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*Submitted electronically to: [Jane.VanSusteren@bof.ca.gov](mailto:Jane.VanSusteren@bof.ca.gov).*

**Re: Comments on RPF Guidance Regarding Botanical Resource Scoping and Surveys for Special Status Plants Under the Forest Practice Act and CEQA (September 2021 Version)**

Dear Ms. Van Susteren:

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 Special Status Plants Under the Forest Practice Act and CEQA, revised September 2021 (referred to herein as "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.

CNPS appreciates the time and resources the Forest Practice Committee ("FPC") has devoted to the process of creating this document. However, we still have identified a number of concerns that merit attention before the Guidance is presented to the full Board for review. While we understand that "one-size-fits-all" guidance is not ideal, we believe there are ways to create a more uniform and structured framework for scoping and surveying for botanical resources that is still not being captured in the draft. The FPC has made clear that it does not intend to expand the Guidance any further than bare minimum legal requirements.<sup>1</sup> In the effort to avoid so-called "best practices" that go beyond legal requirements, however, the Guidance creates a scoping and

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<sup>1</sup> CNPS encourages the FPC to reflect on whether issuing guidance that adheres strictly to minimum legal requirements is ideal from a policy standpoint. In legal frameworks that have regulatory gaps, such as the Forest Practice Act and CEQA, which do not have regulations specifying how to properly scope and survey for botanical resources, agencies play a crucial role in issuing guidance that fills those regulatory gaps. We hope that the FPC considers whether the function of this Guidance should be to steer RPFs toward minimum legal requirements, in light of the fact that the absence of formal botanical regulations in the FPA and CEQA is what necessitates this Guidance in the first place. We also urge the FPC to contemplate whether avoiding "best practices" that benefit forest health and biodiversity is a desired objective.

surveying process that will create more guesswork for RPFs, and more inconsistency between plans because it calls on RPFs to exercise professional judgment over standard data collection that can and should be routinized. Overall, the Guidance as presently written will not lead to adequate protections for botanical resources and could result in irreparable damage to forest health.

CNPS provides the following suggestions to address our remaining concerns that are still not adequately handled in the Guidance.

**I. The Guidance Should Be Reviewed for Consistency with the California Vegetation Treatment Program PEIR as Approved by the Board in December 2019.**

The California Vegetation Treatment Program (CalVTP) Program Environmental Impact Report (PEIR) was approved and certified by the Board in December 2019, and outlines a thorough process for ensuring that vegetation treatment projects implemented under the CalVTP are CEQA-compliant. Conforming the Guidance to the CalVTP would similarly ensure that RPFs preparing timber harvest plans are meeting minimum obligations under CEQA. The environmental impacts assessed in the CalVTP PEIR will likely be similar to the impacts of timber operations, and will likely be performed in similar landscapes, so the CalVTP provides a helpful model for how the Guidance should be structured. It would also promote internal consistency within the Board's existing programs and policies, which is important since the same RPFs to whom this Guidance is directed to will also be required to comply with the CalVTP PEIR if they are tasked with designing a CalVTP project. Since the Board has already certified the PEIR as an appropriate tool for streamlining CEQA compliance for vegetation treatment projects, it makes sense to mirror the CalVTP processes for analyzing botanical resources in timber harvest plans that also must be CEQA-compliant.

CNPS suggests that the FPC review the Guidance holistically for consistency with the CalVTP PEIR. There are a number of recommendations in the Guidance that CNPS still finds concerning, and revising the Guidance to conform to the CalVTP will help rectify these remaining sticking points.

CNPS highlights the following inconsistencies between the Guidance and CalVTP, and suggests the FPC review and revise the Guidance to ensure that the documents do not contain conflicting definitions or recommendations. This is not an exhaustive list of all inconsistencies between the CalVTP and this Guidance, and the FPC and staff should do an independent review of the CalVTP to confirm consistency throughout.

