and endangered species are involved, field monitoring may be necessary.

Regional water boards need to provide early consultation and watershed information to submitters of sensitive watershed nominations. The state/regional water boards will participate in the CDF team (office) review of each nomination and of proposed watershed mitigation measures. Regional water boards will conduct or participate in field review of sensitive watershed nominations and mitigation measures. State/regional water boards will prepare findings, conclusions, and recommendations regarding watershed mitigation and monitoring, and present these at BOF hearings on sensitive watershed nominations.

Absent funding for the needed staff and other costs, the above plan has not come into fruition. If the process continues without proper staffing, the Rule will continue to disrupt other important program activities for the agencies that review the

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nomination. The quality of the nominations and the recommendations from the nomination review committee will also be poor. Other program activities will suffer when staff and operating funds are redirected to an unfunded activity.

Besides the issue of agency staff and operating funds, the costs for other nominating committee members is critical. As mentioned, the Cohasset nomination was done with volunteers, but this hardly seems to be a prudent way to do business. The BOF's intent for the composition of the Nominations Review Committee was to include individuals who have technical and scientific experience and knowledge of the region. The Committee would assist the BOF by giving a thorough analysis of the nomination and making a recommendation following their review. Final adoption rests with the BOF following the regular rulemaking process in the Administrative Procedures Act. When the rules were adopted, the continued funding of the District Technical Advisory Committees (DTACs) was uncertain. The BOF determined not to specify the membership of the Nominations Review Committee within the Rule. The BOF intended to select a technically experienced committee with members representing a range of interest groups and experience. Without a funding mechanism, it is unlikely the BOF can sustain a viable system to meet its intent.

#### Summary

In light of the preceding arguments it is difficult to justify Sensitive Watershed Rules.

There is potential overlap with requirements in the federal ESA and the federal Clean Water Act.

The Watercourse and Lake Protection Rules will likely be strengthened in 1997.

There are numerous ongoing landscape planning processes that address the same issues.

The Administrative Procedures Act provides a process for a person to petition the BOF for special rules.

The potential advantages of Sensitive Watershed Rules may not provide the efficiencies to the THP and review process as when first envisioned.

There is no staff to implement the Rules and little likelihood of getting any in the future.

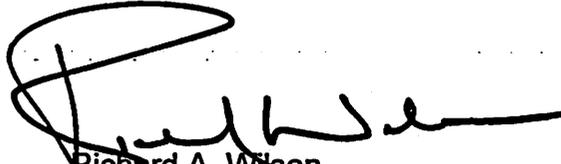
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Therefore, we have concluded that the BOF should repeal the Sensitive Watershed Rules (14 CCR 916.8, 936.8 and 956.8).

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard A. Wilson', written over a horizontal dotted line.

Richard A. Wilson  
Director

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