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ARTICLE

REGULATION OF LOGGING ON PRIVATE LAND IN CALIFORNIA UNDER GOVERNOR GRAY DAVIS

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I. INTRODUCTION

This article examines the performance of Governor Gray Davis' administration in regulating logging on private and state-owned lands in California. In order to evaluate that performance in context, this article describes the laws and administrative agencies governing this industry, as well as the principal judicial decisions relevant to current legal and policy issues. The article describes the Davis administration's responses to the most serious challenges facing this industry, including the listing of numerous anadromous fish species in coastal areas as threatened or endangered under the federal Endangered Species Act, and the continuing decline of old-growth forest-associated wildlife species in the north coast and Sierra Nevada regions. The article also explores the Davis administration's responses to other federal and state regu-

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latory agencies with jurisdiction over resources affected by logging, as well as the political context of these decisions, including the possible influence of election campaign contributions. In addition, incentive-based and other non-regulatory approaches are briefly discussed.

Few issues in California have been more controversial or engendered more passionate public debate than the damage to the state's environment from logging. The almost complete disappearance of the primeval old-growth redwood forests that once blanketed the north coast of California has been the focal point for much of the debate. Since the redwood forests have for the most part remained in private hands, they are subject to regulation by the state of California. And the fate of the redwoods has brought several waves of litigation, ballot initiatives, new regulations and numerous public acquisitions, all designed to preserve these forests from commercial logging.

While logging has also caused severe environmental changes in the Sierra Nevada region, most environmental activism in the region has focused on the federal government's management of the eleven Sierran province national forests. However, a recent increase in clearcut logging on private lands in the Sierra Nevada has triggered widespread public concern among tourist-oriented business leaders and increased public scrutiny of the state's regulation of logging in this region.

To evaluate the Davis administration's performance in this area, the authors of this article conducted their own research into Governor Davis' election fundraising activities and relied on their own extensive, continuous experience in working with and against the California Department of Forestry ("CDF") and the Board of Forestry ("Board") over the last 10 to 15 years. In addition, this article discusses the results of a number of other investigations conducted by government agencies and non-profit organizations into the effectiveness of California's regulation of logging.

Beginning in the 1970s and continuing to the present, activists working to protect California's forests have concluded that the state's regulatory system is ineffective and biased in favor of the economic goals of timberland owners. Since Gov-

ernor Davis campaigned as "committed to the environment,"[1] it has been a source of continuing frustration in the environmental community that the governor has done very little to change this negative perception. Indeed, in several high-profile ways, he has exacerbated these problems.

This is not just the conclusion of a fringe band of disgruntled "greens." For example, in 1998 the federal Environmental Protection Agency ("EPA") reviewed California's coastal nonpoint pollution control program pursuant to Section 6217(a) of the Coastal Zone Act Reauthorization Amendments of 1990. The EPA conditioned its approval of the state's program on the attainment of specific improvements in forestry regulation, stating:

> Although California does have the basic legal and programmatic tools to implement a forestry program in conformity with Section 6217, these tools have not been fully effective in ensuring water quality standards are attained and maintained and beneficial uses are protected. California waters currently experience significant impacts from forestry. For example, silviculture is the leading source of impairment to water quality in the North Coast of California. Related to these water quality problems, California has a number of species, in particular salmon, that are endangered, threatened or otherwise seriously at risk, due in very significant part to forestry activities that impair their spawning, breeding and rearing habitat. (http://www.epa.gov/Region9/water/nonpoint/cal/finding.html) (last visited April 4, 2001)

In 1993 the California Legislature charged the "Little Hoover Commission" with investigating and reporting on the effectiveness of the state's timber harvest plan program. The Commission's June 1994 report found that:

> Despite the hoops that timber operators must jump through and the barriers erected by the planning process, the environment is not being effectively protected because of the flawed concept that the Timber Harvest Plan process is based on—-namely that ecology can be addressed on a parcel-by-parcel basis. In addition, the State's focus is almost entirely on procedural steps rather than on the eventual outcome. As a result, what occurs in the real world may have

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[1] *See* Governor Gray Davis, *Official Website* (last visited Feb. 16, 2001) <http://www.governor.ca.gov>.

