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VIA FACSIMILE (916-653-0989)

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Christopher Zinny
Regulations Coordinator
Board of Forestry and Fire Protection
Room 1506-14
1416 Ninth Street
P.O. Box 944246
Sacramento, CA 95814

RE: Proposed Regulations for Road Management Plan 2006

Dear Mr. Zinny and Members of the Board of Forestry:

These comments are submitted on behalf of the Environmental Protection Information Center (EPIC), a non-profit organization headquartered in Garberville California which continues to work for sustainable forest practices and protection of ecological resources and the environment. For many years, EPIC has worked tirelessly in its efforts to remedy inadequacies in the regulatory structure governing private land forest practices, and to challenge legal error when appropriate.

This makes the third version of a proposed rule package on Road Management that EPIC has reviewed and provided comment on. EPIC previously has reviewed the proposed rule packages entitled "Road Management Plan, 2005" (RMP) and "Road Management Plan 2004" (RMP 2004). While there are differences between this current version and what has previously been proposed, the legal errors remain the same. EPIC supports development of a reliable watershed evaluation of timber operations, particularly so as to evaluate cumulative effects related to ongoing operations in relation to past and future activities and impacts. However, this rule package fails to accomplish that objective, for many reasons. Importantly, it does not provide adequate elements to ensure protection of watersheds, because it rests on a landowner's objectives, and authorizes standards that provide less protection than those currently in the Rules. Moreover, it also fails to encompass the kind of regulatory controls that are necessary to prevent impacts from roading, which go beyond watershed issues and include the overall effect that a roaded area can have on many different ecological resources, including terrestrial wildlife and bird species.

In previous years EPIC has identified numerous deficiencies of the 2004 and 2005 RMP rule packages. While this rule package attempts to deal with some of those concerns, it still does not provide legal compliance, particularly as to the Administrative Procedures Act and California Environmental Quality Act criteria for review and adoption of regulations. To the extent these problems persist, we incorporate our analysis from previous comments, as they are as relevant today as they were when originally submitted.

Lack Definitions. As with the previous attempts at a road management plan rule package, the current version relies on several terms which are not defined in the rule package or existing rules. For example, these include terms in proposed Rules 1093 [“sustained timber production,” “transportation system,” and “cumulative impacts assessment”]; 1093.1 [“transportation system” and “forest resource management activities”]; 1093.2 [“forest transportation system,” “transportation objectives,” “road management activities,” “long-term management costs,” “sensitivity,” and “trend”]; 1093.3 (c)(1) [“long-term road planning process and objectives,” “desired future conditions,” “performance standards,” “road system,” “scale,” “detail,” and “sufficient”]; 1093.3(c)(2) [“watersheds,” “historic,” “pertains to,” “transportation system,” “airshed,” “inventory,” “road systems maps,” “sensitivity,” “100 year flood flows,” “directly associated with,” “take into account,” “addressed,” and “practicable”]; 1093.3(c)(3) [“addressing,” “practices,” “appropriate,” “practical,” “planned transportation system,” “commensurate with,” “operational limitations,” “variable,” “accommodate,” “anticipated use,” “routine,” and “long-term transportation network”]; 1093.3(c)(4) [“representative conditions”]; 1093.3(c)(5) [“new information,” “scientific reports and data,” “new legal requirements,” “changing environmental conditions,” and “progress.”]; and 1093.4 [“readily available”]. While this new proposal does define “road management plan,” it fails then to define the essential components of the proposed document, notably “long-term management” of a “transportation system.” All of these terms will be given particular interpretation by CDF and the timberland owner and RMP submitter. They need to be defined so that those affected by the regulations, including the public and review team agencies which have independent duties to protect watersheds and their resources, understand clearly what is intended and what is to be adopted. Absent such clear definition, the proposed rule package is insufficient for adequate review and comment.

Previously EPIC referred to the state court case in which the Pacific Lumber Sustained Yield Plan was set aside, to provide an example of how CDF and a plan submitter can go to great extremes to provide incorrect interpretation of rules. In that case, CDF and PL have taken the position that no actual plan is required when an SYP is approved. From our perspective, such a position is absurd. It appears that you have no concern about such interpretation as here you have not provided definition of numerous terms and have not included any requirement that an actual RMP exist at the time of decision. The rule package continues to not require that an actual

physical plan exist at the time of approval which incorporates all final elements and requirements. This must be expressly required. Please respond precisely to the lack of definition and lack of requirement for the RMP.

The lack of definition creates an opening for illegal conduct. It is contrary to the law to impose a burden on the public and other agencies to enforce rules which are inadequate from the outset.

