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Board of Forestry and Fire Protection
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2 November 2014

Dear Chairman Gillless and Members of the Board

Ebbetts Pass Forest Watch (EPFW) is submitting the following comments for consideration related to the Board's Hearing (Item 12 on the November 5, 2014 agenda¹), the purpose of which is:

12. To assure the timely dissemination and effective implementation of rule language, as well as to assist and improve subsequent rulemaking efforts the Board is requesting public comment, and a presentation by the Department, addressing the following:
 1. Areas where questions exist on interpretation of the regulatory standards, including potential solutions.
 2. Issues encountered in achieving compliance with the regulatory standard of rules, including potential solutions.
 3. Suggested regulatory modifications which would either a) clarify existing rule language to better achieve the intended resource protection, or b) which would reduce regulatory inefficiencies and maintain the same or better level of protection.

EPFW key comments cover:

1. Areas where questions exist on interpretation of the regulatory standards, including potential solutions:
 - General failure of the THP process to meet legislative intent of the Z'BergNejedly Forest Practice Act of 1973 (FPA)and

¹ http://bofdata.fire.ca.gov/board_business/meeting_agendas/2014_board_meeting_agendas/final_november_14.pdf

- Failure to adapt appropriately in response to state-level analyses of the THP process
2. Issues encountered in achieving compliance with the regulatory standard of rules, including potential solutions:
 - THP Cumulative Assessment needs to be expanded to include
 - fire threat from the proposed harvest and
 - effect of 20 years of burned forestlands (both public and private) within the largest appropriate assessment area for the THP
 3. Suggested regulatory modifications that may clarify existing rule language, improve resource protection, and/or reduce regulatory inefficiencies:
 - Lack of THP appeal process other than litigation

EPFW has submitted comments to the Board regarding these same items since 2008. Although there has been positive movement on a few, unfortunately, most of these same issues still remain unaddressed. We hope that 2015 proves to be the year in which these substantive matters that relate to the appropriate management and stewardship of public trust resources are finally reflected in the Board's committee priorities and are at last resolved. EPFW looks forward to being a useful working partner in these efforts.

1. Areas where questions exist on interpretation of the regulatory standards, including potential solutions

- General failure of the THP process to meet legislative intent of the Z'Berg Nejedly Forest Practice Act of 1973 (FPA) and
- Failure to adapt appropriately in response to state-level analyses of the THP process

Failure to meet legislative intent

The FPA 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."² However, in fact, THPs are assessed and approved primarily based on their relationship to "maximum sustained timber yield" with only token consideration to the other forest values required to be evaluated and maintained.

As well, the Forest Practices Rules, developed to implement the FPA, set forth principles based on a high standard of biological diversity and resource protection across the landscape under which THPs shall be evaluated.

(b) In determining whether a THP conforms to the intent of the Act, the Director shall be guided by the following

² http://calfire.ca.gov/resource_mgt/downloads/2013_FP_Rulebook_with_Tech_RuleNo1.pdf; p. 251

principles:

(1) The goal of forest management on a specific ownership shall be the production or maintenance of forests which are healthy and naturally diverse, with a mixture of trees and under-story plants, in which trees are grown primarily for the production of high quality timber products and which meet the following objectives:

(A) Achieve a balance between growth and harvest over time consistent with the harvesting methods within the rules of the Board.

(B) Maintain functional wildlife habitat in sufficient condition for continued use by the existing wildlife community within the planning watershed.

(C) Retain or recruit late and diverse seral stage habitat components for wildlife concentrated in the watercourse and lake zones and as appropriate to provide for functional connectivity between habitats.

(D) Maintain growing stock, genetic diversity, and soil productivity.

(2) Individual THPs shall be considered in the context of the larger forest and planning watershed in which they are located, so that biological diversity and watershed integrity are maintained within larger planning units and adverse cumulative impacts, including impacts on the quality and beneficial uses of water are reduced.

http://calfire.ca.gov/resource_mgt/downloads/2013_FP_Rulebook_with_Tech_RuleNo1.pdf; p.26

However, in practice, THPs are routinely approved that provide minimal diversity and biodiversity across a landscape.

In January 2009, the Board of Forestry (Board) received “Advice Regarding Board of Forestry’s Regulatory Authority to Provide for the Restoration of Resources” from the Attorney General of the State of California. This document clearly discussed legislative intent and emphasized the Board’s responsibility to protect resources and biodiversity.

“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.”³

However, consistently in practice, EPFW continues to see bias toward timber yield as the pre-eminent value evident in THP review and approval. For those who live in the Sierra Nevada or who have seen visual documentation of the evenage conversion to plantations occurring range-wide, no other evidence is necessary to convince them that maximum timber yield is trumping resource protection.