> very little relationship to what is prescribed in a harvest plan, and there is no mechanism for linking demonstrated effectiveness of mitigation measures to future policy directives.[2]

In 1997 the EPA reiterated some of these criticisms in response to a petition submitted to the Board of Forestry requesting that the Board adopt emergency rules to protect coho salmon habitat in the Humboldt Bay region, stating:

> In 1994, the Little Hoover Commission found that the Timber Harvest Plan (THP) 'process looks at potential damage on a site-by-site basis rather than across entire ecosystems, making it difficult to assess cumulative impacts over time and throughout watersheds'. EPA concurs that improved methods for assessing cumulative effects on a watershed basis are necessary. In addition, EPA and the National Oceanic and Atmospheric Administration have found that additional management measures are necessary in order to attain and maintain water quality standards.[3]

In 1996 and 1997 the National Marine Fisheries Service ("NMFS") listed the Central California and Southern Oregon/ Northern California Coast populations of coho salmon as threatened under the ESA.[4] On August 18, 1997, NMFS listed the Central California Coast and South-Central California Coast populations of steelhead as "threatened."[5] On June 7, 2000, NMFS listed the Northern California population of steelhead trout as "threatened."[6] In all of these rules, NMFS has repeatedly criticized the state's regulation of logging on

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[2] *See* Little Hoover Commission, *Timber Harvest Plans: A Flawed Effort to Balance Economic and Environmental Needs* (last modified Jun. 8, 1994) <http://www.lhc.ca.gov/lhcdir/126rp.html>.

[3] *See* Letter from Alexis Strauss, Acting Director, Water Division, U.S. *Environmental Protection Administration*, to Robert Kersteins, *California Board of Forestry* (Nov. 21, 1997) (on file with author).

[4] *See* Endangered and Threatened Species; Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56138 (1996); *See also* Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24588 (1996).

[5] *See* Endangered and Threatened Species; Listing of Several Evolutionarily Significant Units (ESUs) of West Coast Steelhead, 62 Fed. Reg. 43937-43954 (1997).

[6] *See* Endangered and Threatened Species: Threatened Status for One Steelhead Evolutionarily Significant Unit (ESU) in California, 65 Fed. Reg. 36074-36094 (2000).

private lands as inadequate to protect endangered fish from harm, and NMFS specifically cited these inadequacies as one of the bases for its decisions to list these species.[7]

In the summer of 2000, Public Employees for Environmental Responsibility, a non-profit membership organization of publicly employed resource professionals, released its survey of state-employed biologists and other resource professionals.[8] The survey results indicate that Governor Davis and key cabinet-level appointees often hinder the legally mandated efforts of these resource specialists to protect environmental and public trust resources by backing the logging industry in virtually every major conflict with state-employed biologists.[9]

In short, all of the independent programmatic reviews of the state's regulation of logging have found that California is not achieving its professed goal of protecting the environment. Based on this data, the authors have identified several areas where the Davis administration can improve its performance in regulating logging on private land.

- The institutional culture at CDF has been and remains "reactive" rather than "proactive." CDF typically takes action in response to pressure generated by court rulings, other government agencies or the Legislature. Rarely does CDF take the initiative to develop solutions to ongoing problem areas within its mission.
- The Davis administration's policy choices often appear driven more by political pressure than science. CDF should

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[7] *See* discussion *infra* Section III.C.

[8] *See* California Public Employees for Environmental Responsibility Report, *California's Failed Forest Policy: State Biologists Speak Out* (last modified Summer 2000) <http://www.peer.org/press/127.html>.

[9] In addition, the U.S. Fish and Wildlife Service ("USFWS") decision to list the Northern Spotted Owl as a threatened species, while it did not directly critique the California forest practice program, it noted that timber harvesting is a principal cause of habitat loss and fragmentation for this species. *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26114, 26183 (1990). Similarly, the USFWS listed the marbled murrelet as a "threatened" species in California on September 28, 1992, finding: "[t]he marbled murrelet is threatened by the loss and modification of nesting habitat (older forests) primarily due to commercial timber harvesting." *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Washington, Oregon and California Population of Marbled Murrelet, 57 Fed. Reg. 45328 (1992).

hire qualified fish and wildlife biologists and base its policy and permit decisions on their advice.