Lack of Standards. The lack of definition of terms identified above constitutes a lack of adequate standards necessary to guide review and approval of the RMP. EPIC previously identified particular areas in which standards are lacking, and it does not appear that the revised rule package resolves most of them.

There are no standards to determine what constitutes a “cumulative impacts assessment” or “sustained timber production,” as those terms are used in Rule 1093. They also impose an unexplained conflict as between the proposed rule package and the rules which govern the contents of an SYP. An SYP is required to have a sustained timber production assessment and analysis of cumulative effects in both the fish and wildlife assessment and the watershed assessment. The RMP can act as a tiering document for an SYP, but it does not require that the RMP meet the standards for the SYP assessments for sustained timber production, fish and wildlife and watershed. Nor are standards provided to assess what is “practical[]” or “reasonable[]” (Rules 1093.3(c), 1093.4), “directly associated,” (Rule 1093.3(c)(2)), “consistent” (Rules 1093.2, 1093.3(c)(3), (4)), “commensurate with” (Rule 1093.3(c)(3)), “appropriate,” (Rule 1093.3(c)(3)), or “readily available” (Rule 1093.4). No standards are given to determine what constitutes “forest resource management activities” (Rule 1093.1.)

Rules 1093.3 appears to identify what information is required in the RMP. The content provisions are not subject to any defined standards. As before, the RMP is based upon measures that are “consistent with the objectives of the timberland owner.” (Rule 1093.3.) Rule 1093.3(c)(1)(B) requires the RMP to identify the timberland owner’s “desired future conditions, performance standards, and priorities . . . needed to attain the objectives of the RMP. [].” The proposed rule package does not identify what guides those conditions, standards and priorities, other than the “objectives of the timberland owner.” (Rule 1093.3.)

As EPIC previously noted, there is nothing to evaluate what regulates the timberland owner’s “objectives.” From the language they can be anything. There is a subsequent reference to “transportation system,” which remains undefined and does not limit what can be the landowner’s objectives. While the RMP 2006 attempts to outline the “RMP objectives” in Rule 1093.3(c), it does not define or provide standards for timberland owner objectives. While the

proposed rule does require more than as outlined in previous packages, it still is fraught with many undefined terms and lacks standards to enable it to be effective. The rules still do not set criteria and standards against which the information can be assessed. Whether it is in the inventory, assessment, or monitoring provision, no time frames are established which define what period of time is necessary for review, and how frequently monitoring should be undertaken. Nor do the results of the evaluation relate to watersheds, as there are no standards requiring evaluation as to what is actually happening in a given defined watershed. These defects are seen in each element of the RMP as outlined in Rule 1093.3.

There are no standards in Rule 1093.3, or elsewhere, other than the contents of the RMP, which guide the assessment by the Director. In fact, there is no clear distinct approval process, which we believe there must be as the RMP encompasses uses beyond timber operations.

The RMP may be relied upon in other plans as evaluating cumulative effects if the RMP has “adequately considered” the factors outlined in Technical Rule Addendum No. 2. (Rule 1093.) However, there are no standards or criteria to determine what is meant by “considered.” This is particularly problematic if an attempt should be made to rely upon the RMP in an SYP, as mentioned above, or a PTEIR.

The lack of standards make the RMP provisions unenforceable.

Conflict with Existing Rules. The rules also conflict with existing rules governing roads, landings and watercourse protection. This current version attempts to outline specific practices as part of the operational element. (Rule 1093.3(c)(3)(F).) However, a comparison of existing rules governing logging roads and landings reveals that, in many cases, the existing rules are much stronger, with better standards, than those provided in the RMP 2006. As a consequence, what this rule package proposes to do is reduce standards, without justification. As one example, the current rule governing road construction (923.2, 943.2, 963.2) provides detail specifics when constructing roads on different slopes, and with different conditions. The RMP 2006 is not consistent with these provisions, and are less protective in many instances. Existing standards are further undermined by the sweeping exemption to use exceptions, in lieu or alternative practices, as stated in proposed Rule 1093.2(h). By allowing a one-for-all exemption or in lieu practice, the landowner is exempted in the future from having to justify use of standards that are outside the rules.

This third proposal has eliminated reference to any field inspection. We criticized the previous proposal for failing to define and be clear about what the field inspection provision required, and how it would be consistent with existing rules. By now eliminating it, the proposed rule package has no defining mechanism to ensure that the road management proposal, or so-

called “transportation system” will be inspected. This is insufficient for adequate evaluation and decision on such a crucial management scheme that can cover thousands of acres.

