



## RUBICON TRAIL

### Status Report

September 1, 2011

#### I. BACKGROUND

On April 23, 2009, the Central Valley Regional Water Quality Control Board (Water Board) issued a Cleanup and Abatement Order (CAO) to two Responsible Parties- El Dorado County (County) and the U.S. Department of Agriculture, Eldorado National Forest (ENF).

On January 26, 2010, the County Board of Supervisors adopted a “preferred route” for the Rubicon Trail, identifying the main route (plus a couple of variant routes in selected spots) where the County would focus its maintenance efforts. The preferred route did not include Wentworth Springs Road because the County does not consider that county-maintained road to be a part of the Rubicon Trail proper.

#### 2010 Maintenance Work

On May 15, 2010, the County submitted its 2010 Annual Maintenance and Activities Plan to the Water Board and the ENF, describing the roadway maintenance work to be done during the summer of 2010. The plan for that summer work season was to start at one of the westerly trailheads, Wentworth Springs Campground, and work easterly along the Board-designated preferred route towards Little Sluice and beyond if possible. This west-to-east strategy had several advantages: (1) it would improve the more frequently travelled portions first, (2) the early work would make it more feasible (and less damaging to the roadway) to get the crew and its equipment through for the later work further east, and (3) while performing the later work, the County could observe how the earlier work was standing up to usage and weather.

The ENF approved the County’s 2010 work plan, and advised the County that ENF staff had examined the Trail and had “cleared” it for the County’s proposed maintenance work from Wentworth Springs Campground all the way to Little Sluice. The County applied for and received grants from the State OHV Commission for its 2010 annual maintenance work.

During the summer of 2010, the County performed about \$800,000 in maintenance work, consisting of the application of “best management practices” or BMPs on approximately 2.5 miles of Trail from the Wentworth Springs Campground to Walker Hill (about 1/3 of total Trail

in the County). The County also completed the scheduled BMPs on a part of the Trail known as the Loon Lake Intertie (about 2 miles).

The County was unable to complete its planned work all the way to Little Sluice because early snow truncated the 2010 summer work season earlier than anticipated and the work had to stop at Walker Hill. The plan at that point was to resume the uncompleted 2010 work in the summer of 2011, picking up at Walker Hill and proceeding to Little Sluice. While that work was being done, the ENF would “clear” from Little Sluice to Rubicon Springs where the last federal land ended. Once the Trail past Little Sluice was “cleared,” the County maintenance crew could work past Little Sluice to Rubicon Springs and then across the private land all the way to the county line. In this manner, all of the roadway maintenance work necessary to satisfy the CAO could be completed in 2011.

### Easement Proposal

When the CAO was first proposed in early 2009, the ENF resisted its inclusion as a Responsible Party based on its position that as a legal consequence of RS 2477, El Dorado County already held an easement to the Rubicon Trail, and that easement included the legal duty to maintain the Trail.

At a meeting of County and ENF staff held on August 31, 2010, while the County’s 2010 annual maintenance work was underway, the ENF urged the County to formally apply to it for an easement under the Forest Roads and Trails Act (FRTA), as had been previously done for the Loon Lake Intertie, and represented that a FRTA easement would obviate any disputes about the precise location of the Rubicon Trail and its variants under RS 2477, and would make future work on the Trail much easier. The ENF also represented that if the County applied for a FRTA easement, the ENF would process that easement application (including an environmental analysis under NEPA) at federal expense, and in the meantime, the County could go ahead with its annual maintenance work on the Trail including two bridges that had been in the planning stages for a couple of years already.

A 1992 Forest Road Agreement between the ENF and the County says “[t]o the extent possible under available authority, each party agrees to convey easements over lands or interests in lands it owns or administers to the other party in order to provide jurisdiction by the appropriate party as may be agreed to for any road or road segment listed on Schedule A.” Schedule A covers a number of road segments, including the Wentworth Springs Road from Airport Flat to Wentworth Springs Campground and the Rubicon Trail from Wentworth Springs Campground to the county line. Thus the ENF is obligated to convey an easement to the County.

### Bridges

Two new bridges have been planned for the area for a number of years, and grant funding has been obtained to plan and build those bridges. One proposed new bridge will be where vehicles currently cross Gerle Creek at grade on Wentworth Springs Road. Wentworth Springs Road predated the establishment of the ENF, and was formally accepted into the county maintained road system since at least 1937. The County does not consider it to be a part of the true Rubicon Trail and it is not a part of the preferred route of the Rubicon Trail adopted by the County Board of Supervisors in January 2010. Wentworth Springs Road is an access road leading vehicles to Wentworth Springs Campground where the true Rubicon Trail starts. The Gerle Creek bridge

will be located entirely on private land. No approval is required from the ENF for the Gerle Creek bridge. The CEQA process for the Gerle Creek bridge was completed on February 8, 2011. The NEPA process was certified complete by CalTrans on behalf of the Federal Highway Administration (FHWA) on February 14, 2011. This analysis included an assessment of the cultural and historical effects of the bridge.