- CDF has no cumulative impact assessment methodology. Instead, the forest practice rules provide a checklist of questions to answer and factors to rate, and a list of topics to discuss. CDF's ultimate conclusion regarding the significance of cumulative impacts represents a "qualitative" judgement, with no objective standards by which to measure its reliability or validity. Virtually all reputable scientists view CDF's cumulative impacts assessments as methodologically flawed.
- The adoption of the California Forest Practice Act in 1973 and the subsequent implementation of the forest practice rules have not prevented populations and habitat of numerous species of fish and wildlife from declining to the point where they have been or soon will be listed as threatened or endangered under the federal or state Endangered Species Acts.
- The Headwaters Forest Agreement and the Pacific Lumber Company Habitat Conservation Plan represent a significant improvement in the level of protection for specific old-growth redwood groves. However, the logging of other old-growth forests both on the north coast and in the Sierra Nevada continues unabated. The conversion of California's forests from biologically diverse old-growth wilderness to second- and third-growth tree farms is almost complete. Yet conservation organizations are still waiting for CDF or the Board to find that this represents a significant impact on the environment. CDF and the Board continue to ignore the "big picture" while "creeping incrementalism" proceeds apace.
- The Board of Forestry's decision not to regulate the logging of oak woodlands has allowed significant changes to occur in this biologically important ecotype.

The timber industry has spent the last one hundred and fifty years logging forests that took thousands of years to develop and has relied on the availability of this natural capital for its profitability. The *laissez-faire* regulatory system of previous administrations has resulted in significant reductions in available timber resources and well-documented environmental damage. This depletion is also causing a shift from the production of saw timber and lumber products derived from older, larger trees to intensive management of younger, smaller trees for the production of wood fiber used in reconstituted wood products. As forest resources dwindle and environ-

mental damage becomes more critical, it is becoming increasingly difficult for CDF and the Board to effectively balance natural resource protection and industry profitability.

II. THE REGULATORY CONTEXT[10]

A. LEAD AND RESPONSIBLE AGENCIES

Logging on private land in California is regulated by two administrative agencies, the California Board of Forestry and the California Department of Forestry and Fire Protection, pursuant to the Z'berg-Nejedly Forest Practice Act of 1973 ("FPA").[11] The FPA provides that commercial logging is permitted only upon CDF's approval of a timber harvest plan.[12] CDF's process for approving timber harvest plans is a certified regulatory program pursuant to the California Environmental Quality Act ("CEQA").[13] Therefore, the timber harvest plan is a document that functions as the equivalent of an environmental impact report under CEQA.[14]

The Board of Forestry is charged with adopting regulations governing the conduct of timber operations and the criteria for CDF's approval of timber harvest plans and timber-

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[10] This article provides a summary treatment of the application of three statutes, the California Forest Practice Act, California Environmental Quality Act and the federal Endangered Species Act, to logging on private land in California. There are a number of other relevant statutes, including the Porter-Cologne Water Quality Act (California Water Code 13000 *et. seq.*); the federal Clean Water Act (33 U.S.C. §1251 *et. seq.*), the California Endangered Species Act (California Fish and Game Code § 2050-2116), the Timberland Productivity Act (Government Code § 51100 *et. seq.*) and more. A discussion of these statutes is outside the scope of this article.

[11] *See* CAL. PUB. RES. CODE § 4511 *et. seq.* (West 1984).

[12] *See* CAL. PUB. RES. CODE § 4581 (West 1984). This section provides that "No person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the department pursuant to this article."

[13] *See* CAL. PUB. RES. CODE § 21000 (West 1996). CEQA is codified at Public Resources Code § 21000 *et. seq.* Public Resources Code § 21080.5 sets forth the requirements for certified regulatory programs under CEQA. CEQA Guideline § 15251 lists all programs currently certified pursuant to Public Resources Code § 21080.5. The CEQA Guidelines are regulations adopted by the Secretary of the California Resources Agency to implement CEQA and are codified at Title 14, Code of California Regulations, § 15000 *et. seq.*

[14] *See* Sierra Club v. State Board of Forestry, 7th Cal. 4th 1215, 1230-1231 (1994).

land conversion permits.[15] This rulemaking process is also a certified regulatory program pursuant to CEQA.[16]