**A. The Guidance Should Adopt the CalVTP Definition for "Special-Status Species".**

The CalVTP provides a definition of special-status species that will be used by RPFs across the state for every vegetation treatment activity that is performed under the program. The latest version of the Guidance includes a definition for special-status plants, but the definition is not entirely consistent with the definition in the CalVTP or CDFW's Special Vascular Plants,

Bryophytes, and Lichens List<sup>2</sup>. While we believe that the Guidance should be consistent with the definition provided in the CDFW list, the Guidance would be improved if it were revised to match the CalVTP definition, so that RPFs can rely on a uniform understanding of the term across all areas of forestry work. The Guidance should mirror this definition:

“Plants and animals may be special-status species due to declining populations, vulnerability to habitat change, or restricted distributions. Special-status species include those species legally protected under the CESA, the ESA, or other regulations, as well as species considered sufficiently rare by the scientific community to qualify for such listing. In this document, special-status species are defined as the following.

- Species listed or proposed for listing as threatened or endangered under ESA (50 CFR 17.12 for listed plants, 50 CFR 17.11 for listed animals, and various notices in the Federal Register for proposed species) or candidates for possible future listing as threatened or endangered under ESA (75 CFR 69222);
- Species listed or candidates for listing by the State of California as threatened or endangered under CESA (14 Cal. Code Regs., Section 670.5);
- Animals fully protected under the California Fish and Game Code (FGC) (Section 3511 for birds, Section 4700 for mammals, Section 5050 for reptiles and amphibians, and Section 5515 for fish);
- Plants listed as rare under the California Native Plant Protection Act (FGC Section 1900 et seq.);
- **Plants considered by CDFW to be “rare, threatened or endangered in California” (California Rare Plant Ranks of 1A, presumed extinct in California and either rare or extinct elsewhere; 1B, considered rare or endangered in California and elsewhere; 2A, presumed extinct in California but common elsewhere; and 2B, considered rare or endangered in California but more common elsewhere). Note, that while these rankings do not afford the same type of legal protection as ESA or CESA, the uniqueness of these species requires special consideration under Section 15380 of the CEQA Guidelines;**
- Animals identified by CDFW as species of special concern;
- Species considered locally significant, that is, a species that is not rare from a statewide perspective but is rare or uncommon in a local context such as within a county or region (CEQA Section 15125 (c)) or is so designated in local or regional plans, policies, or ordinances (CEQA Guidelines, Appendix G); or
- **Species that otherwise meets the definition of rare or endangered under CEQA Section 15380.**

(CalVTP Chapter 3, Section 3.6, Part 1 of 2, page 3.6-16) (emphasis added).

CNPS understands that the CalVTP definition of “special-status species” does not necessarily clarify which species should be considered under Section 15380, which the FPC has articulated as a priority. For additional clarity on specific species that are “special-status”, we suggest that the Guidance point RPFs to CDFW’s Special Vascular Plants, Bryophytes, and Lichens List, which is updated regularly and used widely across California. The special-status plant species tables in Appendix BIO-3 of the CalVTP<sup>3</sup> could also be useful in determining species that may

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<sup>2</sup> Special Vascular Plants, Bryophytes, and Lichens List, <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109383&inline>.

<sup>3</sup> <https://bof.fire.ca.gov/media/9386/vol-2-apdx-bio-3.pdf>.

be present in a plan area on a regional basis, but these lists are static and not updated regularly, unlike the CDFW list which is updated multiple times per year.

Instructing RPFs to defer to the same sources for identifying 15380(d) plants will promote consistency between plans, since all RPFs will be referring to the same lists. It will also be more efficient than suggesting that RPFs take on the task of determining which species qualify as special-status under 15380(d). It is always advisable for RPFs to consult with a qualified botanist or CDFW on special-status plants, because sometimes CRPR 3 and 4 plants and plants with no rarity designation at all require consideration under 15380. Consultation with CDFW during the plan review process is required by the Forest Practice Rules,<sup>4</sup> and the Guidance should ensure that complex botanical questions are properly answered with oversight by a professional botanist and/or CDFW.