The other proposed new bridge will be on the Rubicon Trail where vehicles currently cross Ellis Creek at grade on ENF land. The proposed new bridge will cross Ellis Creek about 75 feet downstream from the current grade crossing because that is the environmentally preferred location. The County will need a right-of-way certification from the ENF for the Ellis Creek bridge. The current plan is to utilize a 240 foot long easement from where the bridge approach will leave the existing Trail to where it will rejoin the Trail on the other side of Ellis Creek. The CEQA analysis for the Ellis Creek bridge was certified on February 8, 2011. The NEPA analysis was delayed on January 14, 2011 by the State Historic Preservation office when it requested additional cultural reports having to do with the potential for a wagon road in the area. The ENF has declined to issue the 240 foot long easement needed for the bridge, choosing to include it as a part of the FRTA easement for the whole Trail.

The two bridges will replace the current grade crossings and thus take vehicles out of the stream beds, and will represent the two most significant and beneficial environmental improvements to the Rubicon Trail in recent history. Each bridge will cost about \$400,000. Grant funding has been awarded to the County, and a significant sum has already been spent on plans and other preparatory efforts to date. The plans are at the 90% completion stage. The grant funding will run out if the bridges are not constructed during the summer 2012 construction season.

The major threat to the timely completion of the bridge projects at the present time appears to be the potential for eligibility for listing the Rubicon Trail in the National Register of Historic Places, as discussed below.

#### Easement Application

Based on the representations made by the ENF described above, on October 19, 2010 the County Board of Supervisors held a public hearing and directed staff to apply to the ENF for an easement along the Rubicon Trail preferred route the Board had previously adopted in January 2010. County staff completed its survey of the preferred route, and a formal easement application was submitted to the ENF on December 9, 2010. Thus in early 2009 the ENF began urging the County to apply for a FRTA easement, by January 26, 2010, the ENF knew that the County had officially adopted the preferred route, by August 31, 2010 the ENF knew that the Board of Supervisors decided to apply for the easement the ENF had requested, and by December 2010 the ENF had the official easement application in hand.

#### Programmatic Agreement

In January 2011, the State Historic Preservation Office (SHPO) held up the NEPA analysis on the Ellis Creek Bridge and asked for additional cultural reports because of a concern over a potential wagon road in the area. This apparently triggered an additional concern that the long-term use of the Trail by the Jeepers Jamboree might be a historic use. In March 2011, the SHPO advised that the County's planned work on the Trail, including the Ellis Creek Bridge, could proceed if the parties signed a Programmatic Agreement (PA), which was described as a device

that would allow the necessary work ordered to be done by the CAO to continue, while the historic aspects of the Trail were being discovered, documented and otherwise appropriately managed. The original time estimate to negotiate the final wording and complete the PA was 30 days. The initial draft of the PA was prepared by SHPO and circulated to the parties, including the ENF, starting in May, 2011.

It has not been completed or signed to date.

An unknown party recently added the Wentworth Springs Road from Airport Flat to Wentworth Springs Campground into the Area of Potential Effects (APE), which the County has objected to since that segment is a county-maintained road and is not a part of the Rubicon Trail proper. No county-maintained road has ever before been subject to a Programmatic Agreement or to SHPO jurisdiction. No federal undertaking is proposed for Wentworth Springs Road except for the Gerle Creek bridge, for which a NEPA document was already completed (including an analysis of cultural and historic effects). Also, an unknown party recently added two private entities to the PA, the Rubicon Trail Foundation and Jeepers Jamboree, Inc. No explanation has been given why two private organizations were added.

The Army Corps of Engineers (ACOE) was added as a signatory to the PA. The ACOE is apparently now taking the position that it will not issue a §404 permit for the Gerle Creek Bridge until it revisits the historical and cultural aspects of the Rubicon Trail, despite the fact that Wentworth Springs Road is not a part of the Rubicon Trail, and despite the fact that the NEPA/CEQA analysis was certified as complete in February, 2011, and that analysis found no negative historical effect.

The currently proposed version of the PA appears to prevent the issuance of the FRTA easement, and to prevent the construction of the two bridges, until a final determination is made concerning the eligibility of the Rubicon Trail for the National Register of Historic Places, which may take years. This time delay threatens to cause a loss of the funding currently in hand for the maintenance work and the two bridges.