The FPA requires that anyone intending to convert commercial timberlands from timber production to non-timber uses must first obtain a timberland conversion permit from the Board of Forestry.[17] The Board has, by regulation, delegated this function to the director of CDF.[18] Unlike the timber harvest plan approval and rulemaking programs, the timberland conversion permit program is not a certified regulatory program under CEQA. Therefore, for timberland conversion permits CDF follows the usual CEQA process of preparing an initial study, followed by either a negative declaration or an environmental impact report.[19]

In addition to CDF and the Board of Forestry, a number of other state agencies play a role in the approval of timber harvest plans. The FPA requires that CDF "for the purpose of interdisciplinary review, shall transmit a copy [of timber harvest plans] to the Department of Fish and Game, the appropriate California regional water quality control board, the county planning agency, and, if the area is within its jurisdiction, the Tahoe Regional Planning Agency, as the case may be."[20] The FPA also provides that "The department shall invite, consider, and respond in writing to comments received from public agencies to which the plan has been transmitted and shall consult with those agencies at their request."[21] In addition, the CEQA provision governing certified regulatory programs requires, as a qualification for certification, that "a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decision making and . . . Require the administering agency to consult with all public agencies which have jurisdiction, by law, with respect to the

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[15] *See* CAL. PUB. RES. CODE § 4551 (West 1984).

[16] *See* CAL. CODE REGS. tit. 14, § 15251 (2000) (CEQA Guidelines).

[17] *See* CAL. PUB. RES. CODE § 4621 (West 1984).

[18] *See* CAL. CODE REGS. tit. 14, § 1102 (2000).

[19] *See* CAL. PUB. RES. CODE § 21080(a) (West 1996), CAL. CODE REGS. tit. 14, §§15268, 15060, 15063, 15070, 15081 (2000) (CEQA Guidelines).

[20] *See* CAL. PUB. RES. CODE § 4582.6 (West 1984).

[21] *See id.*

proposed activity."[22]

The forest practice rules require that CDF convene a "review team" composed of representatives of CDF, the California Department of Fish and Game ("CDFG"), the California Division of Mines and Geology ("CDMG") and the regional water quality control board ("RWQCB") to review each timber harvest plan.[23] As discussed below, despite this opportunity, both lack of resources as well as political constraints have severely hampered these agencies' active participation in the timber harvest plan approval process.

B. PUBLIC POLICIES EXPRESSED IN THE FPA AND CEQA

The core problem in forestry in California is that many timberland owners attempt to maximize their short-term economic gain from logging, which invariably involves damage to the environment. Indeed, one of the earliest California judicial decisions to consider the scope of the state's authority to regulate logging on private land remarked upon logging's legacy of environmental damage, stating: "It seems to be widely recognized that few, if any, industries adversely affect the rights of others, and the public generally, as do timber and logging operations."[24]

The FPA responds to this clash of interests and values by requiring that CDF and the Board achieve a balance between the production of wood products and protection of the environment. The Legislature's declared intent is "to create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to assure that: . . . The goal

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[22] *See* CAL. PUB. RES. CODE § 21080.5(d) (West 1996).

[23] *See* CAL. CODE REGS. tit. 14, §1037.5 (2000)

[24] *See* Bayside Timber Co. v. Board of Supervisors, 20 Cal. App. 3d 1, 6-8 (1971). ("It is said that the greatest 'threat to salmon and steelhead are land use practices which are destroying the basic productivity of streams by promoting the flow of silt and debris from adjacent lands.' [fn omitted] And at least one California river 'has been dammed four times since 1920; yet as soon as reservoirs have been built, they have been filled with more mud than water.' [fn omitted] It was said, 'If we continue careless practices of land use on our major watersheds, our entire reservoir system will someday be converted into a series of flat alluvial plains through which old rivers will cut their channels as they flow to the sea.' [fn omitted]); *See also* Natural Resources Defense Council, Inc. v. Arcata Nat'l. Corp., 59 Cal. App. 3d 959, 965 (1976). ("It is undisputed that . . . logging operations and timber harvesting activities may have a significant effect on the environment.")

of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment."[25] The California Attorney General has interpreted the phrase "while giving consideration to" in the FPA as requiring that CDF give equal consideration to environmental protection and timber productivity.[26]