Self-regulation. This proposal, like those before it, constitutes self-regulation by the timberland owner. The Board does not have authority under the Forest Practice Act to go so far as to turn over control and discretion to the regulated public. As noted previously, and outlined above, it is wrong to allow the objectives of the timberland owner to be the defining element for protection of environmental resources. Conditioning protection of resources upon “consisten[cy]” with the timberland owner objectives places ultimate control and discretion in the hands of the regulated public. This is an abuse of discretion by the Board, as it is contrary to the law requiring CDF to regulate forest practices. It also deprives other agencies of their authority under the law, both as review team members and in exercise of whatever independent authority they may have to protect resources. The RMP allows a landowner to decide not only how, but what, will be done, if anything, to protect resources, because whatever is done must be consistent with the landowner’s objectives. There is no provision to constrain this deference to the landowner.

The self-regulation also is allowed through the use of in-lieu practices and alternatives in Rule 1093.2(h). As EPIC previously noted, there are express restrictions in existing rules which require that in-lieu and alternative practices be proposed and evaluated on a site-specific basis in a THP. (*See e.g.* Rule 914.9, 916.1.) The RMP would violate these rules, as it still allows the use of in-lieu and alternatives within the RMP itself. The language which has been added to the RMP 2006 does not remedy this violation, as continues to allow the use of the alternative measures, which by their own terms cannot be used in such programmatic way. The additional language only serves to complicate and make even more confusing a set of rules that lack definition and standards. The additional language does not remove the inconsistency with existing rule requirements. The RMP proposal to allow use of in-lieu and alternative practices constitutes an exception to the rules, resulting in self-regulation.

The RMP continues to lack a mechanism to ensure that substantial changes are reported, and that monitoring is actually done and timely reported. While this proposal requires submission of an annual monitoring report, it does little more than that. In the absence of clear requirements to report changes and to provide timely results of monitoring, a timberland owner can continue to operate even though such changes have occurred. CDF has no authority under these rules to do anything about it, as there are no defined requirements, leaving the landowner to do as it pleases.

The RMP is not based on any specific scientific standard(s) or credible methodology, and is instead left to the landowner’s design, objectives, and what it considers practical and

reasonable, with no accountability.

Lacks Clarity. The proposed rules do not meet the standards for clarity as required by the Administrative Procedures Act (APA). Under the APA, “clarity” means the regulation must be easily understood by those persons directly affected by them. In this case, that is not only the timberland owners, but all those who are affected by timber operations and their watershed impacts. Anyone reading these regulations would question what terms mean, what standards should govern, given the lack of definition and criteria.

Rules are Not Necessary. The APA requires that the adopting agency establish that the rules are necessary. The RMP statement of reasons outlines purposes and needs, but these do not meet the requirement. The rules are not necessary as they do not fulfill the fundamental need for watershed assessment, and protection of wildlife. Instead they place regulation in the hands of those to be governed. The rules do not provide the analysis recommended by the scientific panels and committees charged with the obligation to define how to deal with the spiraling degradation of our watersheds. The rules will not protect threatened and impaired watersheds, and in fact, will conflict with the rules protecting such watersheds. The rules do nothing to protect wildlife. The rules will simply allow the landowner’s objectives to rule the day.

Failure to Comply with CEQA. The Board has failed to consider the significant environmental effects associated with the RMP 2006 rules, in the face of the above-identified problems. Many of these same problems existed with previous versions of the RMP.

There is potential for environmental effect as a result of allowing the landowner’s objectives to control and take priority by requiring consistency with them. Absent standards to ensure that landowners’ objectives will protect the environment, the Board cannot assume there will be no environmental effect. Allowing practicality and reasonableness to govern also exposes the environment to harm. The RMP will allow a landowner to avoid the duty to provide a cumulative impacts assessment in a plan, including an SYP, without having to provide the information as required in a SYP. Absent valid standards, the likelihood of physical and environmental risk to resources, such as salmonids and water quality, is realistic and grave. The potential for environmental harm from these rules is real, and must be addressed in the first instance. Roads can be used for an extensive amount of activity, including off-road vehicles. The rule package fails to analyze these impacts. Furthermore, an extensive road system can severely and adversely impact terrestrial and bird species. At the end of this letter is a list of road impacts to wildlife and habitat, with supporting references, developed by Defenders of Wildlife. Included with this comment is an article entitled *Overview of Transportation Impacts on Wildlife Movement and Populations*, authored by Scott D. Jackson of the Department of Natural Resources Conservation at the University of Massachusetts, Amherst. This outlines the nature of

evaluation that is necessary. Before this rule package can be approved, an analysis of impacts as outlined below and in the accompanying article must be provided, as this rule package intends to authorize a mechanism to approve large undefined “transportation system[s].” Yet, no restraints are considered in the proposal to prevent such impacts. Accordingly, the rule package proposal must evaluate the potential under the rule proposal for extensive road networks and their impact on wildlife and bird species. Further, to the extent the RMP is intended to act as a tiering document, and it does not comply with CEQA, then too no document tiered to it will be in compliance with CEQA.