### 2011 Planned Maintenance Work

On December 30, 2010, the County delivered to the Water Board and to the ENF its "BMP Toolbox," which describes in detail every type of Best Management Practice (BMP) to be used as part of the County's efforts to maintain the roadway in order to control sedimentation in satisfaction of the CAO. On December 31, 2010, the County submitted to the Water Board and the ENF its Saturated Soil Water Quality Protection Plan (SSWQPP), which describes in proper engineering detail what work the County is planning on doing on the Rubicon Trail, taken from the analysis originally made by the California Geologic Survey (CGS). The SSWQPP denotes the specific BMP from the BMP Toolbox that will be applied at precise locations along the Rubicon Trail. The SSWQPP does not cover the Wentworth Springs Road because that is a county-maintained road which is subject to a whole host of other maintenance plans, procedures, and legal obligations, and because the Wentworth Springs Road is not a part of the Rubicon Trail.

In March 2011, the County applied to the OHV Commission for grants for roadway maintenance work to be done in the summer of 2011, which was to install BMPs according to the SSWQPP on the Rubicon Trail from Wentworth Springs Campground to Little Sluice. While this work

was being done to Little Sluice, it was contemplated that the ENF would “clear” the rest of the Rubicon Trail, so the County work crew could then continue right along the Trail past Little Sluice and complete the SSWQPP all the way to the county line. The grants were awarded in July, 2011.

On May 15 of every year, the County submits to the Water Board its Annual Maintenance and Activities Plan. The ENF gets a copy. The County’s 2010 Annual Maintenance and Activities Plan shows that the County was prepared to perform \$1.6 million in maintenance work on the next part of the Trail, from where the 2010 work was forced to stop, Walker Hill, to where the USFS had ‘cleared” the work in 2010, Little Sluice, and beyond if possible, during the summer construction season in 2011.

On May 17, 2011, the ENF told the County it couldn’t do work on the Trail segment from Walker Hill to Little Sluice until botany was “cleared.” This was surprising because the ENF had previously advised the County that this part of the Trail had been “cleared” when the same work was authorized the year before. This unexpected change by the ENF forced the County at the last minute to alter its maintenance plan for the early part of the 2011 season. Prevented from pursuing its original plan, the County decided to start the season by performing routine maintenance work on the Wentworth Springs Road from Airport Flat to the Wentworth Springs Campground until the ENF could once again “clear” the segment of the Rubicon Trail from Walker Hill to Little Sluice, at which time the County could shift back to the Walker Hill to Little Sluice segment.

The County was ready to start its revised maintenance plan on July 20, 2011. However, on July 18, 2011, the ENF told the County that it couldn’t do any work this summer on Wentworth Springs Road either. This was surprising because Wentworth Springs Road existed before the ENF was established, it has been a formal part of the county-maintained road system since at least 1937, it is the subject of the 1992 Forest Road Agreement which requires the county to maintain it, and it has been maintained like all other parts of the county-maintained road system for many decades without any hindrance by the ENF.

#### Meeting of August 1, 2011

The County requested a meeting with the ENF so it could attempt to understand the conflicting and confusing messages it had been receiving. A meeting was held on August 1, 2011. The ENF announced for the first time that it was concerned that some of the BMPs in the BMP Toolbox and the SSWQPP could be considered to be “construction” rather than “maintenance,” and thus not categorically excluded under NEPA, so the County could not install any BMPs anywhere on the Trail until the ENF completed its EIS for the FRTA easement, a process that was projected to take over a year and which would cause the loss of two work seasons and over \$1 million in grant funding. Also, the ENF announced that the routine roadway maintenance work could not proceed on Wentworth Springs Road either, because that work needed a permit from the ENF which could not be issued until the area had been “cleared” for botany, endangered species, archeology, and historic issues. The only thing that the ENF would allow was maintenance of the BMPs installed last year on the Trail between Wentworth Springs Campground and Walker Hill (*i.e.*, cleaning out the sediment traps installed last summer).

The ENF had received the County’s SSWQPP describing the work planned for the Trail in December 2011, 8 months before the August 1 meeting. The ENF also had the County’s BMP

Toolbox 8 months before the August 1 meeting. The ENF had the County's 2010 Annual Maintenance and Activities Plan 3 months before the August 1 meeting. It is not known why the ENF waited until August 1<sup>st</sup> to tell the County that the forest engineer considered some BMP work to be non-exempt construction, or "reconstruction," rather than exempt maintenance. All that could be done at this late date was to ask the engineers to set up a meeting in the next few weeks to view the Trail together where the work was to be performed, to discuss and try to reach consensus on this issue.

The ENF also advised the County that it has not completed its review of the PA, and that the current draft of the PA was sitting on an ENF employee's desk. When asked how long it would take that employee to complete her review so the parties could circulate the completed PA for signature, the ENF staff said they didn't know because their employee was on personal leave. When asked how long the employee would be out, the ENF said it didn't know, perhaps a week or two. When told that a delay in approving the PA might cause the loss of an entire season of work with the possible loss of millions of dollars of grant funding, and when asked if another ENF employee could look at the PA in the absence of the original employee, the ENF answer was a flat "no," with no explanation or discussion.