C. THE CERTIFIED REGULATORY PROGRAM.

Ordinarily, projects that may adversely affect the environment and which require a discretionary permit approval from a state agency must be evaluated for environmental impacts under CEQA. The usual process under CEQA is for the state agency to prepare an initial study. If this study indicates that the project will not cause significant adverse effects on the environment, the agency may prepare a "negative declaration" and approve the project. If the initial study indicates that the project may cause significant adverse effects on the environment, the agency must prepare an environmental impact report before approving the project.[27]

Since logging almost always has the potential to cause significant adverse impacts on the environment, CDF would have to prepare EIRs for virtually every timber harvest plan unless such plans were exempt from CEQA. In 1975, the Humboldt County Superior Court ruled that timber harvest plans are not exempt from CEQA; therefore, CDF would have to prepare an EIR for each plan.[28] Consequently, in 1976 the Legislature amended CEQA to provide a limited exemption from CEQA's EIR requirement for projects approved pursuant to programs that the Secretary of the Resources Agency certifies as meeting the requirements of Public Resources Code § 21080.5. On January 6, 1976, the Secretary of Resources certified both CDF's program for approving timber harvest plans and the Board of Forestry's program for adopting forest prac-

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[25] *See* CAL. PUB. RES. CODE § 4513 (West 1984).

[26] *See* 58 Cal. Op. Atty. Gen. 250 (1975).

[27] *See* CAL. PUB. RES. CODE §21080(a) (West 1996), CAL. CODE REGS. tit. 14, §§15268, 15060, 15063, 15070, 15081 (2000) (CEQA Guidelines).

[28] *See* Arcata, 59 Cal. App. 3d at 976.

tice rules as "certified regulatory programs" entitled to this limited exemption from CEQA.[29]

The certification of the timber harvest plan program as a "functionally equivalent" regulatory program under CEQA has created at least two conundrums for state regulators, timberland owners and the conservation community. First, the time period specified by the Forest Practice Act for CDF to approve or deny a timber harvest plan (i.e., fifteen days after filing the plan or after any on-site pre-harvest inspection, whichever is later)[30] is usually not enough time to conduct a thorough assessment of the cumulative impacts of logging on the environment. This conundrum has never been resolved; it is simply played out in practice according to the degree of public attention that any given timber harvest plan generates. Where public scrutiny is intense, such as timber harvest plans submitted by Pacific Lumber Company in the Headwaters Forest region of Humboldt County, CDF requests more review time and more detailed information from the plan submitter prior to plan approval. On the other hand, where public scrutiny of a timber harvest plan is minimal or nonexistent, which is true in most of the state most of the time, CDF approves timber harvest plans closer to the expedited time schedule referenced in the FPA.

Second, timber harvest plans submitted by large timberland owners are, by definition, smaller parts of a longer-term and spatially larger project to harvest the land continuously for the foreseeable future. This simple fact constantly collides with the CEQA "principle that 'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.' "[31] This piecemealing conundrum is rarely resolved, though it underlies much timber harvest plan litigation.

As a result of certification, the legal and political battleground since the adoption of the FPA has been defined by two interrelated, overarching issues: the extent to which CEQA's

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[29] *See id.*

[30] *See* CAL. PUB. RES. CODE § 4582.7 (West 1984).

[31] *See* Laurel Heights Improvement Ass'n v. Regents of the University of California, 47 Cal. 3d 376, 396 (1988).

substantive provisions apply to timber harvest plans, and whether CDF assesses the cumulative impacts of timber harvest plans in the manner required by law. The factual content of these disputes has involved a wide range of environmental values, including endangered or threatened species such as the coho salmon, Northern spotted owl and marbled murrelet.[32] Assessing the impact of logging on these species requires considering a large body of existing scientific literature. In addition, field studies are often necessary to determine whether any of these species are present in or near a logging plan or whether the plan contains or will affect suitable habitat for these species. CDF is also legally obligated to assess cumulative watershed impacts, such as increases in peak stream flow, sedimentation and channel morphology degradation.[33] These environmental impacts, while dramatically visible on the ground, are exceedingly complex to describe and predict on paper.

Although timber harvest plans are often voluminous, it is virtually impossible to conduct a careful impact assessment for resources of this complexity and sensitivity within the expedited time schedule for approving timber harvest plans established by the FPA and allowed by the functional equivalence certification. This is just one of several factors that have convinced most environmental activists familiar with the system that the timber harvest plan approval process is incapable of good science, as well as biased in favor of the resource extraction goals of timber owners. As we shall see, Governor Davis has done very little to change that perception.