With the above points in mind, the section of the Guidance titled “Identification of Special-Status Plant Species” can be substantially simplified, thus relieving RPFs of the burden of determining which species should be considered during plan preparation.

**B. Reconnaissance and Protocol-Level Surveys Should Be Required in the Same Way They Are Required in the CalVTP.**

CNPS reiterates and incorporates by reference our concerns raised in past comment letters regarding the Guidance’s instructions for botanical surveys. The Guidance still wrongly asserts that scoping “may determine the need for and the character of a botanical survey, and for the formulation of any avoidance and minimization measures that may be appropriate and necessary.” (Guidance, page 3). This is incorrect. The information that can be gained by scoping is limited to information that has been collected in the past. Because many timber harvest areas have never been surveyed or have not been recently surveyed, scoping (i.e., reviewing positive-occurrence databases like the CNDDDB) cannot predict which sensitive species are located within THP boundaries. 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. *See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-37 (failure to obtain necessary information regarding existing conditions made meaningful assessment of impacts and development of site-specific mitigation measures impossible). Any THP that relies on scoping alone and does not incorporate survey data will not be CEQA-compliant. It is incredibly misleading for the Guidance to imply to RPFs that scoping alone is sufficient in THP preparation.

The Standard Project Requirements (SPRs) for biological resources outlined in the CalVTP are instructive for how botanical surveys should be handled in plan preparation, and should be mirrored in the Guidance. We suggest that staff carefully review the Biological Resources section of the CalVTP PEIR and revise the Guidance to be consistent with the SPRs and mitigation measures provided in the PEIR.

CNPS points out the following SPRs in particular for consideration and inclusion in the Guidance:

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<sup>4</sup> 14 C.C.R. § 1037.5.

- **SPR BIO-1: Review and Survey Project-Specific Biological Resources.** The project proponent will require a qualified RPF or biologist to conduct a data review and reconnaissance-level survey prior to treatment, no more than one year prior to the submittal of the PSA, and no more than one year between completion of the PSA and implementation of the treatment project. . . . Reconnaissance-level biological surveys will be general surveys that include visual and auditory inspection for biological resources to help determine the environmental setting of a project site.
- **SPR BIO-7: Survey for Special-Status Plants.** If SPR BIO-1 determines that suitable habitat for special-status plant species is present and cannot be avoided, the project proponent will require a qualified RPF or botanist to conduct protocol-level surveys for special-status plant species with the potential to be affected by a treatment prior to initiation of the treatment. The survey will follow the methods in the current version of CDFW’s “Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities.” . . .  
 (For the full text of these SPRs, please consult the CalVTP PEIR: <https://bof.fire.ca.gov/projects-and-programs/calvtp/calvtp-program-eir/>, Chapter 3, Section 3.6, Part 2 of 2, page 3.6-119).

The Guidance should be revised to be consistent with these SPRs, and corrected to clarify that scoping alone will never be sufficient to create a THP that is CEQA-compliant. *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, 1393-98, which the Board relies upon in the current version of the draft Guidance, supports such a revision.<sup>5</sup> In that case, the biologist conducted a reconnaissance-level field survey, which confirmed that the dairy site did not support habitat for any special status species. *Id.* at 1394. Only at that point was it appropriate to determine that protocol-level surveys were not necessary. *Id.* This case illustrates that RPFs must, at the very least, perform reconnaissance-level surveys, and follow up with protocol-level surveys if the initial study indicates there is potential habitat for special-status species that cannot be avoided. The biological SPRs in the CalVTP confirm this interpretation. *See also Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236 (failure to consider site-specific survey data during evaluation of timber harvest plans is inconsistent with CEQA and the Forest Practice Act).