The work stoppage on Wentworth Springs Road was particularly perplexing. Wentworth Springs Road existed as a county road before the ENF was established, and has been in the formal county-maintained road system since about 1937. As a county-maintained road, it is subject to a different set of maintenance obligations, design standards, construction procedures, and liabilities than non-maintained roads such as the Rubicon Trail. Wentworth Springs Road is part of the NPDES permit that covers all 1,076 miles of roadway in the formally-designated county-maintained road system. There has never been any need for ENF involvement on this segment; maintenance was not only authorized but required by the 1992 Forest Road Agreement. Wentworth Springs Road is not a part of the FRTA easement application, which only covers the true Rubicon Trail from Wentworth Springs Campground easterly to the county line. Wentworth Springs Road is not considered by the County to be a part of the Water Board CAO, although it is mentioned in the CAO as an approach to the Rubicon Trail. The Wentworth Springs Road is only partly on ENF land; the bulk of it is on private land. The County only decided to do work on Wentworth Springs Road this year when, at the last minute, the ENF unexpectedly prevented the County from working on the Walker Hill to Little Sluice segment of the true Rubicon Trail that it had previously "cleared" for work last year. Since routine maintenance of the Wentworth Springs Road had been done at many times in the past without any notice to, or objection from the ENF, the County assumed that it could simply perform routine maintenance there in the summer of 2011 while it waited for the ENF to re-clear the work planned on the Trail.

As of August 1, 2011, the ENF for the first time advised the County that it would not be allowed to do any work on the Trail until the EIS for the FRTA easement was completed in August 2012, except to clean out the BMPs installed on one segment of Trail last year.

The County asked the ENF for a formal schedule showing the remaining steps the ENF would be taking on the FRTA easement application and its associated NEPA analysis, and how long that process would take. The ENF had a year of advance notice that the County would apply for a FRTA easement, and had 16 months of advance notice where the preferred route was, and had the formal FRTA easement application for 8 months. At the meeting on August 1, 2011, the ENF for the first time provided a schedule, which indicated that the ENF environmental review

process would start on September 1, 2011, and not be completed until the Record of Decision (ROD) was published on April 25, 2012, and the appeal period ended on August 8, 2012.

Completion of the EIS in August 2012 effectively loses that year's summer construction season, so the net effect of the ENF's position as of August 1, 2011 was the loss of two successive construction seasons, and over \$1 million in grant funding.

#### Water Board Staff Meeting of August 17, 2011

At a full Water Board meeting on August 5, 2011, both Responsible Parties summarized their work to date in attempting to comply with the CAO. It was apparent that one of the two Responsible Parties, the County, was performing the bulk of the work required by the CAO, while the other Responsible Party, the ENF, had arrogated unto itself the role of merely giving (or withholding) permission from the County. The Water Board expressed concern about the County's inability to proceed with its planned maintenance work, and directed its staff to investigate. Water Board staff invited the County and ENF staffs to a meeting at the Water Board office on August 17, 2011.

At that staff meeting, the ENF presented a schedule for the NEPA analysis for the FRTA easement. The first date listed on the ENF schedule is August 26, 2011, for the "Notice of Intent" (NOI), the first official legal notice that a federal agency is commencing the preparation of an Environmental Impact Statement (EIS), which must be published in the Federal Register. This date was a week earlier than in the schedule the ENF had given the County on August 1<sup>st</sup>.

The ENF indicated that it would be authorizing the County's roadway maintenance work by issuing a "CE," which is an acronym for a "Categorical Exclusion." Under NEPA, routine road maintenance is categorically excluded from environmental analysis, except if there are "extraordinary circumstances." There is no similar categorical exclusion for road construction. The term "CE" was used as shorthand for the ENF approval for the County to proceed with its planned work based on a determination that it was categorically excluded from a more extensive environmental analysis under NEPA, and that there were no "extraordinary circumstances."

After the meeting was over, the Water Board issued an action and decision memorandum, as follows:

#### *Action Items:*

- 1. USFS will provide decision on NEPA CE applicability for maintenance BMPs by next Wednesday (August 24<sup>th</sup>). This decision will be communicated to all parties at the meeting.*
- 2. The County and USFS engineers will walk segments of the trail on Thursday (August 18<sup>th</sup>) to categorize the remaining BMPs as maintenance or construction items, and revise the 2011 work plan accordingly. This document should also be submitted to all parties.*
- 3. The County will contact Caltrans and Army Corps to find status of PA and report out to group. County may need help from the Board to keep PA moving.*
- 4. USFS to issue the NOI to begin the NEPA review by August 26. The Board needs to receive a copy.*

