
California Native Plant Society, Forestry Program



Date: December 20, 2002

To: Brad Valentine
California Department of Fish and Game (DFG)
Post Office Box 47
Yountville, CA 94599

From: Greg Jirak
California Native Plant Society (CNPS), Forestry Program Coordinator

Subject: *"Planning Agreement Between The Mendocino Redwood Company and The California Department of Fish and Game Regarding The Mendocino Redwood Company Natural Community Conservation Plan and Habitat Conservation Plan"*, dated November 21, 2002 (the "Planning Agreement").

Introduction

Mendocino Redwood Company (MRC) is proposing a combined Natural Community Conservation Plan (NCCP) and Habitat Conservation Plan (HCP) covering MRC's timber operations in north coastal California (the "Project".)

CNPS has actively participated in all public activities related to the Project, and has submitted a number of public comment letters as part of the Project's scoping process.¹

¹ Including all of the following, hereinafter collectively referred to as the "CNPS comment letters", which have been submitted previously as part of the Project's administrative record:

1. July 8, 2002 – Gregory A. Jirak, CNPS Forestry Program Coordinator to: Eric Shott, John Hunter, Brad Valentine, *"Scoping comments for the Mendocino Redwoods Company's (MRC) proposed Habitat Conservation Plan (HCP) and Natural Community Conservation Plan (NCCP) as announced in the June 6, 2002, Federal Register (the "Project") by the United States Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the California Department of Fish and Game (DFG)"*.
2. July 8, 2002 – Lori Hubbard, President Dorothy King Young Chapter of CNPS to : John Hunter, Brad Valentine, Eric Shott, *"Comments on the proposed Habitat Conservation Plant (HCP) and Natural Communities Conservation Plan (NCCP)"*.
3. July 19, 2002 - Gregory A. Jirak, CNPS Forestry Program Coordinator to: Brad Valentine, *"Scoping comments for the Mendocino Redwoods Company's (MRC) proposed Natural Community Conservation Plan (NCCP) as announced in the June 6, 2002, Federal Register (the "Project") by the California Department of Fish and Game (DFG)"*.
4. September 25, 2002 – Gregory A. Jirak, CNPS Forestry Program Coordinator to: Eric Shott, John Hunter, Brad Valentine, Mike Jani, *"Nominations for Independent Scientific Advisory Panel"*.
5. September 30, 2002 – Gregory A. Jirak, CNPS Forestry Program Coordinator to: Eric Shott, John Hunter, Brad Valentine, Mike Jani, *"Science Panel for MRC HCP/NCCP"*.

These letters are included as Exhibits A, B, C, D, and E to this letter.

This document contains the CNPS Forestry Program's comments on the Planning Agreement, and **CNPS respectfully requests that DFG insure that this document, all of its exhibits, and all documents referenced by this letter, be made part of the public administrative record for the Project.**

Project To Be Conducted Pursuant to SB 107 and SB 2052

Throughout the scoping process², MRC and the California Department of Fish and Game (DFG) repeatedly assured the public that the Project would be conducted pursuant to the latest version of the Natural Community Conservation Planning Act, as codified in Senate Bill 107, approved by the Governor on February 2, 2002, filed with the Secretary of State on February 4, 2002, and as subsequently amended by Senate Bill 2052, approved by the Governor on July 9, 2002, and filed with the Secretary of State on July 9, 2002 (“NCCPA” hereinafter.)

However, §1.4 of the Planning Agreement uses weak language to state only that, “The Plan is *intended* [emphasis added] to comply with the NCCPA (as revised in 2002 by SB107).”

CNPS asks that this language be revised to read, “The Plan *will* [emphasis added] comply with the NCCPA (as revised in 2002 by SB 107 and SB 2052).” Such revision will make it clear that the Project will be conducted as represented to the public by MRC and DFG, and as required by current state law.³

Geographic Scope Improperly Defined

CNPS believes that the geographic scope of the planning area is improperly defined based on the following facts:

1. The Federal Register notice for the Project⁴ stated that, “The proposed 80-year HCP/NCCP will encompass 220,000 to 240,000 acres of lands owned by MRC.” Throughout the scoping process MRC has consistently maintained this general geographic scope.⁵
2. §3.1 of the Planning Agreement introduces the definition of “Adjustment Area”, to be “... lands that are *adjacent* to the lands that MRC currently owns and *similar in character* to MRC’s lands...”