The Guidance must also reflect the reality that in forest ecosystems where timber harvests occur, there will almost always be potential habitat for special-status species, so RPFs should be cognizant of the fact that protocol-level surveys will almost always be required. Unlike the degraded dairy site that was being used for agricultural purposes in *Association of Irrigated Residents*, forest ecosystems almost always contain suitable habitat for special-status species that cannot be avoided, thus necessitating protocol-level surveys. The Guidance should make clear that only rarely will reconnaissance-level surveys alone be sufficient, and scoping alone will never be sufficient. It should also make clear that reconnaissance-level surveys are meant to identify the presence of potential *habitat*, not the presence of species. A reconnaissance-level survey cannot serve as definitive proof of the presence or absence of a species from a site, and by extension cannot serve as the basis for avoidance or minimization measures; only protocol-level floristic surveys can serve that purpose.

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<sup>5</sup> CNPS suggests removing the reference to *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383 from the Guidance altogether. It is readily distinguishable from timber harvest plan preparation, and does not help RPFs in understanding how to prepare a THP.

The following statement on page 10 of the Guidance should be deleted and replaced with language that more accurately describes the importance and necessity of survey data in designing avoidance and minimization measures:

*“In some instances, the RPF may have sufficient information from the scoping process to properly avoid or minimize the potential for impact for special status plant species. 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.”* (Guidance, page 10).

### **C. Qualifications for RPFs and Botanists**

The language in the Guidance regarding the qualifications of surveyors could be improved by adopting the definitions for qualified RPFs, biologists and botanists in the CalVTP, which also accords with the qualifications outlined in the CDFW survey protocols:

**Qualified RPF or Biologist:** To be qualified, an RPF or biologist would hold a wildlife biology, botany, ecology, forestry, or other relevant degree from an accredited university and: 1) be knowledgeable in relevant species life histories and ecology, 2) be able to correctly identify relevant species and habitats, 3) have experience conducting field surveys of relevant species or resources, 4) be knowledgeable about survey protocols, 5) be knowledgeable about state and federal laws regarding the protection of special-status species, and 6) have experience with CDFW’s California Natural Diversity Database (CNDDDB) and Biogeographic Information and Observation System (BIOS). The project proponent will review the resume and approve the qualifications of RPFs or biologists. If species-specific protocol surveys are performed, surveys would be conducted by qualified RPFs or biologists with the minimum qualifications required by the appropriate protocols, including having CDFW or USFWS approval to conduct such surveys, if required by certain protocols.

**Qualified RPF or Botanist:** To be qualified, an RPF or botanist would 1) be knowledgeable about plant taxonomy, 2) be familiar with plants of the region, including special-status plants and sensitive natural communities, 3) have experience conducting floristic botanical field surveys as described in CDFW “Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities” (current version dated March 20, 2018), or experience conducting such botanical field surveys under the direction of an experienced botanical field surveyor, 4) be familiar with the *California Manual of Vegetation* (Sawyer et al. 2009 or current version, including updated natural communities data at <http://vegetation.cnps.org/>), and 5) be familiar with federal, state, and local statutes and regulations related to plants and plant collecting. The project proponent will review the resume and approve the qualifications of RPFs or botanists.”

(See CalVTP PEIR, Chapter 3.6, Part 2 of 2, page 3.6-118).

This language, in addition to the references already included in the Guidance about the RPF’s professional obligations under PRC § 752(b) to perform only those services for which they have expertise, will likely ensure that botanical scoping and surveying are being performed by a qualified individual.

#### **D. Identification of the Plan Assessment Area Should Adopt the Nine-Quad Search.**

CNPS continues to recommend that the Guidance implement a standard nine-quad search for determining the area of the plan assessment. As CDFW stated in its comments from August 2021, “CDFW guidance documents recommend a nine-quad search as a straightforward way to capture much of the variability that should be included in scoping for botanical resources. In many cases, scoping for botanical resources at this scale may indeed be needed to provide the information necessary to evaluate impacts of the proposed project.” (See CDFW comments from August 2021 that includes recommendations in “track changes”). CNPS agrees with this statement and encourages the Board to retain the standard nine-quad search recommendation. In addition to resulting in a plant list that captures the range of species likely to occur in the plan area, this method also simplifies the RPF’s task by saving them from having to determine an appropriate assessment area by ecoregion, elevation, and other factors on a project-by-project basis.