5. *Board Chair Kate Hart wants to meet with incoming Forest Supervisor Kathy Hardy before she begins work on September 19<sup>th</sup>. FS Executive Secretary Laura French will contact Kiran Lanfranchi-Rizzardiat (916) 464-4839 to set up an appointment.*

#### *Decisions*

1. *The USFS is ready to sign the PA on August 19. A related question that wasn't answered at the meeting is whether or not the USFS can issue CE for maintenance activities if PA not signed.*
2. *USFS is committed to firm timelines for NEPA/EIS process. Resolution of the Rubicon issues has become a regional priority.*
3. *Supervisor Jack Sweeney is the point of contact for the County.*
4. *Acting Forest Supervisor Tony Valdes is the point of contact for the USFS until Kathy Hardy begins work. After that, Kathy Hardy is point of contact and Tony will assist in the transition.*

#### “Approved to Proceed” Letters

In an attempt to comply with the Water Board order to provide a decision on a CE for the maintenance BMPs by August 24<sup>th</sup>, on Sunday August 21, 2011, at 2:45 p.m., the ENF District Ranger issued a letter entitled “Road Maintenance Approved to Proceed.” It noted that the County and ENF engineers had visited the Rubicon Trail on August 18<sup>th</sup> as planned. The engineers reviewed the Trail from Ellis Creek to Walker Hill, where maintenance BMPs had been installed in 2010, and from Walker Hill to Little Sluice, where similar work was planned during this summer. The letter recites that after the review, all three engineers concurred that the BMPs in the SSWQPP “are consistent with the definition of road maintenance used by both the County DOT and the Forest Service.” The letter recites that a similar review had been made by County and USFS engineers of the proposed work on the Airport Flat segment of Wentworth Springs Road, and once again all engineers agreed the proposed work “also meets the definition of road maintenance.” The letter also recites that in 2010, the ENF engineer had reviewed the Trail and determined that the work planned from Wentworth Springs Campground to Ellis Creek “also meets the definition of road maintenance,” including work on the variants included in the preferred route.

Four special items of work that the County was proposing, but which had not been listed in the BMP Toolbox or the SSWQPP, were determined to be road maintenance. These 4 special items are: (1) pulling side cast back onto the road surface, (2) using previously disturbed areas adjacent to the travelled way for stockpiles of material (*i.e.*, crushed rock) to be used for maintenance, (3) installing rock check crossings and rock outlet protection in areas where water naturally flows (specifically at a location called Winter Camp which presents a unique drainage problem), and (4) replacement of the FOTR bridge (a short wooden bridge over a seasonal drainage). Finally the letter said that there were no “extraordinary circumstances” that might prevent a categorical exclusion from being issued. The letter concluded that “[m]aintenance as planned on Wentworth Springs Road (ELD-63) from Airport Flat to the intersection of 14N07 and on the Rubicon Trail from Wentworth Springs Campground to Little Sluice are approved for immediate implementation.” Also, approval was given to maintain the BMPs previously installed in the summers of 2009 and 2010 from Wentworth Springs Campground to Walker Hill.



This letter meant that, at last, the County could perform the work it had been planning on doing in the summer of 2011, even though the bulk of the summer work season had already been lost. However, the next day on Monday August 22, 2011 at 5:38, the County received a second letter which said that it was replacing the letter from the day before. This new letter of August 22 repeated the previous letter, except that it added a significant new limitation: all work had to be within the “traveled way,” defined in a diagram attached to the letter as the smallest possible part of the road surface, essentially in between the wheel ruts. This limitation to the “traveled way” eliminated any work on the road shoulders, or berms, or ditches, or cut slopes or fill slopes. This essentially meant that the County could not install any BMPs as listed in the SSWQPP, and could not do any work on the Trail that would control erosion or sedimentation.

Four minutes later, on August 22, 2011 at 5:42 p.m., the County received a third letter, which said that it replaced the first two letters. It repeated the approvals and restrictions of the second letter, but added an additional limitation. Not only could the County not work outside the “traveled way” as defined, but it also could not install the 4 separately listed items of work described above (sidecast, stockpiles, rock check crossings, and FOTR bridge).

Thus in the space of 27 hours, the County received three different letters constituting authority to proceed, each replacing its predecessor, and each adding a new restriction, so that the final letter prevents any substantial remedial work from being accomplished at all.

