

**From:** "Gary Paul" <gpaul@got.net>  
**To:** "Bill Arkfeld" <Barkfeld@rb3.swrcb.ca.gov>  
**Date:** Thu, Jan 22, 2004 2:50 PM  
**Subject:** RMC waiver 1-03-082 SCR

Bill:

I have these comments on the monitoring plan:

1. Five years of monitoring

Considering the level of monitoring required for each THP, five years of monitoring seems excessive and burdensome, particularly if no problems are revealed within the first year of monitoring. Could the monitoring be eliminated or reduced if no temperature, turbidity, or other problems are found in the first year following logging, when most problems should result?

On the RMC property, I will be doing extensive monitoring on possibly three to four large harvest areas/year. The staffing required for that to be done, within the time framework required by the monitoring plan, would not be feasible. I don't have excess people who I could pick up after every storm for this work. Not to mention other harvest areas for which I will be responsible. The costs for this are enormous. I think Big Creek and Redwood Empire have documented the potential costs.

2. Photo-point monitoring for each watercourse confluence and watercourse crossing

I have 37 confluences with no good access (mostly Class III into II or I). I have 16 watercourse crossings, mostly dry dip crossings of Class III watercourses.

Again, the time and costs for this are enormous, and for what result?

3. Point C on Attachment B, a change in watercourse class from II to I, was moved on the PHI to immediately below crossing "F".

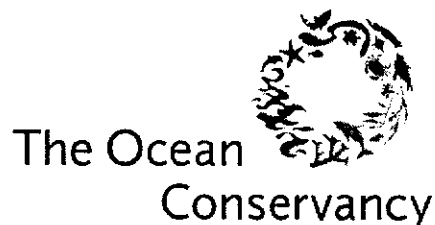
4. Where can I get Standard Operating Procedures 5.2.3 Photo Documentation Procedure?

Regards,

Gary

January 30, 2004

Mr. Bruce Daniels, Chairman  
Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
San Luis Obispo, CA 93401



VIA FACSIMILE

Re: Comments on the Proposed Waivers of Waste Discharge Requirements for the RMC Timber Harvest (THP No. 1-03-082 SCR), the Smelt-Locatelli Timber Harvest (THP No. 1-04-008 SCR), and the Bartlebaugh Timber Harvest (THP No. 1-03-071 SCR).

Dear Mr. Daniels and Members of the Board:

The undersigned, representing The Ocean Conservancy, Citizens for Responsible Forest Management, Sierra Club – Santa Cruz Group and the Lompico Watershed Conservancy, submit the following comments on the proposed waivers of waste discharge requirements (proposed waivers) for the RMC Timber Harvest (THP No. 1-03-082 SCR), the Smelt-Locatelli Timber Harvest (THP No. 1-04-008 SCR), and the Bartlebaugh Timber Harvest (THP No. 1-03-071 SCR). We appreciate the time and effort you and your staff have put into the preparation of the draft waivers, and are grateful for the opportunity to provide these comments.

We urge you to reject the proposed waivers for several reasons. First, the monitoring proposed in the draft waivers is inadequate and fails to meet the statutory requirements for monitoring pursuant to waivers under recent amendments to the Porter-Cologne Water Quality Control Act. Second, the efficacy of prospective waivers of waste discharge requirements for timber operations is highly questionable given recent legal developments, including SB 810 and the Court's opinions in the ongoing EPIC v. Pacific Lumber lawsuit. Third, the Board must adopt a coordinated approach to regulating timber discharges consistent with its obligation to protect water quality, and subject to environmental review under CEQA. Fourth, the waivers are not in the public interest. Finally, we request that before the Board takes action on timber harvest activities in the future, it allow a longer period for public review.

1. The Monitoring Provisions of the Proposed Waivers are Inconsistent with Porter-Cologne Monitoring Requirements for Waivers.