Failure to adapt appropriately in response to state-funded analyses of the THP process

In 1990, LSA Associates exhaustively studied the THP process, preparing a report for CAL FIRE

³ Rudd, Anita E., Deputy Attorney General. “Advice Regarding Board of Forestry’s Regulatory Authority to Provide for the Restoration of Resources.” Attorney-Client Communication and Work Product (copied and distributed by the Board of Forestry). State of California Department of Justice, Office of the Attorney General. January 9, 2009. p. 4

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.

(Department) on that investigation.⁴ They concluded that major change was needed:

In our view, the Department is at a crisis point with respect to the administration of the forest practices program. Bold action aimed at recapturing public support is called for. We believe these actions should be pursued on two related fronts:

- Establishing a greater degree of independence from the industry it regulates,
- Asserting a stronger leadership role in forestry matters in California.

Rightly or wrongly, too many people perceive CDF as not aggressively enforcing the intent of the Forest Practices Act and the requirements of CEQA. While it is vital to maintain a working relationship with the industry, it is equally important to visibly demonstrate to the industry and the public that the statutory obligations of assuring adequate environmental consideration in the management of private forestlands cannot be compromised and that the Department is committed to its regulatory obligations even if it angers the industry. Past CDF actions have failed to demonstrate this. In areas such as the determination of significant impacts, the identification of appropriate mitigations, and currently, the development of a new rule package for wildlife and cumulative impacts, the Department is operating in a manner that fails to establish a public perception of appropriate independence from the industry it regulates.

We are not unaware of the complexities of interactions with the industry and, particularly, the Board. CDF does not make the rules; it is charged with administering them. But as a key agency staking claim to a leadership position in the forestry and wildland management affairs of California, the Department needs to begin taking more independently derived positions that may not march in close step with either the Board or the industry. *Ibid.* p. 13

As detailed in our previous comments, there is a systemic failure of the entire THP process, which will not be remedied by small modifications in current process. This failure was thoroughly analyzed and documented in the Little Hoover Commission Report of June 1994.⁵ At that time, numerous conclusions were drawn and recommendations made for meaningful and effective change to the process.

From the Little Hoover Commission Report:

The Outcome

- * Timber Harvest Plans have not protected the environment from degradation.
- * The plans are too narrow in scope, examining only a small portion of an

⁴ FINAL REPORT: CONCLUSIONS AND RECOMMENDATIONS FOR STRENGTHENING THE REVIEW AND EVALUATION OF TIMBER HARVEST PLANS. PREPARED FOR: CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION. PREPARED BY: LSA ASSOCIATES, INC. LSA PROJECT #CDF8O2. March 1990.

⁵ State of California. LITTLE HOOVER COMMISSION. "Timber Harvest Plans: A Flawed Effort to Balance Economic and Environmental Needs". June 1994. Report #126. <http://www.bsa.ca.gov/lhcdir/126rp.html>.

ecosystem.

* State efforts are focused more on procedural steps than on the desired outcome: a balance between economic and environmental needs.

A sample of recommendations from the Little Hoover Commission report:

Recommendations:

- * Require planning on a watershed or ecosystem basis.
- * Create a public appeal process and encourage mediated solutions.
- * Shift focus from plan approval to monitoring and enforcement.

Unfortunately – 20 years later -- the bulk of substantive changes mandated by that bipartisan report have yet to be addressed, let alone implemented, by the Board of Forestry and Department. So, the THP process remains now, as then, “A Flawed Effort to Balance Economic and Environmental Needs.” If only from the vantage point of considering the uncertain and increasingly challenging weather and fire patterns we are witnessing, EPFW believes it is time to address the Little Hoover Commission comprehensive and balanced work.

Potential Solutions:

As stated above, solution to the large problem of failure to meet legislative intent or respond adequately to exhaustive investigations of the THP process cannot be remedied by small modifications. Rather, there must be a commitment from both the Board and Department to make the THP process meet its intended role for the concerned public, the regulated public, and the state’s public trust resources. Such a process must be prioritized and begun as quickly as possible. EPFW is willing to be a good-faith participant in this much-needed process, volunteering time and effort to aid in its success. We hope other stakeholders will also step forward.

If the commitment and resolve to undertake this overhaul from within is lacking, then the impetus for it must be provided by an outside source.

2. Issues encountered in achieving compliance with the regulatory standard of rules, including potential solutions:

There are many specifics in which EPFW has encountered difficulties with the achievement of compliance with the regulatory standard of rules. We are gratified that there has been improvement in some of the specifics in this area. We are committed to continuing to work with the Board and Department to resolve outstanding issues.