Examination of the map provided in Exhibit A of the Planning Agreement shows the

² E.g., at the scoping meeting held at the Fort Bragg Town Hall, 363 North Main Street, Fort Bragg, California, on June 27, 2002, and public workshops held at Tradewinds Lodge, 400 South Main Street, Fort Bragg, California on September, 24, 25, 27, and 30, 2002.

³ The proposed NCCP does not qualify for any of the conditions contained in §2830 of the NCCPA that would allow it to be approved pursuant to prior law, and hence is subject to SB 107 as amended by SB 2052.

⁴ Federal Register, volume 67, number 109, Thursday, June 6, 2002.

⁵ E.g., at scoping meeting held at the Fort Bragg Town Hall, 363 North Main Street, Fort Bragg, California, on June 27, 2002, and public workshops held at Tradewinds Lodge, 400 South Main Street, Fort Bragg, California on September, 24, 25, 27, and 30, 2002.

Adjustment Area claimed by MRC to include all of southern Humboldt County west of Highway 101, all of Mendocino County west of Highway 101, and all of northern Sonoma County west of Highway 101. The map further indicates that the Adjustment Area is possibly an order of magnitude larger than MRC's current holdings, and includes urban areas in Willits, Ukiah, Cloverdale, Point Arena, and Santa Rosa. Also included in the Adjustment area are agricultural areas including vineyards, orchards, field crops, and type-converted pastureland. Natural communities, such as oak woodlands, unrelated to MRC's covered activities, and distinct from the character of MRC's lands, are also included in the Adjustment Area.

While it is true that all of the land shown as Adjustment Area in the Exhibit A map is in *some sense* adjacent to MRC lands, so is the state capitol in Sacramento, or the national capitol in Washington, DC. However, from a regulatory point of view, it seems to CNPS that the Adjustment Area depicted in the Exhibit A map is far too large to be considered adjacent to MRC lands.

It is also clear that MRC has not obtained permission from all owners of properties in the Adjustment Area to permit inclusion of such properties in the Adjustment Area.⁶

CNPS believes that the Adjustment Area, as shown in Exhibit A of the Planning Agreement, is improperly large, vaguely defined, illegally inclusive, and inconsistent with the definition provided in §3.1 of the Planning Agreement and the Federal Register notice for the Project.

CNPS is unaware of any precedent for use of the concept of Adjustment Area in any prior NCCP, and believes that such concept is regulatorily unsupportable.

3. §3.13 is unreasonably vague in its definition of Planning Area. §3.13 of the Planning Agreement states that, "Planning Area means the lands subject to either MRC's ownership or timber harvest rights that MRC proposes to cover in the NCCP/HCP and the incidental take permits issued under FESA and the NCCPA."

However, the Planning Agreement never makes clear *exactly* which lands MRC is proposing to cover in the NCCP/HCP. The only indication is given in the Exhibit A map, but §3.13 does not make this explicit.

4. Sections 3.13 and 4.1 taken together are contradictory.

§4.1 of the Planning Agreement states that, "The geographic area MRC proposes to address in the NCCP/HCP includes lands in the Planning Area that MRC either owns or holds timber harvest rights to as of the date MRC is issued incidental take authorizations under FESA and the NCCPA, plus adjacent lands in the Adjustment Area that are similar in character to MRC's lands, some of which MRC may potentially acquire an interest in."

Thus, §3.13 claims that the geographic scope of the Project is the Planning Area, but

⁶ E.g., the author of this document owns both residential and commercial property located within the Adjustment Area, as shown in Exhibit A of the Planning Agreement, and has not received any notice of, nor given permission for, inclusion of such properties in the Adjustment Area.

§4.1 claims it is the Planning Area plus Adjustment Area.