Under SB 923 (Sher 2003), a recent amendment to the Porter-Cologne Water Quality Control Act, “[t]he conditions of [waivers] shall include, but need not be limited to, the performance of individual, group, or watershed-based, monitoring . . . . Monitoring requirements shall be designed to support the development and implementation of the waiver program, including, but not limited to, verifying the adequacy and effectiveness of the waiver’s conditions.”<sup>1</sup> Accordingly, monitoring must be able to verify that the waiver’s conditions are consistent with the Basin Plan.<sup>2</sup>

Currently, no systematic water quality monitoring occurs to assess the water quality impacts of timber harvesting throughout the State.<sup>3</sup> In general, approved plans are monitored only at the individual site level, and then only to check internal compliance with FPRs and BMPs.<sup>4</sup> It is widely acknowledged that this THP-level monitoring is inadequate to gauge the effectiveness of BMPs at meeting basin plan standards.<sup>5</sup> Consequently, under most monitoring regimes, “the actual water quality impact of silvicultural activities conducted under the current THP process is unknown for most watersheds.”<sup>6</sup>

The monitoring provided for in the proposed waivers does not go beyond the minimal, site-level monitoring alluded to above and is therefore inconsistent with SB 923’s requirements for monitoring pursuant to waivers of waste discharge requirements. A watershed-based, instream monitoring plan is the only effective means of gauging the waivers’ ability to meet Basin Plan Goals. If the Board intends to issue waivers of waste discharge requirements for these timber harvest activities, it is legally obligated to adopt such a plan. If it does not, waste discharge requirements must be issued.

It should be noted that in order to monitor the effectiveness of waiver conditions, comprehensive pre-harvest water quality data is necessary. Such “background” data should be sufficient to describe pre-harvest conditions during both dry-weather and wet-weather flows. If such data is unavailable, the effectiveness of the waiver will – by definition – be impossible to assess, and consequently the Board cannot legally issue a waiver under Porter-Cologne. Under these circumstances, the Board would be obligated to either conduct the necessary background monitoring before issuing waivers or develop waste discharge requirements for these plans.

## 2. The New Legal Landscape Governing Timber Harvesting Activities Necessitates a New, Forward-Looking Approach by the Central Coast Regional Water Quality Control Board.

Within the last several months, several significant events changed the law governing the management of timber harvest. We refer, specifically, to the opinions of the District Court in EPIC v. Pacific Lumber Company, et al., and the enactment of SB 810 (Burton 2003). The implications of these occurrences are discussed in detail below. SB 923 (Sher 2003) also made important changes, the significance of which was discussed above. We respectfully request that the Board cease consideration of these and other prospective logging waivers and direct staff to begin development of a new program that takes these legal changes into account.

### EPIC v. Pacific Lumber Company, et al.

<sup>1</sup> *Id.* at § 13269(a)(2).

<sup>2</sup> California Water Code § 13269(a)(1) (“[waste discharge requirements] may be waived . . . if the state board or regional board determines . . . that the waiver is consistent with any applicable state or regional water quality control plan . . . .”)

<sup>3</sup> Dunne Report at 27.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Central Valley Regional Water Quality Control Board Staff Report: “Timber Harvesting and Water Quality report (December 2002), attached to CVRWQCB January 2003 Public Meeting Notice and Staff Report.

Two recent decisions of the Court in EPIC v. Pacific Lumber Company, et al. (C 01-2821 MHP) portend changes in the regulatory landscape governing timber harvest activities by clarifying that many logging-related activities result in point source discharges, making them expressly subject to the requirements of the National Pollutant Discharge Elimination System (NPDES) program. Specifically, on October 14, 2004, the Court held that EPA's regulation establishing the scope of the term "silvicultural point source" may not be interpreted to exclude any pollution source that would qualify as a point source under the language of the Clean Water Act. The Court stated that:

Where this runoff system utilizes the kind of conduits and channels embraced by section 502(14) [of the Clean Water Act], EPA's regulation does not control: It cannot control, for one, because . . . EPA may not alter the definition of an existing 'point source.'