For the sake of this letter, we wish to discuss one important and timely issue that, particularly in the light of current conditions, demands immediate and thorough attention. That matter is the **crucial need for THP cumulative impacts assessments to include thorough analysis of the fire threat that may be posed from the proposed timber harvest as well analysis of the effect on the current plan of a 20-year fire history (and post-fire forest condition) of forestlands (both public and private) within an appropriate assessment area.**

As everyone is well aware, fire season has lengthened to essentially now year-round and increasingly severe fires are becoming more frequent. The current water crisis is exacerbating this trend. We also know that decisions about which type of management to choose for timber harvest can effect fire threat immediately and for decades after harvest. Yet, there is no analysis of that in the THP documents, despite this being a potentially huge cumulative impact. It is time to change the THP process to assure that it is considered with other impacts at the time of THP review.

As well, previously-burned forestlands (both public and private) within the larger assessment area can affect the fire vulnerability of a proposed plan and may call for mitigations or adjustments to that plan. EPFW believes a 20-year fire history (with appropriate mapping included in the THP) as well as an analysis of the post-fire condition of fire-affected areas must be part of the cumulative impacts assessment of any THP.

As is well known and borne out by recent fire analyses, evenage harvest and its subsequent plantations can increase fire threat and fire severity. This must be taken into consideration when analyzing plans, as must the acreage and condition of plantations in the assessment area from previous THPs and from replanting after fire. The following are just a few quotes that speak to the vulnerability of young trees and plantations:

Extensive harvest in the late 1800s and early 1900s resulted in an overall young forest. There is concern that these changes have contributed to an increased likelihood of severe fire. Younger forests are more susceptible to mortality from fires. This is due to the lower height and size of small trees. Their bark is thinner, and their crowns are lower to the ground, making them more susceptible to lethal heating by flames of a low height. With much of the Basin in a younger state, a large proportion of it could burn severely, with high rates of mortality. These two human activities— creating younger forests by harvesting older trees and suppressing fires that otherwise would have burned off accumulated fuel—have increased the likelihood of severe fire in the Basin.⁶

Since European settlement of the United States, fire has been altered substantially by anthropogenic factors acting as root causes of the current fire crisis, including.... increases in fuel accumulation through active creation of dense tree plantations and a buildup of shade-tolerant conifers from fire suppression (Agee 1993; Arno & Allison-Bunnell 2002; Odion et al 2004); ...[and] losses of fire-resilient properties at the stand and landscape levels through the removal of large trees and "legacy" stand components and homogenization of fuels across large landscapes (Lindenmayer & Franklin 2002; Brown et al 2004); Such fundamental changes in fire behavior may be amplified by a predicted incremental lengthening of the fire season and increase in fire

⁶ http://www.bof.fire.ca.gov/pdfs/OALEmergencyfinal%206_20_05withOALedits%20.pdf State Board of Forestry and Fire Protection. "Findings Pursuant to Government Code Section 11346.1(b) in Support of Adoption of Emergency Rules to Implement Lake Tahoe Region Exemption Emergency Rule, 2005." Final Version with OAL Edits 6_20_05. Notice Date: June 13, 2005. p. 8

intensity in the western United States, exacerbated by global warming (McKenzie et al 2004).⁷

Both fire and competitive stress threaten the development of the plantations into mature forest ecosystems....In some areas, the over story density of pole sized trees compounds the hazard by providing a uniform high-density canopy fuel complex that could not only carry crown fire, but would also trap convective heat and increase crown scorch and mortality....

Silviculturalists from both the federal and private side are concerned about how to handle well-growing plantations of this age. Mike Landram, R5 Regional Silviculturist, defined three pressing problems driving a need for action:

- Where the pine plantations have taken, independent of fuel concerns, the stands are overstocked.
- Competition and beetles, in addition to the creation of continuous crown fuels, constitute considerable threats to the development of these plantations. High tree density tends to increase tree damage through increased crown scorch resulting from limiting the escape of the convective heat rising from the surface fire.
- The USDA Forest Service does not have a sufficient Timber Stand Improvement budget to do much about it. Landrum estimates that at least 300,000 acres within Region 5 need treatment. Many of the private plantations are in a similar situation, and contribute to the landscape level problem.⁸

It is worth noting that the last quote is discussing plantations within the granite Burn which, in line with concerns put forth in the document, did in fact re-burn during the recent Rim Fire.

EPFW fervently hopes that the Board considers this fire threat issue of immediate concern and incorporates it into their 2015 Committee Priorities.