The County raised the problem of having 3 contradictory “Approved to Proceed” letters in 27 hours, and the inexplicable restriction to working only within the “traveled way,” in an email to the Water Board on Tuesday August 23, 2011. The ENF was required by the Water Board memo to “provide [a] decision on NEPA CE applicability for maintenance BMPs by . . . Wednesday (August 24<sup>th</sup>).” In an attempt to comply with this directive, the ENF Acting Regional Forester sent an email to the Water Board on August 24<sup>th</sup>. This email stated that on August 19<sup>th</sup>, the maintenance on the Wentworth Springs Road from Airport Flat to Wentworth Springs Campground, and on the Rubicon Trail from Walker Hill to Little Sluice, were categorically excluded from further NEPA analysis, and did not involve any extraordinary circumstances. The email explained that the County was authorized to maintain the BMPs that had previously been installed in 2010 on the Rubicon Trail from Wentworth Springs Campground to Walker Hill. However, this email inexplicably did not reference the three “Approved to Proceed” letters of August 22<sup>nd</sup> and 23<sup>rd</sup>, and failed to mention the “traveled way” problem.

The ENF email of August 24<sup>th</sup> did provide a timeline to resolve the 4 special items as follows:

- (1) Sidecast work will be the subject of a field visit by engineers on August 25<sup>th</sup> and then evaluation by resource specialists.
  
- (2) One stockpile on the Airport Flat segment of Wentworth Springs Road near Rocky Basin Creek will be the subject of a field visit by engineers on August 25<sup>th</sup>. Five proposed stockpiles along the Trail between Winter Camp and Rubicon Springs will be the subject of field visits by engineers during the week of August 29<sup>th</sup>, plus field review and analysis by resource specialists.

(3) Rock check crossings and rock outlet protection, particularly in the area of Winter Camp, will be the subject of field visits during the week of September 29<sup>th</sup> and will also be the subject of unspecified analysis.

(4) Replacement of the FOTR bridge will be included in the EIS for the easement, and therefore will not be completed until the EIS is completed in April – August 2012.

The August 24<sup>th</sup> email also said that on September 22 and 23 the engineers would perform a field survey of the Rubicon Trail from Little Sluice to Rubicon Springs for the BMP work “the County proposes to perform during the 2012 field season.” This is actually work that the County had originally planned on performing in the 2011 season.

The August 24<sup>th</sup> email also referred to the Fawn Lake Inventoried Roadless Area (IRA), and said that the County’s maintenance work inside the IRA would be evaluated in the EIS, and the work outside the IRA would be field reviewed by the ENF resource specialists in October 2011. The August 24<sup>th</sup> email said that the ENF would complete its analysis “during the winter of 2011” and a CE will be prepared authorizing the County to install BMPs in the vicinity of Fawn Lake “during the 2012 field season.”

#### Meeting of August 26, 2011

The above email from the ENF failed to solve the problem of the limitation to the “traveled way”, and raised a number of new issues, so the County and ENF staffs met on August 26, 2011. At that meeting, the ENF agreed that the three engineers who had visited the Rubicon Trail the day before on August 25<sup>th</sup> (two of whom were present at the meeting) had all agreed that the BMPs in the SSWQPP were road maintenance, and were not road construction or reconstruction. The ENF staff agreed with the August 24<sup>th</sup> email that there were no “extraordinary circumstances” on the Airport Flat to Wentworth Springs Campground segment of Wentworth Springs Road, nor on the Rubicon Trail from Walker Hill to Little Sluice. The ENF also agreed that the BMPs should not be limited to the “traveled way” only, but could be installed in the “roadway” or “road prism,” defined as from the original ground on one side of the road to the original ground on the other side, including the full road surface plus any berms, ditches, cut slopes or fill slopes. No explanation was offered for why the restriction to the “traveled way” appeared in the two “Approved to Proceed” letters of August 22<sup>nd</sup>. The County asked for a new letter to replace the old ones which eliminated the “traveled way” restriction. The ENF said such a letter, signed by the Forest Supervisor, would be given to the County the following Monday, August 29<sup>th</sup>.

County staff inquired about the NOI that the ENF schedule said would occur on August 26, 2011, and that the Water Board memorandum ordered to be issued on that day. The ENF staff said it would be mailed out on the following Monday, August 29<sup>th</sup>, and would be published in the Federal Register later that week on September 1<sup>st</sup> or 2<sup>nd</sup>. When it was pointed out that this was later than the ENF schedule and the Water Board memorandum, ENF staff explained that they felt they had met the schedule because the NOI was technically “ready” on August 26<sup>th</sup> even though it would be sitting on someone’s desk until Monday. When asked if the delay in the first item on the schedule, the NOI, would cause all of the subsequent dates to slip, the ENF did not know.

The ENF staff confirmed the schedule in the ENF email to the Water Board of August 24<sup>th</sup> for special items 1 through 4. In regard to the stockpiles (item 2), the County pointed out that it would be best if the stockpiles could be approved sooner rather than later this season, because it might be possible to coordinate the helicopter lift of rock into the stockpile sites this season so the material would be on-site at the beginning of the 2012 season, thus saving a great deal of time. Another meeting was scheduled for October 2011, at which time it was expected that many of the various scheduled items described above would be completed.