Put simply, discrete conveyances of pollution associated with logging activities are subject to the Clean Water Act's NPDES permitting requirements. The Court provided further clarification on this point in its January 23, 2004 order, in which it also expressed frustration with Pacific Lumber's failure to acknowledge the significance of its interpretation of the law:

It its complaint, EPIC alleges that many of the pollution sources in the Bear Creek area are "point sources," discharging both stormwater and pollutants into the creek itself. [These pollution sources] were (and are) "point sources" like other "point sources" subject to the terms of the CWA and the NPDES. That PALCO misunderstood - and apparently continues, despite the court's October 14, 2003 opinion, to misunderstand - this point does not change the validity of this legal conclusion or the scope and effect of section 402(p). Where PALCO's Bear Creek runoff system utilizes the kind of conduits and channels embraced by section 502(14), this court has noted, the pollution sources are definitively "point sources"; EPA may not alter this categorization, and section 122.27 does not - and cannot - absolve silvicultural businesses of CWA's "point source" requirements. Nor does section 402(p).

We acknowledge that, because the Board is not a party to the EPIC lawsuit, it is not - technically - bound by these opinions. However, as the language above indicates, the Court has repeatedly articulated its intention to construe to relevant sections of the CWA and its implementing regulations as requiring NPDES permits for discrete conveyances of silvicultural runoff. All that remains for the Court to do is complete its review of the merits of the claims (*e.g.* decide the question of whether the Pacific Lumber timber harvests actually utilize discrete conveyances).

The Board should not wait for the ultimate resolution of the fact issues in this case, because the issue of significance to the Board - whether THPs utilizing discrete conveyances for runoff are required to obtain NPDES permits - has already been decided. Nor should the Board await the application of this precedent to the Board through a lawsuit in which it is the named defendant. The Board should see the writing on the wall and recognize that, as a result of the decisions in this case, it will ultimately be required to write NPDES permits for these and other timber harvesting operations. The Board could most efficiently and effectively use its resources by addressing this issue now.

The Regional Board has an obligation to "obtain coordinated action in water quality control . . . ." <sup>7</sup> Accordingly, the Board must do more than simply note that: "[t]his waiver does not regulate point-

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<sup>7</sup> California Water Code § 13225.

source discharges that require an NPDES permit under the Clean Water Act . . .”<sup>8</sup> The Board should cease its development of waivers for prospective timber harvest plans and direct staff to develop an integrated program for regulating these discharges that includes solicitation of NPDES permit applications, as appropriate.

### *SB 810*

SB 810 (Burton 2003) empowers the Board to reject a timber harvest plan whenever it finds that the plan allows discharges into an impaired waterbody where such discharges cause or contribute to a violation of the Basin Plan. This gives the Board substantial new regulatory authority over timber harvest plans. To date, the Board has been relegated to participation in an inter-agency review team in which it makes recommendations and may occasionally file a nonconurrence – an action that has few practical implications – if it determines that the plan “does not adequately protect water resources.”<sup>9</sup> This new legislation gives the Board a substantially stronger voice at the stage of timber harvest plan review and strengthens the legal standard under which the Board must review timber harvest plans.

Although none of the three THPs that the Board is currently reviewing are located on waterbodies that are listed as impaired for sediment, there are 35 such impaired waterbodies in the Central Coast Region. Consequently, it is inevitable that the Board will be faced with this issue in the near future. Pursuant to the Board’s obligation to “obtain coordinated action in water quality control,”<sup>10</sup> it is critical for the Board to decide how it will handle this new authority and advise staff and the public accordingly before it makes any further decisions on timber activities in our region. The Board should cease its development of waivers for prospective timber harvest plans until this issue has been formally addressed.

### 3. The Board Must Adopt a Comprehensive Timber Harvest Policy, with Public Notice and Comment and Environmental Review Pursuant to CEQA.

Unlike every other Regional Board that manages water quality impacts from timber harvest operations, the Central Coast Regional Water Quality Control Board waives waste discharge requirements for individual THPs, instead of acting categorically. Staff has argued that, by approving waivers on a THP-by-THP basis, the waivers fall under the CEQA equivalency of the California Department of Forestry and Fire Prevention’s (CDF’s) THP review and that, consequently, the Board is exempt from environmental review.