D. SIGNIFICANT JUDICIAL DECISIONS INTERPRETING CDF'S AUTHORITY TO APPROVE TIMBER HARVEST PLANS

The California Legislature's first attempt to regulate logging on private land was the State Forest Practice Act, adopted in 1965.[34] In 1971 the Court of Appeal struck this law down as an unconstitutional delegation of government author-

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[32] *See* CAL. CODE REGS. tit. 14, § 898.1(c)(3); § 898.2(d), (f); § 912.9 (2001), Technical Rule Addendum No. 2, § 919.9 (1999).

[33] *See* CAL. CODE REGS. tit. 14, § 898.1(c)(1), (d), (f), (g); 898.2(d), (h); 912.9 (2001); Technical Rule Addendum No. 2 (1999).

[34] *See* 1965 Cal. Stat. 1144 § 9.6.

ity to the timber industry because the Act expressly allowed the industry to write the rules that would govern logging.[35] The law was revised and readopted in 1973 as the Z'berg-Nejedly Forest Practice Act of 1973, which provides that the Board of Forestry shall exercise rulemaking power for forest practices. Nevertheless, many critics of the system and of the current administration argue that little has changed and that the industry still writes the rules that the Board adopts.

In 1976 the Court of Appeal held that timber harvest plans approved by CDF under the FPA must also comply with CEQA.[36] Many judicial decisions since have held that all of CEQA's substantive policies and provisions that are not expressly exempted from certified programs as specified in subdivision (c) of section 21080.5 apply to CDF's approval of timber harvest plans.[37] For example, CDF has authority under CEQA to require the submission of information that is neces-

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[35] *See* Bayside Timber, 20 Cal. App. 3d at 1.

[36] *See* Arcata, 59 Cal. App. 3d at 963, 969.

[37] *See* CAL PUB. RES. CODE §§ 4514.5; 21080.5(g) (1984). The FPA and CEQA provide that "any person" may bring an action for writ of mandate to challenge CDF's approval of a timber harvest plan. *See also* Bozung v. Local Agency Formation Com., 13 Cal.3d 263, 272 (1975). California's liberal standing rules apply. *See also* Resources Defense Fund v. Local Agency Formation Comm., 191 Cal. App. 3d 886 (1987); *See also* CAL. PUB. RES CODE § 21177 (West 1996). Exhaustion of administrative remedies is required: only issues raised in the administrative process before CDF may be litigated and only persons who objected to approval of the timber harvest plan may bring an action. *See also* Friends of Old Trees v. CDF, 52 Cal. App. 4th 1383, 1389-1391 (1997). Challenging CDF's approval of a timber harvest plan is by mandamus under Code of Civil Procedure§1094.5. *See also* Fort Mojave Indian Tribe v. California Dept. of Health Services, 38 Cal. App. 4th 1574, 1594 (1995) *citing* Western States Petroleum Assn. v. Superior Court, 9 Cal. 4th 559, 578 (1995). Therefore, evidence in the case may be restricted to the administrative record compiled by CDF in the approval process. Restricting evidence to the administrative record was explicitly limited to "quasi-legislative" decisions by agencies challenged by traditional mandamus under Code of Civil Procedure § 1085; therefore, *Western States* does not provide the rule of decision for quasi-judicial decisions challenged under C.C.P. § 1094.5); *See also* CAL. CODE OF CIV. PROC. § 1094.5(e) (West 1980). "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion; *See also* CAL. CODE OF CIV. PROC. § 1904.5(b), (c) (West 1983). Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by . . . substantial evidence in the light of the whole record."

sary to identify potentially significant environmental impacts, even where there is no specific forest practice rule requiring the submission of such information.[38] CDF must prepare written responses to significant environmental comments.[39] CDF must assess the cumulative impacts of timber harvest plans.[40] CDF must circulate the timber harvest plan cumulative impact assessment to the public for review and comment.[41] CDF cannot rely on nonpublic documents to respond to significant environmental points.[42] CDF must consider a range of reasonable alternatives to the logging proposal contained in a timber harvest plan.[43] While these and other decisions have established the broad legal principles that govern CDF's approval of timber harvest plans, CDF retains discretion as to how to apply these principles to individual timber harvest plans.