#### ENF Letter of August 31, 2011

The letter promised for August 29<sup>th</sup> was received on August 31<sup>st</sup>. It rescinded the three “Approved to Proceed” letters of August 21<sup>st</sup> and 22<sup>nd</sup>. The letter of August 31<sup>st</sup> removed the restriction limiting work to only within the “traveled way” and confirmed that the work could be done within the “trail/roadway prism.” It reiterated that the County was authorized to clean out the previously installed BMPs from Wentworth Springs Campground to Walker Hill, and that the County was authorized to install BMPs per the SSWQPP on the Wentworth Springs Road and on the Rubicon Trail from Walker Hill to Little Sluice. It gave approval for special item number 1 (pulling sidecast back on to the road surface) and part of special item number 2 (one stockpile on Wentworth Springs road near Rocky Basin).

The letter did not mention clearing the Trail from Little Sluice to Rubicon Springs, the remaining 5 stockpiles on that section, specialty items 3 and 4, the Fawn Lake IRA, the two bridges, and a schedule for approvals needed for the 2012 season, which hopefully could be obtained before the end of August 2012!.

## II. WHERE ARE WE NOW?

As of September 1, 2011, the situation is as follows:

1. The Programmatic Agreement has not been signed. The most recent version includes 2 items that it shouldn't: the Area of Potential Effect (APE) should not include Wentworth Springs Road, which is a county maintained road that leads to the Rubicon Trail, and the PA should not include two private organizations (Rubicon Trail Foundation and Jeepers Jamboree, Inc.), who have not even been contacted about their inclusion. The currently proposed version of the PA appears to prevent construction of the Gerle Creek and Ellis Creek bridges until a final determination is made concerning the eligibility of the Rubicon Trail for the National Register of Historic Places, which may take years, and will surely cause the loss of the funding obtained for these bridges. It is not clear at this point what the effect of the PA will be, whether positive or negative, for any particular portion of the Rubicon Trail work. Unless and until this is clarified, the County is not inclined to sign the PA.
2. It has been established that the ENF can issue approval to proceed documents without the PA having been signed. It has issued four such letters already.
3. It has been established, and the ENF has agreed, that all BMPs described in the BMP toolbox, and delineated in the SSWQPP, constitute road maintenance as defined in the applicable federal laws and regulations, and are not road construction or reconstruction.

The work proposed for Wentworth Springs Road from Airport Flat to Wentworth Springs Campground is also road maintenance and is not road construction or reconstruction.

4. The ENF has determined that there are no “extraordinary circumstances” that would prevent a Categorical Exemption from being used for the BMPs described in the SSWQPP on (a) Wentworth Springs Road from Airport Flat to Wentworth Springs Campground, or on (b) the Rubicon Trail from Walker Hill to Little Sluice, or in regard to (c) the maintenance of the existing BMPs installed in the summers of 2009 and 2010 on the Rubicon Trail from Wentworth Springs Campground to Walker Hill.
5. The County’s planned road maintenance work on (a) Wentworth Springs Road from Airport Flat to Wentworth Springs Campground, and on (b) the Rubicon Trail from Walker Hill to Little Sluice, and (c) the maintenance of the existing BMPs installed in the summers of 2009 and 2010 on the Rubicon Trail from Wentworth Springs Campground to Walker Hill, are categorically exempt under NEPA, and do not involve any extraordinary circumstances, and therefore may proceed independent of the EIS for the FRTA easement.
6. The County is currently approved to proceed with (a) its planned maintenance work in 2011 on Wentworth Springs Road from Airport Flat to the Wentworth Springs Campground, and with (b) its planned work installing BMPs in accord with the SSWQPP on the Rubicon Trail from Walker Hill to Little Sluice, and with (c) its planned maintenance of the BMPs installed last year on the Rubicon Trail from Wentworth Springs Campground to Walker Hill. The restriction to work only within the “traveled way” contained in the letters of August 22, 2011, is eliminated, and the County’s work is authorized within the “roadway” as defined in the diagram attached to those letters, which in a road section is from original ground on one side to original ground on the other, and includes the full road surface plus any berms, ditches, cut slopes or fill slopes. The ENF has also approved special item number 1 (sidecast work) and the one stockpile in special item 2 on Wentworth Springs Road.
7. The County engineer provided a complete Operations and Maintenance Plans to the ENF engineer on August 31, 2011. ENF engineers will complete their analysis and finalize the O&M plans by September 1, 2011.
8. The Notice of Intent (NOI) which the ENF indicated would be issued on August 26<sup>th</sup>, and which the Water Board ordered to be issued on that day, was completed on August 29, 2012, and has been sent for publication in the Federal Register. It is not known what effect this delay will have on all of the subsequent dates in the ENF schedule for its EIS.
9. The ENF should adhere to the schedule for its NEPA analysis for the FRTA easement that it gave the Water Board on August 17, 2011. The County will request that any potential delay in adhering to that schedule will be immediately reported in writing to the County and to the Water Board.
10. In regard to special item number 2, stockpiles, the one stockpile on the Airport Flat segment of Wentworth Springs Road near Rocky Basin Creek was the subject of a field visit by County and ENF engineers on August 25<sup>th</sup> and was approved in the Forest Supervisor letter of August 31, 2011. The five proposed stockpiles along the Rubicon