The Regional Boards have an obligation, independent of the Management Agency Agreement (MAA) with CDF<sup>11</sup>, to protect the quality of the waters of the Central Coast Region.<sup>12</sup> It is well known that the Forest Practice Rules (FPRs) and the THP Review process have proven grossly inadequate to protect water quality. Numerous experts have criticized the FPRs and THP Review for failing to address cumulative watershed effects and for failing to monitor for those effects as well as the

<sup>8</sup> California Regional Water Quality Control Board – Central Coast Region, Proposed Order No. R3-2004-0010, Waiver of Waste Discharge Requirements for Bartlebaugh Timber Harvest Plan (1-03-071 Santa Cruz County) at 1(f).

<sup>9</sup> 14 CCR § 1037.5(e).

<sup>10</sup> California Water Code § 13225.

<sup>11</sup> Management Agency Agreement Between the Water Resources Control Board, the Board of Forestry, and the Department of Forestry and Fire Protection, State of California.

<sup>12</sup> California Water Code § 13000 *et seq.*

effectiveness of Best Management Practices (BMPs) in protecting water quality and beneficial uses.<sup>13</sup> Similarly, it is widely recognized that BMPs, even if perfectly implemented, are simply not designed to eliminate water quality impacts from logging activities.<sup>14</sup> Consequently, it is clear that CDF's timber harvest review process is inadequate to protect water quality in the Central Coast Region.

The only other layer of water quality protection that the Board is providing – and the only other action the Board takes in furtherance of its obligation to protect water quality – is the waivers. However, individual waivers do not, indeed cannot, address the deficiencies cited above – particularly the deficiencies in cumulative impact review. Any THP-by-THP review, regardless of which agency conducts it, will never be able to assess, predict, or mitigate cumulative watershed effects that may be caused by an individual logging project throughout an entire watershed. At a minimum, some sort of coordinated, watershed-wide review must occur.

The Regional Board has a "Timber Harvest Framework," which appears to attempt to coordinate decision-making on waivers in the region. The Framework is a mysterious document. Although it was listed as an action item on the Board's September 12, 2003 agenda, a staff report prepared, and public comment received, it is unclear what action the Board has taken on the Framework, which has also been known, variously, as a "template" and "decision model." As described in a staff report, the Framework outlines: (1) what constitutes a complete waiver application, (2) what the main components of a monitoring program are, (3) what maintenance activities will be required; and (4) how staff will handle enforcement. Despite these apparent policy-like characteristics, staff claims that the Template is "a work in progress"<sup>15</sup> and "an internal staff guidance tool."<sup>16</sup>

In light of the Board's obligation to protect water quality, the failure of the THP review process to do this especially as it relates to cumulative impacts, and the critical importance and legal necessity of coordinated management under these circumstances, we respectfully request that the Board assemble a cogent, transparent, and formal policy for its prospective regulation of timber harvest projects. Such a policy must be adopted following public rulemaking procedures and only after conducting an appropriate environmental review pursuant to CEQA. The Timber Harvest Framework has some characteristics of such a policy; if it is to serve as the Board's framework for timber-related water quality regulation, it should be formally adopted following public procedures and environmental review. Until the Board has adopted a uniform policy with respect to timber-related discharges, it should cease development of waivers for prospective timber harvest plans.

#### 4. The Proposed Waivers are Not In the Public Interest.

Underlying the comments above are the three THPs that are the subject of the proposed waivers. Although the THPs themselves pose threats of varying magnitudes, the points above apply equally to all

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<sup>13</sup> Letter from EPA to SWRCB (July 29, 2988) (deciding not to certify BMPs); Dunne, Thomas, et al., "A Scientific Basis for the Prediction of Cumulative Watershed Effects" (June 2001) (Dunne Report); Reid, Leslie M., "Forest Practice Rules and Cumulative Watershed Impacts in California" (attached to letter to Hon. Fred Keeley, May 24, 1999); Little Hoover Commission Report (July 1994); Ligon, Frank, et al., Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat, prepared for The Resources Agency of California and NMFS (June 1999).

