



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Deputy Director's Office
Ecosystem Conservation Division
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



May 6, 2016

J. Keith Gillless, Ph.D.
California Board of Forestry and Fire Protection
Post Office Box 944246
Sacramento, CA 94244-2460

RECEIVED BY
MAY 05 2016
BOARD OF FORESTRY AND FIRE PROTECTION

Dear Dr. Gillless:

REVISED NATIONAL MARINE FISHERIES SERVICE PROPOSED RULE PLEAD TO FACILITATE APPLICATION OF ENDANGERED SPECIES ACT SECTION 10(j) IN WATERSHEDS ABOVE RIM DAMS

On July 23, 2015, the California Board of Forestry and Fire Protection (Board) voted to adopt proposed changes to the California Forest Practice Rules (FPRs) to facilitate the application of Section 10(j) of the Endangered Species Act (ESA). The National Marine Fisheries Service (NMFS) proposed these changes in a July 13, 2015, letter addressed to you, to resolve potential impediments to the reintroduction of listed experimental populations of salmonids under the authority of ESA Section 10(j). The California Department of Fish and Wildlife (CDFW) staff reviewed the NMFS letter and supported the proposed rule language. CDFW addressed a letter to you on July 13, 2015, detailing our support for reintroductions of listed experimental populations of salmonids as well as the proposed rule language.

As an outcome of a discussion with the Office of Administrative Law about the July 23, 2015, rule plead, the Board decided to not adopt the plead's changes to the FPRs. Recently, Board staff created a revised rule plead that is narrower in scope than the initial plead but still addresses NMFS' original purpose. CDFW staff has reviewed the new language, a copy of which is enclosed with this letter.

CDFW supports the revised proposed changes to the FPRs as they would help ensure successful implementation of actions necessary to conserve and promote recovery of selected Central Valley salmon and steelhead listed pursuant to ESA and/or the California Endangered Species Act (CESA). These actions include reintroduction to historic spawning and rearing habitats above rim dams of populations of these native species that NMFS has designated as experimental; pursuant to ESA Section 10(j). Some of these habitats are on private timberlands.

The current proposed changes to the FPRs still appear likely to address concerns, reportedly expressed by some forest landowners, that the Anadromous Salmonid Protection (ASP) rules would extend to watersheds where the experimental salmonid populations would be reintroduced. The ASP rules were established to help protect listed anadromous salmonids in watersheds with listed salmonids, as defined in the FPRs, from the effects of timber operations.

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They are more restrictive than the FPRs applied to timber operations in watersheds without listed salmonids. The proposed change to the FPRs, would clarify that the ASP rules would not apply to reaches above large dams and natural barriers that preclude anadromous fish passage.

Through this proposed change to the FPRs, the experimental salmonid populations would be reintroduced above large rim dams, where the ASP rules would not apply.

Aside from clarifying that the ASP rules would not apply where the experimental populations would be reintroduced, the proposed plead still includes a change to FPRs Section 898.2, Special Conditions Requiring Disapproval of Plans. Subdivision (d) states the Director of the California Department of Forestry and Fire Protection (CalFire) shall disapprove a timber harvesting plan (THP) where "Implementation of the plan as proposed would result in either a 'taking' or finding of jeopardy of wildlife species listed as rare, threatened or endangered" pursuant to ESA or CESA, but provides an exception when the taking is "incidental and is authorized by a wildlife agency acting within its authority under state or federal endangered species acts." Again, certain forest landowners reportedly expressed concern that CalFire would not approve THPs resulting in unauthorized incidental take of listed anadromous salmonids reintroduced as experimental populations within watersheds that include lands they manage. This proposed change would provide the Director of CalFire an additional exception, allowing approval of THPs resulting in incidental take of an anadromous salmonid species in an experimental population under Section 10(j) of ESA and corresponding regulations under Section 4(d) of ESA, when state and federal agencies determine no further authorizations are necessary under CESA or ESA. Although there are more steps that may need to be taken to provide relief to landowners pursuant to CESA at this time, this is an important exception that will create avenues for future streamlining.

Should the Board adopt the revised proposed changes to the FPRs, and experimental populations of listed anadromous salmonids are then reintroduced, CDFW expects NMFS will implement robust monitoring and evaluation programs to determine how the related land use practices and the regulatory regimes affect the recovery objectives of the reintroductions. For private timberlands, such programs will require strong support and commitment by at least the Board, CalFire, NMFS, and CDFW.

Should you have any questions and/or would like to discuss our input, please contact William Condon, Environmental Program Manager, with the CDFW's Timberland Conservation Program in the Habitat Conservation Planning Branch, at (916) 651-3110 or by email at William.Condon@wildlife.ca.gov.

Sincerely,



Sandra Morey, Deputy Director
Ecosystem Conservation Division

Enclosure

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1 *Watershed Association, v. California Department of Forestry & Fire Protection*, Sonoma
2 County Superior Court No. SCV 229850.

3
4 **Amend:**

5 **§ 898.2 Special Conditions Requiring Disapproval of Plans.**

6 The Director shall disapprove a plan as not conforming to the rules of the Board if any
7 one of the following conditions exist:*****

8 *****(d) Implementation of the plan as proposed would result in either a "taking" or
9 finding of jeopardy of wildlife species listed as rare, threatened or endangered, by the
10 Fish and Game Commission, the National Marine Fisheries Service, or Fish and Wildlife
11 Service, or would cause significant, long-term damage to listed species. The Director is
12 not required to disapprove a plan ~~which would result in a "taking" if the "taking" is~~
13 ~~incidental and is authorized by a wildlife agency acting within its authority under state or~~
14 ~~federal endangered species acts.~~ under either of the following circumstances:

15 (1) Which would result in a "taking" if the "taking" is incidental and is authorized by a
16 wildlife agency acting within its authority under state or federal endangered species
17 acts.

18
19 (2)Where anadromous salmonid populations are designated as an Experimental
20 Population under Section 10(j) of the Federal Endangered Species Act, and
21 corresponding regulations under Section 4(d) of the Federal Endangered Species Act
22 for those populations provide an exception from take prohibitions under the Federal
23 Endangered Species Act for activities subject to the California Forest Practice Rules,
24 and federal and state agencies determine no further take authorizations are necessary.

1 under the Federal Endangered Species Act or the California Endangered Species

2 Act. *****

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4 *****Note: Authority cited: Sections 4551, 4555 and 4582, Public Resources Code.
5 Reference: Sections 2053, 2080.1, 2090-2097, 2830 and 2835, Fish and Game Code;
6 Sections 4555, 4582.7 and 4582.75, Public Resources Code; Section 51115.1,
7 Government Code; the federal Endangered Species Act of 1973, 16 U.S.C. Section
8 1531 et seq.; and Laupheimerv. State(1988) 200 Cal.App.3d 440; 246 Cal.Rptr. 82.
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