Trail between Winter Camp and Rubicon Springs will be the subject of field visits by engineers during the week of August 29<sup>th</sup>, plus field review and analysis by ENF resource specialists. The ENF will endeavor to complete the task of reviewing and flagging acceptable stockpile sites in sufficient time during the fall of 2011 so that a helicopter lift of rock onto those stockpile sites can be accomplished this season. The ENF previously said it would give approval to proceed with the 5 stockpiles by September 2, 2011.

11. Special item number 3, rock check crossings and rock outlet protection, particularly in the area of Winter Camp, will be the subject of field visits during September 12 - 16, 2011. All field work and analysis should be completed in a timely manner so that this work can be accomplished during the 2012 construction season. Approval to proceed must be received by the County by February, 2012.
12. Special item number 4, replacement of the FOTR bridge, will be included in the EIS for the easement, which according to the ENF schedule is expected to be completed in April – August 2012. The individual grant for this bridge is scheduled to expire on August 31, 2012, so the current ENF schedule for the easement EIS potentially threatens the loss of funding for this project.
13. ENF engineers will perform a field survey on September 22 and 23, 2011, of the Rubicon Trail from Little Sluice to Rubicon Springs for the BMP work delineated in the SSWQPP. ENF staff should then perform all other analyses necessary, and should give approval to proceed to the County in a timely manner so that the work can be accomplished during the 2012 construction season. Approval to proceed must be received by the County by February, 2012.
14. The County's maintenance work inside the Fawn Lake Inventoried Roadless Area (IRA), if any, will be evaluated by the ENF in the EIS. The County's maintenance work outside the IRA would be field reviewed by the ENF resource specialists in October 2011. All analyses will be completed during the winter of 2011. Approval to proceed should be issued in a timely manner so that the work can be accomplished during the 2012 construction season. Approval to proceed must be received by the County by February, 2012.
15. The CEQA analysis for the proposed bridge at Ellis Creek was completed in February 2011. The NEPA analysis was not completed because of a concern raised by SHPO. The ENF says NEPA on the bridge will be analyzed in the EIS for the FRTA easement. According to the schedule the ENF gave the Water Board on August 17<sup>th</sup>, the Record of Decision (ROD) for the FRTA easement EIS will be issued on April 18, 2012. At the Water Board meeting of August 17, 2011, Regional Engineer Earl Applecamp noted that it would typically take up to a year after the ROD is issued for the ENF to actually record a conveyance of the easement, and suggested that some interim documentation could be executed immediately upon issuance of the ROD that would allow construction of the bridge to begin before the formal conveyance is eventually recorded. Perhaps a right-of-way certificate and a special use permit would suffice. The ENF should advise what documentation will be issued at the time of the ROD that would allow construction of the bridge to commence during the 2012 season so that the funding can be preserved. Another issue is that the currently proposed PA appears to prevent construction of the bridge until a final determination is made concerning the eligibility of the Rubicon Trail

for the National Register of Historic Places, which may take years. This delay also has the potential to cause the loss of the funding previously obtained for this bridge.

16. The proposed Gerle Creek bridge is on a county-maintained road on private property. The NEPA/CEQA analysis was certified as complete in February, 2011. The ENF should confirm that no approval or permit of any kind is required from the ENF in order for the County to construct this bridge, which is currently planned for summer 2012. The Army Corps of Engineers is currently saying it will not issue a §404 permit on the ground that it must re-review the historic aspects of the bridge in relation to the Rubicon Trail. The currently proposed PA appears to prevent construction of this bridge until a final determination is made concerning the eligibility of the Rubicon Trail for the National Register of Historic Places, which may take years, and this delay appears likely to cause the loss of the funding obtained for this bridge.
  
17. The ENF advised the County of its plan to acquire 166 acres of land along Wentworth Springs Road in the vicinity of Rocky Basin Creek. A concrete bridge built in 1937 crosses Rocky Basin Creek on this property. The County will request all documents concerning this proposal that currently exist, and will ask the ENF to keep the County apprised of all events related to this proposed acquisition and provide all documents generated in the future concerning this proposed acquisition. The ENF should confirm the preexisting road right of way held by the county, and confirm that this right of way will be preserved after the ENF takes title.