CNPS respectfully requests that the geographic scope of the Project be clarified:

1. Due to lack of precedent, and the numerous problems identified with the concept, CNPS would like to see the concept of Adjustment Area eliminated from the Planning Agreement, and have the Planning Area be explicitly identified as those lands MRC currently owns.
2. If DFG allows the concept of Adjustment Area, then CNPS respectfully requests that DFG:
 - a. Refine the definition of Adjustment Area so that it is a meaningful concept. This would include reducing the Adjustment Area to only those areas realistically considered for acquisition by MRC, to exclude all other areas, and to exclude all areas that are not similar in nature to MRC's current holdings.
 - b. Include all non-MRC landowners within the Adjustment Area as signatories to the Planning Agreement. Pursuant to NCCPA §2810(b)(1) such owners must be considered participating private landowners, since, according to DFG and MRC, there are no local agencies with land use permitting authority for these lands.
 - c. Resolve the conflict between §3.13 and §4.1.

Initial Focus Species Lack Supporting Data

Throughout the scoping process, CNPS has expressed concern about *how* covered taxa are to be determined, e.g., the following issues were raised in CNPS comments on July 8, 2002:

“CNPS is concerned that few, if any, sensitive taxa occurring on the Project area currently have sufficient data or management information so that they can be considered covered species, yet produce no unforeseen circumstances during the entire term of the Project.

“CNPS would appreciate knowing:

- a. What process will be used to identify the preliminary list of covered species and natural communities?⁷
- b. What minimum set of data and management information will be required to add each taxon or natural community to this list?
- c. Who will compile this list, and what public review and comment will be provided for this list?
- d. How DFG ensure that no take of any covered species occurs before management information sufficient to meet the conservation and restoration mandates?

However, to date, neither DFG nor MRC has provided answers to these questions. Instead, Exhibit B simply contains a list of taxa without any supporting data, or a description of the process that generated this list.

⁷ NCCPA §2810(b)(3)

CNPS wishes to note that many sensitive botanical species lack adequate information on current population levels, distribution, autecology, and life history characteristics needed to provide good scientific guidance for conservation management. For each taxon that is proposed for coverage, DFG and MRC will need to supply solid scientific information to support coverage pursuant to NCCPA §2821(a). To date, MRC has provided the public with no such information for the taxa contained in Exhibit B of the Planning Agreement.

For the initial focus taxa listed in Exhibit B of the Planning Agreement, CNPS respectfully requests that DFG:

1. Describe the process which produced this particular set of taxa;
2. Demonstrate that good science was used by scientifically qualified personnel to produce this particular set of taxa; and
3. Supply the data, references, or other information needed to demonstrate that MRC has sufficient management and biological information for each taxon on this list to justify that such taxon be considered a covered species.

Initial Conservation Objectives Lack Supporting Data

Given the large areal extent of the Project, and its long temporal span, CNPS suggests that the conservation objectives be amended to include:

1. §4.5.1, new item – “to promote self-sustaining function of ecologically meaningful natural riparian corridors through preservation and restoration of site-specific, appropriate, native vegetation.”
2. §4.5.3, new item – “to promote self-sustaining function of ecologically meaningful natural terrestrial communities through preservation and restoration of site-specific, appropriate, native vegetation.”

CNPS does not believe that focusing narrowly on sensitive species is justified, given the size and duration of the project. Over the next eighty years, CNPS believes that good science will require resource management to address cumulative impacts on a landscape scale to all natural communities and taxa, not just those taxa and communities that are currently classified as sensitive.

CNPS believes that DFG must carefully consider where good science is going, and incorporate measures that may be required in the future, during the term of the Project. By allowing a project of this scope and duration, DFG must protect public trust resources by looking forward to all reasonably foreseeable conditions which may arise during the term of the Project, and crafting the Planning Agreement, and subsequent Implementation Agreement to serve the public interest over the entire term of the Project.

CNPS wishes to note that, to date, neither DFG nor MRC have addressed the process questions asked by CNPS in its letter of July 19, 2002, regarding preliminary conservation objectives:

“CNPS would appreciate knowing:

- a. Through what process will the preliminary conservation objectives be established?
- b. How will these preliminary conservation objectives address the restoration mandate for covered species?
- c. How will DFG ensure that then current best available science will be used to establish the preliminary conservation objectives?
- d. Who will be involved in establishing the preliminary conservation objectives?
- e. What public review and comment will be used when establishing the preliminary conservation objectives?"

