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## Digest: Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection

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*Digest: Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection*

*Kari Kadomatsu*

Opinion by Werdegar, J., expressing the unanimous view of the Court.

Issue

Did the California Department of Forestry and Fire Protection violate the law in approving timber harvest plans in selecting geographic areas for analyzing the cumulative impacts of logging on two animal species and in analyzing the effects of potential herbicide use after logging?

Facts

Real party in interest Sierra Pacific Industries submitted three timber harvest plans (THPs) for the harvesting of trees on private lands in the Sierra Nevada region.<sup>1</sup> The THPs analyzed the cumulative impacts of Sierra Pacific's past, present and future logging efforts on the habitat of wildlife located in "geographic areas previously designated as State Planning Watersheds."<sup>2</sup> The THPs concluded that Sierra Pacific's logging would be "unlikely to cause short or long-term significant adverse effects on the habitat available" for the California spotted owl and would even "improve habitat for the Pacific fisher . . . ."<sup>3</sup> In April 2002, the California Department of Forestry and Fire Protection (CDF) approved the plans.<sup>4</sup>

Plaintiffs Ebbetts Pass Forest Watch (EPFW) and the Central Sierra Environmental Resource Center (CSERC) sought a writ of mandate to cause the CDF to rescind its approval of the THPs.<sup>5</sup> The trial court denied the petition.<sup>6</sup> The Court of Appeal reversed, concluding that the CDF abused its discretion in approving plans using a single cumulative-impacts assessment area for all biological resources; and that the CDF failed to assess the impacts of Sierra Pacific's use of herbicides in replanting the logged areas.<sup>7</sup> The California Supreme Court granted review.<sup>8</sup>

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<sup>1</sup> Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry & Fire Prot., 183 P.3d 1210, 1214 (Cal. 2008).

<sup>2</sup> *Id.* at 1215.

<sup>3</sup> *Id.*

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

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1215.

## Analysis

## 1. Review of Cumulative Impacts Analysis Under CEQA and the Forest Practice Act

The approval of timber harvesting plans is governed by the provisions of the Z'berg-Nejedly Forest Practice Act (Act).<sup>9</sup> The Act "requires timber owners or operators on private land to submit a timber harvest plan to CDF for approval before harvesting."<sup>10</sup> The plans must consider the "cumulative impacts" of the project and all related past, present, and future projects on the environment.<sup>11</sup> The implementing regulations of the Act, the Forest Practice Rules (Rules), provide that "cumulative impacts" shall be assessed based on Technical Addendum No. 2 "and shall be guided by standards of practicality and reasonableness."<sup>12</sup> The CDF's approval is subject to the California Environmental Quality Act's (CEQA) standard of review for abuse of discretion.<sup>13</sup> Abuse is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."<sup>14</sup>

## 2. Geographic Scope of Sierra Pacific's and CDF's Cumulative Impacts Analysis

The Court agreed with the Court of Appeal that the THPs failed, in a technical sense, to designate different cumulative-impacts assessment areas for the spotted owl and the Pacific fisher, as required by Technical Rule Addendum No. 2.<sup>15</sup> However, the Court said, the THPs have substantive discussions of the potential cumulative impacts on these species all Sierra Pacific's forest lands in the Sierra Nevada region.<sup>16</sup>

The Court said that the California Environmental Quality Act (CEQA) standard of review applied in determining whether Sierra Pacific and CDF, in preparing and approving THPs that formally designated a single cumulative-impacts assessment area for all biological resources, failed to

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<sup>9</sup> *Id.* at 1214, 1216 (citing CAL. PUB. RESOURCES CODE § 4511-4628 (West 2008)).

<sup>10</sup> *Id.* at 1216 (citing §§ 4581-4582.5).

<sup>11</sup> *Id.* (citing Cal. Code Regs., title 14, §§ 895.1, 952.9).

<sup>12</sup> *Id.* at 1216-17 (citing § 898). Technical Rules Addendum No. 2 provides in part:

The [preparer of a harvest timber plan] shall establish and briefly describe the geographic assessment area within or surrounding the plan for each resource subject to be assessed and shall briefly explain the rationale for establishing the resource area. This shall be a narrative description and shall be shown on a map where a map adds clarity to the assessment.

Cal. Code Regs., title 14, § 952.9 (hereinafter, Technical Rule Addendum No. 2). The addendum's appendix provides, "Biological assessment areas will vary with the species being evaluated and its habitat." *Id.*, append. factor C.

<sup>13</sup> *Id.* at 1217 (citing *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505 (Cal. 1994)).

<sup>14</sup> *Id.* (quoting *Vineyard Area Citizens for Responsible Growth, Inc., v. Rancho Cordova*, 150 P.3d 709 (Cal. 2007)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1217-18.

comply with the Act and the Rules.<sup>17</sup> The standard depended on whether the alleged violation was procedural, which required *de novo* review, or factual in nature, which is reviewed for substantial evidence.<sup>18</sup> The Court found that this was a procedural question.<sup>19</sup> Under *de novo* review, the Court said, CDF acted correctly in approving the THPs.<sup>20</sup> The Court reasoned that the THPs “devoted ample discussion to cumulative impacts on the two species at issue, on a much broader geographic scale . . . .”<sup>21</sup> The Court added that Technical Rule Addendum No. 2’s purpose is not to require “rigid adherence to a particular analytical process” but to be “reasonably tailored” to each species to “ensure that the public and decision makers receive full information before the project is approved.”<sup>22</sup>

### 3. Adequacy of Sierra Pacific’s and CDF’s Analysis of Future Herbicide Use

The Court also disagreed with the Court of Appeal that the THPs failed to assess the environmental impacts of Sierra Pacific’s potential post-harvest herbicide use.<sup>23</sup> The Court said that, “[w]hen a proposed act, such as the application of herbicides, is reasonably foreseeable in general terms, the THP must include a general discussion of the act and its possible environmental effects, but need not include a detailed analysis of specific acts that cannot reasonably be foreseen at the time THP is prepared.”<sup>24</sup> The Court reasoned that, while the THPs stated that the use of pesticides was “speculative,” they recognized that their use was “reasonably foreseeable,” discussed their potential impacts, and concluded that their use in reforestation would have “no significant adverse environmental effects” on plant biodiversity.<sup>25</sup> The Court concluded that “CDF did not abuse its discretion by accepting the plans’ finding that the precise parameters of future herbicide use could not be predicted . . . .”<sup>26</sup>

### Holding

The Court held that the CDF did not violate the law in approving the timber harvest plans submitted by Sierra Pacific.<sup>27</sup>

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<sup>17</sup> *Id.* at 1220.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1221.

<sup>23</sup> *Id.* at 1224.

<sup>24</sup> *Id.* (quoting *Laurel Heights Improv. Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278 (Cal. 1988)).

<sup>25</sup> *Id.* at 1222–23.

<sup>26</sup> *Id.* at 1225.

<sup>27</sup> *Id.* at 1220, 1225.

### Legal Significance

This case illustrates the judicial system's strong deference toward an agency's findings and approval of timber harvest plans. Under *de novo* review of whether the THPs failed to follow explicit procedural guidelines, the Court applied a flexible standard of "practicality and reasonableness" to conclude that the THPs' cumulative impacts discussion was substantively sufficient and served its purpose of full and complete disclosure. Under abuse of discretion review on the second issue, the Court again found that disclosure was sufficient by applying a flexible "reasonably foreseeable" standard to conclude that the plans did not require a detailed and precise evaluation of the impacts of potential herbicide use.