A number of judicial decisions have outlined the limits and extent of the Board's rule-making authority. For example, the California Supreme Court held that new forest practice rules governing the conduct of timber operations apply to previously approved timber harvest plans, noting that "it is the board [of forestry], and not the courts, that establishes forest policy."[44] While the Board of Forestry cannot create new exemptions from the FPA,[45] the Board does have the authority to adopt rules exempting specified "emergency" timber harvests from the timber harvest plan requirement of the FPA.[46] And while local ordinances that attempt to regulate the conduct of or impose additional permit requirements on timber operations are generally preempted by state law, which grants sole authority in such matters to the Board,[47] the First

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[38] *See* Sierra Club v. State Board of Forestry, 7 Cal. 4th 1215, 1228-1235 (1994) (holding that Public Resources Code § 21160 applies to certified programs).

[39] *See* Gallegos v. State Bd. of Forestry, 76 Cal. App. 3d 945, 952 (1978).

[40] *See* EPIC v. Johnson, 170 Cal. App. 3d 604, 609-611 (1985); *See also* Laupheimer v. State of California, 200 Cal. App. 3d 440, 462 (1988).

[41] *See* Schoen v. CDF, 58 Cal. App. 4th 556, 565-567 (1997).

[42] *See* Johnson, 170 Cal. App. 3d at 629.

[43] *See* Friends, 52 Cal. App. 4th at 1394.

[44] *See* Public Resources Protection Assn. v. Department of Forestry & Fire Protection, 7 Cal. App. 4th 111, 120 (1994).

[45] *See* Envtl. Protection Information Center v. Dept. of Forestry & Fire Protection, 43 Cal. App. 4th 1011 (1996).

[46] *See* County of Santa Cruz v. Board of Forestry, 64 Cal. App. 4th 826 (1998).

[47] *See* Westhaven Community Dev. Council v. County of Humboldt, 61 Cal. App.

District Court of Appeal upheld a County ordinance regulating the location of timber operations against a preemption challenge.[48]

E. THE FEDERAL ENDANGERED SPECIES ACT

As more forest-dwelling species are listed as threatened or endangered under the federal Endangered Species Act, the ESA has become a more important factor in the regulatory framework governing logging. Congress enacted the ESA in response to growing public concern about extinctions of various species of fish, wildlife and plants caused by "economic growth and development untempered by adequate concern and conservation."[49] The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species . . . . "[50] To achieve this purpose, the ESA authorizes citizen suits "to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof."[51]

Three sections of the ESA have played a significant role in the regulation of logging on private land in California: sections 7, 9 and 10. Section 9 of the ESA forbids "taking" "any endangered species of fish or wildlife."[52] The U.S. Fish & Wildlife Service has, by regulation, extended the take prohibition to all terrestrial wildlife species listed as "threatened."[53] By contrast, NMFS issues rules under section 4(d) of the Act to include threatened species within the section 9 take prohibition after determining on a case-by-case basis which species require that protection (see section III.C.1, *infra*).

The term "'take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to

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4th 365 (1998).

[48] *See* Big Creek Lumber Co. v. County of San Mateo, 31 Cal. App. 4th 418 (1995).

[49] *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1993); *See also* 16 U.S.C. § 1531(a)

[50] *See* 16 U.S.C. § 1531(b).

[51] *See* 16 U.S.C. § 1540(g)(1)(a).

[52] *See* 16 U.S.C. § 1533(a)(1)(B).

[53] *See* 50 C.F.R. § 17.31(a)(1994).

engage in any such conduct."[54] NMFS defines "harm" as: "an act which actually kills or injures fish and wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering."[55]

Section 10 of the ESA provides authority to the USFWS and NMFS to issue "incidental take" permits which provide immunity from section 9 liability.[56] To obtain this permit, the applicant must submit and obtain approval of a Habitat Conservation Plan ("HCP"), which must demonstrate that the incidental taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[57] The Pacific Lumber Company HCP is described in more detail in section III.D below.[58]

Section 7(a)(2) of the ESA requires that federal agencies must "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical . . . . "[59] Section 7(a)(2) requires that all federal agencies "consult" with the USFWS regarding any agency action that may jeop-

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[54] *See* 16 U.S.C. § 1532(19).