While §4.5 of the Planning Agreement lists initial conservation goals and objectives, no references, or other data, are provided to justify these goals and objectives, or to show that they are sufficient to achieve the conservation and restoration mandate of the NCCPA.⁸

For the conservation goals and objectives listed in §4.5 of the Planning Agreement, CNPS respectfully requests that DFG:

1. Describe the process which produced this particular set of goals and objectives;
2. Demonstrate that good science was used by scientifically qualified personnel to produce this particular set of goals and objectives; and
3. Supply the data, references, or other information needed to demonstrate that this particular set of goals and objectives are sufficient to achieve the NCCPA conservation and restoration mandate.

Independent Scientific Input

§2810(b)(5) of the NCCPA requires inclusion of independent scientific input to insure that the Project embodies scientifically sound conservation strategies and to establish management principles and conservation goals for the Project, and §2815 of the NCCPA requires public participation throughout development of the Project.

CNPS has the following concerns regarding independent scientific input:

1. As a science-based organization with recognized expertise regarding botanical resources in the State of California, and as specified in its letter to Brad Valentine of DFG, dated September 30, 2002, CNPS is concerned that exclusion of the public from active participation in selection of the science advisory panel (SAP) is not in accordance with the intent of the NCCPA.

CNPS objects to the closed selection process for the SAP, and believes that the public should be involved in reviewing potential candidates for the SAP.

2. It appears to CNPS that only the public is to be isolated from the SAP. It seems patently obvious that DFG and MRC, as public trust agency and applicant, will have

⁸ NCCPA § 2800(i).

direct interaction with the SAP. CNPS believes that NCCPA §2810(b)(5) and §2815 require fully open and transparent SAP function. The Planning Agreement blocks public interaction with the SAP, but permits MRC and DFG to interact with the SAP.⁹

CNPS believes that the NCCPA requires DFG to establish a process whereby the public has reasonable interaction with the SAP.

3. CNPS is also concerned that the Planning Agreement has been created prior to establishment of the SAP, even though, according to DFG, "... scientific input is sought as early as possible during plan initiation."¹⁰

CNPS would like to understand why DFG did not require input from the SAP regarding the preliminary list of covered species and natural communities and the preliminary conservation objectives.

4. CNPS believes that
 - a. The selection process and criteria for SAP membership be made public;
 - b. The issues posed to the SAP be made public;
 - c. That the public has a right to pose additional issues and questions to the SAP; and
 - d. That the work products of the SAP are part of the public administrative record for the Project.
5. CNPS is concerned that the Planning Agreement makes no arrangements for MRC to fund the operation of the SAP. Without adequate, committed funding, CNPS believes that the SAP will not be able to fulfill the requirements of NCCPA §2810(b)(5), and that DFG needs to insure such funding before proceeding with the Project.

Public Participation

§2815 of the NCCPA requires public participation throughout plan development and review, starting early in the process.

While appreciating the value of, and participating fully in, the public meetings and workshops, CNPS does not believe that such meetings and workshops fulfill the public participation requirements of NCCPA §2815.

CNPS respectfully requests that DFG and MRC promptly establish a community advisory panel (CAP), composed of responsible members of the public, to pose questions and issues to the SAP, to review work products of the SAP on an ongoing basis, and to provide detailed input to DFG and MRC on an ongoing basis. CNPS further requests that it have at least one seat on the CAP.

⁹ Planning Agreement §5.1.

¹⁰ "Guidance for the NCCP Independent Science Advisory Process", DFG, August, 2002, "DFG SAP Guidelines" hereinafter.

NCCP/HCP Costs And Agency Compensation

NCCPA §2829 stipulates that, “The department may be compensated for the actual costs incurred in participating in the preparation and implementation of natural community conservation plans.” Further, NCCPA §2810(a) states that, “The [planning] agreement shall include a provision specifying the amount of compensation, if any payable to the department pursuant to Section 2829.

However, §6.1 of the Planning Agreement states that, “... development and implementation of the NCCP/HCP must be funded *primarily* [emphasis added] by MRC.”

Given the substantial benefits MRC will derive from the Project, it seems unreasonable for MRC not to bear all such costs. Accordingly, CNPS respectfully requests that, “... development and implementation of the NCCP/HCP must be funded *fully* [emphasis added] by MRC.” §7.5 of the Planning Agreement should also be amended to remove all mention of any grants from DFG to MRC for development or implementation of the HCP/NCCP.