3. Suggested regulatory modifications that may clarify existing rule language, improve resource protection, and/or reduce regulatory inefficiencies:

- **Lack of THP appeal process other than litigation**

The Little Hoover Commission found litigation as the only allowed means of appealing an approved THP unfortunate.⁹ The LSA report also noted that Official Responses (OR) to

⁷ "Beyond Smoke and Mirrors: A Synthesis of Fire Policy and Science." Dominick A. Dellasalla, Jack E. Williams, Cindy Deacon Williams, and Jerry F. Franklin. *Conservation Biology*. Volume 18, No. 4, August 2004. p. 977

⁸ Sapsis, Dave (Fuel and Fire Behavior Specialist) and Brandow, Clay (Watershed Specialist). "Turning Plantations into Healthy, Fire Resistant Forests: Outlook for the Granite Burn." Fire and Resource Assessment Program; California Department of Forestry and Fire Protection. October 9, 1997. http://frap.cdf.ca.gov/projects/granite_burn/gb.html

⁹ From the Little Hoover Commission Report:

Lack of public appeal mechanism leads to challenges in court system

In addition to failing to address cumulative impacts effectively, the design of the Timber Harvest Plan process encourages litigation rather than consensus-shaped resolution to problems. The process lacks a public appeal mechanism that would

THP comments were lacking, perhaps largely because they are used as means to position the Department for legal challenges.¹⁰

Legal action, while useful for those who like to hold up the concerned public as fond of litigation, is in fact a process that expends valuable state resources of both money and professional staff time. And in the end, it leaves the development of forest law in the hands of judges who may not fully understand the complexities involved or be sufficiently motivated to consider all of these in issuing rulings.

As well, the threat of legal action has increased divisiveness among stakeholders, resulted in lengthier THPs without commensurate increases in resource protection, and led to Department staff having written process become a greater portion of their THP review work than on-the-ground monitoring. None of this has served any positive purpose.¹¹

allow plan approvals to be challenged short of court action. As a result, when environmentalists or other interested parties believe that CDF has reached a bad decision, a lawsuit may follow.

¹⁰ From the LSA Report:

Our evaluation of several recent ORs prepared for THPs in the coast region leads us to the conclusion that additional guidance and assistance is needed for personnel who are preparing ORs. Many ORs do not compare favorably with the standard of presenting a reasoned, meaningful response to environmental comments and of demonstrating the scientific opinion and/or reasoned analysis that supports the THP decision. A more detailed discussion of this conclusion is contained in our August 1, 1989, interim report and we will only briefly repeat them, here. As currently being prepared, ORs clearly do not respond to Judge Cox's ruling that even non-significant environmental comments merit a response as to why CDF judges them to be non-significant. And for significant comments, it is sometimes very difficult to identify in the OR where and how the Department has responded. Current direction to OR preparers is to lump all comments into a synthesized response rather than splitting out and responding to each significant comment, individually. But in applying this direction, the ORs generally fail to present an impression of responsiveness or even acknowledgement that many of the comments have been considered. They leave the department vulnerable to judicial impressions that the Director and/or his representative have prejudicially abused their discretionary authority. The use of "boiler plate" language further erodes the credibility of the OR and lends credence to the impression that the Department has not seriously considered some of the significant points raised by commenters.

¹¹ From the Little Hoover Commission Report:

Litigation is an expensive, divisive way to reach balanced decisions
Litigation is not only expensive to pursue -- 10 of the cases involved more than 300 hours of state attorney time and four exceeded 500 hours, according to the Department of Justice -- but it also tends to increase antagonism and harden positions. The result over time can be disadvantageous to both economic and environmental interests.

While there is no formal recourse for appealing Timber Harvest Plan approvals, mediation has proven successful in at least two areas where it has been tried.

EPFW has repeatedly asked the Board to develop at least a pilot project to test an alternative means for THP appeals. We have never received even a follow-up conversation. Our hope is that now the Board will wish to undertake that discussion.

Potential Solutions:

- Create a workplan within 6 months and begin Implementation by 1 September 2015 of the Little Hoover Commission Report: Recommendation #7: The Governor and the Legislature should enact legislation establishing a public appeals process to allow non-litigation challenges to Timber Harvest Plan approvals.

Members of the public have little avenue for recourse other than filing a lawsuit if they disagree with a plan approval or believe further restrictions should be imposed on harvesting operations. Providing an alternative to litigation could save money, encourage compromise solutions and diminish the animosity that is usually heightened by legal processes. Potential places in the state bureaucracy for establishing the appeals process include the Board of Forestry, the Office of Administrative Hearings or the Secretary for Environmental Protection.

- Create a workplan within 6 months and begin Implementation by 1 September 2015 of a pilot project for an alternative, mediated means of THP appeal

Thank you for the opportunity to comment on these important issues and for your serious consideration of our concerns.

EPFW looks forward to working with the Board and Department to make the THP process effective, efficient, and protective of public trust resources.

Respectfully submitted on behalf of Ebbetts Pass Forest Watch,



Addie Jacobson, Board Member



Susan Robinson, Board Member