The proposed road management plan, if these rules are adopted, will not be covered by the Public Resources Code section 21080.5 functional equivalent certification of the Forest Practice Rules for timber operations on private lands. That certification covers “timber operations,” a term defined by Public Resources Code section 4527. While that definition includes “construction and maintenance of roads,” it does not, nor would it, contemplate coverage of a “transportation system” across an ownership, as would be included in the RMP. The difference is crucial. For example, it is a matter of common knowledge that private forest lands are used for hunting and for off-road vehicle activity. Neither of these activities are within the scope of “timber operations.” The undefined “transportation system” accommodates these and other activities, unrelated to timber operations. A road management plan would need to evaluate these activities. As they are not within the scope of “timber operations,” evaluation of their impacts under CEQA must be done pursuant to a negative declaration or environmental impact report. Furthermore, as already conceded, the RMP alone does not authorize timber operations, but instead appears intended to act as a programmatic guide. EPIC does not believe the functional certification will cover review and adoption of the RMP.

EPIC is aware that the Board has recently considered allowing the use of a PTEIR for Mendocino Redwood Company to exempt that company from future compliance with subsequently enacted regulations. As this Board is aware, EPIC believes such a position is illegal and exceeds the Board’s authority. To the extent that this RMP proposal is also intended to be a back-door attempt to undermine statutory duty to comply with newly-enacted regulations, the Board’s adoption would be in excess of its authority and violate the law.

Because the RMP can exist for as little as three years, or conceivably in perpetuity if attached to a PTEIR, the spectrum of environmental effects associated with this variation must be provided.

Additionally, currently there is a very substantial question whether CDF can rely upon the certification for purposes of interdisciplinary review. It is well-recognized that sister agencies do not have the resources to participate in review of plans. The Department of Fish and Game and

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the Regional Water Quality Control Boards simply do not have the staff or financial resources to have effective participation, if any at all. Adoption of a new rule package which clearly must depend upon inter-agency review and participation, is irresponsible in the absence of reliable authority that the necessary review will occur. In the absence of necessary review, the review of each RMP be flawed and inconsistent with the certification requirements. CDF will not have sufficient information to review and decide RMPs, which will compel denial. And, the likelihood of impact to the physical environment will be all the greater. This is all the more true when dealing with a plan that can exist forever.

The Board needs to make as a priority the engagement and effective participation of sister agencies in the review process of plans before it embarks upon yet another scheme that serves to drain resources, avoid adequate review, and yield control to the regulated public.

Conclusion. The RMP 2006 rule should not be approved as proposed. While it is a modified version of the previously proposed rule packages, it continues to violate fundamental principles of rule making, notably the need for clear definitions and standards, clarity, and adequate environmental review. If the Board proceeds to adopt these rules, it will exceed its authority under the Forest Practice Act and the APA.

EPIC respectfully requests that the Board not adopt these RMP 2006 rules.

Sincerely,



Sharon E. Duggan

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cc: EPIC

ROAD IMPACTS TO WILDLIFE & HABITAT

1. Roads cause direct animal mortality through collisions with vehicles (roadkill).
2. Roads expedite the conversion of surrounding lands to development.
3. Roads fragment wildlife habitat, isolating populations and decreasing the chances of survival of the fragments.
4. Roads complicate the management of remaining habitat fragments (e.g., fire management), compromising the quality of the habitat and its value to wildlife.
5. Roads alter animal behavior by causing changes in home ranges, movement, reproductive success, escape response, and physiological state.
6. Roads may provide habitat and movement corridors for opportunistic species of plants and animals. Roads can provide corridors of disturbance and seed transport for exotic species of plants.
7. Roads increase human access to natural areas, increasing disturbance to wildlife.
8. Roads affect the physical environment: change the soil density, temperature, soil water content, light levels, surface waters, patterns of runoff, sedimentation, and create dust in their immediate environment.
9. Roads affect the chemical environment: add heavy metals, salts, organic molecules, ozone, and nutrients to roadside environments.
10. Roads pollute air & water, and impair aquatic ecosystems.
11. Road construction displaces and kills plants and animals.

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