Recommending the nine-quad search is also consistent with the CalVTP. The CalVTP instructs RPFs and project preparers to follow the CDFW Survey Protocols, and those protocols instruct surveyors to conduct a nine-quad search.<sup>6</sup> (See SPR BIO-3; SPR BIO-7). It would be consistent to recommend the nine-quad search in this Guidance, as it will be utilized in CalVTP projects.

As discussed in the previous section, the Guidance must make clear that the nine-quad search is a helpful and informative pre-survey activity, but it is not a replacement for in-person surveys.

#### **E. Sensitive Natural Communities**

CNPS understands that the Guidance is intentionally limited in scope to address only special-status plants. However, excluding sensitive natural communities (SNCs) from the Guidance implies that RPFs should exclude SNCs from review in THPs. This implication is bolstered by Footnote 8, which explains that the Board intentionally omits SNCs because “there are no legal authorities that define the term, establish criteria for designating plant communities as such, or clarify the manner and extent to which such communities are subject to CEQA.” Conserving SNCs is critical for maintaining biodiversity and ecosystem function, and assessing impacts to SNCs is commonplace in typical CEQA practice (see CEQA Guidelines Appendix G), the CDFW Survey Protocols, and the CalVTP.

The FPC should delete Footnote 8 and instead include procedures for assessing and analyzing SNCs in timber harvest plans that are consistent with those outlined in the CalVTP PEIR.

Specifically, the CalVTP provides:

- ▶ **SPR BIO-3: Survey Sensitive Natural Communities and Other Sensitive Habitats.** If SPR BIO-1 determines that sensitive natural communities or sensitive habitats may be present and adverse effects cannot be avoided, the project proponent will:

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<sup>6</sup> Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities (Dept. of Fish and Wildlife, 3/2018), <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959&inline>.

- require a qualified RPF or biologist to perform a protocol-level survey following the CDFW “Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities” (current version dated March 20, 2018) of the treatment area prior to the start of treatment activities for sensitive natural communities and sensitive habitats. Sensitive natural communities will be identified using the best means possible, including keying them out using the most current edition of *A Manual of California Vegetation* (including updated natural communities data at <http://vegetation.cnps.org/>), or referring to relevant reports (e.g., reports found on the VegCAMP website).
- map and digitally record, using a Global Positioning System (GPS), the limits of any potential sensitive habitat and sensitive natural community identified in the treatment area.
- This SPR applies to all treatment activities and treatment types, including treatment maintenance.

(See CalVTP PEIR, Chapter 3.6, Part 2 of 2, page 3.6-120).

SNCs should be treated similarly in the Guidance.

## **II. Timing of Survey Data Available for Review**

Again, CNPS urges the FPC to require survey data be made available prior to project approval, so that CDFW, review teams, and the public have the opportunity to meaningfully review and comment on the survey data as required by law. CDFW and the public are often excluded from reviewing botanical data because the data is not provided until after Plans are approved. This practice precludes the 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). When survey data is submitted after a Plan has already been approved, it “will inevitably have a diminished influence on decisionmaking.” *Id.* “Even if the [data] is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.” *Id.* (internal citation omitted). Here, even if survey data is uploaded after plan approval and CDFW is given an opportunity to review and comment, neither CDFW nor the public have been afforded their right to review and comment on the data prior to the agency’s decision as required by CEQA.

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.

For these reasons, the FPC should require that survey data be submitted prior to plan approval.



Thank you for the opportunity to comment on the September version of the Guidance. Please contact me if you have any questions.

Sincerely,

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