<sup>14</sup> Dunne Report at 24

<sup>15</sup> Central Coast Regional Water Quality Control Board – Central Coast Region, Minutes of Regular Meeting (Friday, September 12, 2003) at item 14.

<sup>16</sup> Central Coast Regional Water Quality Control Board – Central Coast Region, Staff Report for Regular Meeting of December 5, 2003 (November 5, 2003) at 5.

three, as well as to any THPs the Board will consider in the future. We request that the Board consider these points both as applied to these specific THPs, and also as generally applicable to the Board's overall approach to timber harvest. These comments are not exclusive – we will continue to review these plans for consistency with the law and the public interest, and in the upcoming weeks, will supply additional comments that are specific to the individual THPs and waivers. However, the points outlined above amply demonstrate that the proposed waivers are not in the public interest because they do not contain safeguards adequate to protect water quality. The Board should refuse to approve the waivers and undertake to either develop waste discharge requirements for these plans or provide for such safeguards, including development of a comprehensive and protective timber program and development of legally sufficient monitoring programs.

5. The Board Has Not Provided for Adequate Public Review of the Proposed Waivers.

We have serious concerns about the procedure followed by staff in releasing these plans for review by the public. All three of the proposed waivers were completed and sent to the applicants on December 23, 2003, requesting that comment be submitted in writing by January 23, 2003. The Board will consider the proposed waivers at its March 19, 2004 meeting. As of the date of this writing, neither the agenda of the March meeting, nor the staff reports accompanying these plans, are available on the Board's website. Most alarmingly, as of the date of this writing, a THP has not been approved for the Smelt-Locatelli Timber Harvest (THP No. 1-04-008 SCR).

For the RMC and Bartlebaugh plans, although this timeframe may comply with the letter of the law, it did not provide sufficient time to meaningfully review these plans and compare them with the proposed waivers. Timber harvest plans are massive documents, and the water quality issues concerned are both numerous and complex. Often, a meaningful review would involve consultation with an expert with experience in timber management, water quality, or geology. By providing only the minimal 30-day review period (beginning two days before Christmas, no less) the Board indicates either that it is unaware of the need for detailed review of plans, or that it does not care about meaningful public input. We appreciate that staff has been flexible on this deadline in this case, and has permitted us to submit these comments past the official deadline. However, we respectfully request that in the future, the public review period set by the Board be adequate to provide sufficient time to complete a meaningful and detailed review.

The Smelt plan is another story altogether. Under staff's own Timber Harvest Decision Model, waiver development begins with the receipt of the approved THP. According to the Timber Harvest Framework, staff's review is based upon a Timber Harvest Information Package, a component of which is a CDF-approved THP. As alluded to above, in the case of the Smelt plan, no THP has been approved to date. The 130-page THP was not even filed until January 22, 2004. We are mystified as to how staff has not only completed its review but also written a waiver that purports to be in the public interest when a THP has not been approved, pre-harvest inspection has not occurred, and review team meetings have not been conducted. Even if staff has been able to accomplish this miraculous feat, it is unreasonable to expect the public to do the same. Consideration of the Smelt Plan should be deferred to the April meeting, at the earliest.

\* \* \* \* \*

In sum, we request that the Board decline to approve the proposed waivers, and cease consideration of prospective waivers until the legal deficiencies identified above have been remedied.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to call.

Sincerely,

**Sarah G. Newkirk**

Sarah G. Newkirk  
Consultant  
The Ocean Conservancy



Jodi Frediani  
Executive Director  
Citizens for Responsible Forest Management



Kevin Collins,  
Board President  
Lompico Watershed Conservancy

**Betsy Herbert**

Betsy Herbert  
Forestry Task Force  
Sierra Club, Santa Cruz Group





January 29, 2004

Central Coast Regional Water Quality Control Board  
895 Aerovista Place, Suite 101  
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By email and post

Subject: Comments on Timber Waivers, March 19, 2004 Board Meeting

The RMC and Bartlebaugh plans were available for review. To my knowledge, a copy of the Smelt plan was not at Felton CDF until January 23, 2004 and I have not had time to review it. My comments will refer only to THP 1-03-082 SCR (RMC) and THP 1-03-071 SCR (Bartlebaugh).