Further, §6.3 of the Planning Agreement states that, “Subject to funding and staffing constraints, DFG agrees to provide technical and scientific information, analyses and advice to assist MRC with the timely and efficient development and implementation of the NCCP/HCP.” Further, CNPS directly addressed this issue in its letter of July 19, 2002, but has never received a response from either DFG or MRC.

Given the substantial benefits MRC will derive from the Project, it seems unconscionable that DFG not insist that MRC fully compensate DFG for all expenses incurred by DFG due to participation in the project.

Since NCCPA §2810(a) requires that any such compensation be specified in the Planning Agreement, CNPS respectfully requests that §6.3 of the Planning Agreement be amended to read in full, “DFG agrees to provide technical and scientific information, analyses and advice to assist MRC with the timely and efficient development and implementation of the NCCP/HCP, and MRC agrees to compensate DFG for all expenses thereby incurred, pursuant to §2829 of the NCCPA.”

CNPS directly addressed this issue in its letter of July 19, 2002, but has never received a response from either DFG or MRC. Given the current California state budget crisis, it seems to CNPS that it is incumbent upon DFG to insist that MRC fully fund planning and implementation of the Project.

CDF As Participating Agency

§1.4 of the Planning Agreement states that, “Because there is no local agency with land use permitting authority over the activities proposed to be addressed in the Plan, this Agreement is solely between CDFG and MRC.” However, all of the Project’s timber harvesting operations will be conducted pursuant to the timber harvesting program administered by the California Department of Forestry and Fire Protection CDF.

CNPS would appreciate understanding why CDF is not a participating state agency pursuant to NCCPA §2810(b)(1)?

Scoping Comments Ignored

During the scoping process CNPS raised numerous substantive issues and asked numerous substantive questions in the CNPS comment letters. To date, CNPS has not received any direct response to its issues or questions. Further, many of the comments CNPS has made in this letter regarding the Planning Agreement are the same ones CNPS raised previously during scoping.

CNPS would appreciate understanding how, and when, its substantive issues and questions will be addressed. CNPS does not believe that simple receipt of its comment letters by DFG is sufficient to satisfy the public participation mandate of NCCPA §2815.

Summary

CNPS wishes to summarize the key points contained in this letter:

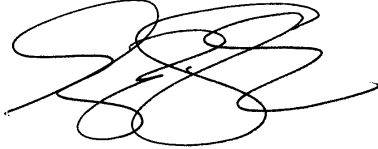
1. The Project will be conducted pursuant to SB 107 as amended by SB 2052.
2. The geographic scope of the Project needs to be clearly defined, with the Adjustment Area concept eliminated or redefined. Private landowners in the Adjustment Area need to be made signatories to the Planning Agreement. §3.13 and §4.1 need to be made consistent.
3. The process and supporting data needs to be supplied for each initial focus taxon.
4. The process and supporting data needs to be supplied for the proposed initial conservation goals and objectives.
5. The selection process and criteria for forming the SAP needs to be disclosed, the SAP process must be made open and transparent to the public, the cosy arrangement between DFG, MRC, and the SAP eliminated, the issues posed to the SAP needs to be made public, a process whereby the public can pose issues for consideration by the SAP needs to be established; a process for regular release of SAP work products needs to be established, and MRC needs to commit funds to fully fund operation of the SAP.
6. A CAP needs to be established as soon as possible.
7. The Planning Agreement must be modified so that MRC bears the full cost of preparation and implementation of the NCCP/HCP, and all agencies, including DFG, are fully compensated for their expenses.
8. CNPS wishes to receive written responses to the issues raised in this letter.

CNPS asks DFG and MRC, to insure that CNPS is on all mailing lists for notices regarding the Project:

Greg Jirak
CNPS Forestry Program Coordinator
PO Box 985
Point Arena, CA 95468

CNPS respectfully requests that DFG insure that this document, all of its exhibits, and all documents referenced by this letter, be made part of the public administrative record for the Project.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Gregory A. Jirak, CNPS, State Forestry Program Coordinator

Cc: Eric Shott, National Marine Fisheries Service
John Hunter, United States Fish and Wildlife Service
Mike Jani, Mendocino Redwood Company
Austin McNerny, Project Manager, Jones and Stokes
Pam Muick, Executive Director, California Native Plant Society
Sue Britting, President, California Native Plant Society
David Chipping, Conservation Director, California Native Plant Society