The RMC plan has been given a high erosion hazard rating (EHR). It is my understanding that the EHR can be generalized to include moderate, high, and extreme ratings into one single average rating. In this THP the entire plan area is designated as high. Both THPs use averaging to arrive at the EHR. In any case, extreme rating areas have to be at least 10 acres in size before the area must be so designated. These two conditions for the calculation of the EHR can lead to serious underreporting of erosion hazard.

In regard to the mapping of landslides or unstable areas; there is considerable misunderstanding by CDF of what constitutes a landslide or debris slide. As a result, an underestimate of erosion potential is part of THP mapping. In most cases CDF does not consider logging on landslides to increase slide risk. This is a very questionable conclusion and is another matter that the Regional Board should be aware of.

The RMC plan permits winter re-grading of roads, as well as ground yarding during the winter. This is a major source of soil erosion. There are 45 log landings, 6.5 miles of skid trails (the actual number is far higher), and 15.6 miles of roads. This plan can not be considered to be moderate risk to water quality. It is a high risk plan by any objective measure.

The Bartlebaugh plan is relatively small (34 acres) but 2 of the 4 log landings are in the ELZ (Equipment Exclusion Zone) of a Class 3 watercourse, and on one landing, the flows spill onto the staging area (landing) for trucks and loaders. I did not see reference to this in the staff documents for this plan.

As to monitoring, the turbidity monitoring recommended by staff continues to state that water samples for turbidity may be taken 24 hours after the end of rain storms. This is useless in most cases. In small sub-watersheds where most logging occurs, turbidity levels drop by orders of magnitude within 24 hours. At the December Water Quality Monitoring Conference in Redding CA, one presenter noted that turbidity can drop by

400% within 2 hours. Monitoring turbidity a day after a rainstorm is useless or worse than useless because it will confuse the situation. For THPs bordering on or surrounding large streams, there is no way to separate out the effects of the THP from all the other erosion sources impacting the stream. This is elementary hydrology. The situation of the RMC and Red Tree plans being on opposite sides of San Vincente Creek is an obvious example of a problem with confusing the effect of two different plans that will occur simultaneously. THP areas bleed excess sediment for more than 10 years after the completion of logging. Again an example of how confusion can be introduced with turbidity readings . Only in-stream automated measuring devices or sondes can begin to address any legitimate protocol for using turbidity measurement unless a person can measure a location every half hour over night. Still these expensive devices would need to be used in at least 2 or 3 locations for a monitoring a single THP. And Comparisons between un-logged drainages and nearby logged drainages, or measurements above and below a tributary or a stream crossing, are among the few ways to use turbidity that is not measured continuously. Still, the measurement needs to be taken at, or a least near peak discharge.

Photo points can be more useful, but taking photos only at the beginning and the end of the winter rain season will miss most of the opportunities to correct problems or stop operations when necessary. Nearly all major erosion takes place episodically during intense storms, not in April or November. There is still the problem of asking a THP operator such as the LTO or RPF to monitor him or herself. If smog tests were done by car owners, in such a subjective situation, I doubt there would be much reason to do it. This is why I have consistently recommended that fees for these permits be collected to pay for the staff time necessary. The point of this monitoring is to determine if Clean Water Act requirements are being met, not to conduct an exercise that uses up time without a useful outcome.

The most cost effective monitoring, region wide, could be on the ground staff inspections of THPs during and after THP operations.

I have many more suggestions that I made previously in the large monitoring recommendations document that was submitted by the Lompico Watershed Conservancy (LWC), Citizens for Responsible Forest Management (CRFM), the Sierra Club and Dr. Bob Curry. I will make further comments on the items before the Board for March. You have received a letter from Sarah Newkirk who is representing the Ocean Conservancy, the LWC, CRFM, and the Sierra Club. We hope to be of assistance to the Regional Board in finding an effective way to deal with this complex situation.

Regards,



Kevin Collins  
Board President

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