[55] *See* 50 C.F.R. § 222.102. The USFWS has issued a similar definition for listed terrestrial wildlife species. 50 C.F.R. § 17.3 (1994). *See* Babbitt v. Sweet Home Ch. of Commun. For Great Or., 115 S.Ct. 2407 (1995), wherein the definition of harm upheld as reasonable interpretation of statute by U.S. Fish and Wildlife Service; *See also* Sierra Club v. Lyng, 649 F.Supp. 1260 (E.D. Tex. 1988) *aff'd in relevant part* 926 F.2d 429 (5th Cir. 1991), where the court found that forest management practices caused "harm" to the species because (1) essential behavioral patterns of woodpeckers had been impaired by isolation of woodpecker colonies from one another by the creation of "islands" of older-growth stands surrounded by clearcuts; (2) isolation causes the available gene pool to become reduced for a given area; (3) logging had eliminated the older stands of trees needed by the birds to use as nests; and (4) cutting of trees which served as windbreaks for the nest trees subjected the birds to increased peril from wind-throw and blow-downs.

[56] *See* 16 U.S.C. § 1539(a)(2).

[57] *See* 16 U.S.C. § 1539(b)(2); § 1539(b)(2)(B)(iv).

[58] *See* 16 U.S.C. § 1531 *et. seq.*

[59] 16 U.S.C. § 1536(a)(2). The Service's regulations also provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03.

ardize listed species or adversely modify their critical habitat. Under section 7(b)(3), the consultation procedures require that the USFWS prepare a "biological opinion" assessing the impact of the action and recommending "reasonable and prudent measures" to avoid jeopardy or adverse modification of critical habitat. Section 7(d) prohibits federal agencies from making, during the consultation period, "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)."

The Environmental Protection Information Center ("EPIC"), based in Garberville, California, has brought several cases under the ESA against private timber harvesting. In 1993 EPIC filed suit against Pacific Lumber Company alleging that its Owl Creek timber harvest plan would cause "take" of marbled murrelet, a "threatened" seabird, in violation of section 9 of the ESA. In 1995 the U.S. District Court found in favor of EPIC and entered a permanent injunction against logging the plan.[60]

In 1995 EPIC filed suit under section 7 of the ESA based on the U.S. Fish and Wildlife Service's participation in CDF's approval of Pacific Lumber salvage logging plans in marbled murrelet habitat and timber harvest plans in Northern spotted owl habitat. EPIC alleged that because CDF's approval of the plans depended on the USFWS' opinions that the logging would not "take" murrelets or owls, the USFWS engaged in "agency action," thereby triggering the consultation and biological opinion requirements of sections 7(a)(2) and 7(b)(3). Two District Court judges issued preliminary injunctions based on these claims. The Ninth Circuit Court of Appeals, however, reversed both injunctions, holding that section 7 does not require "formal consultation" when the USFWS provides advice to state agencies that hold final permit authority over private projects.[61]

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[60] *See* Marbled Murrelet v. Pacific Lumber Co. ("Owl Creek"), 880 F. Supp. 1343 (N.D. Cal. 1995), aff'd Marbled Murrelet v. Pacific Lumber Co. ("Owl Creek"), 83 F.3d 1060, 1066 (9th Cir. 1996), cert den. 519 U.S. 1108; 117 S. Ct. 942; 1997 U.S. LEXIS 697; 136 L. Ed. 2d 831.

[61] *See* Marbled Murrelet v. Babbitt, 83 F.3d 1068 (9th Cir. 1996) ("Marbled Murrelet I"); Marbled Murrelet v. Babbitt, 111 F.3d 1447(9th Cir. 1997) ("Marbled

In 1998, EPIC filed suit against Pacific Lumber Company alleging that its logging of timber harvest plans within the area subject to Pacific Lumber's application for an incidental take permit under section 10 of the ESA violated section 7(d)'s prohibition on the "irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." The District Court granted a preliminary injunction against logging the plans pending completion of the USFWS consultation process under section 7(a)(2), finding that section 7(d) applies to private permit applicants, that section 7(a)(2)'s consultation requirement applies to incidental take permits under section 10, and that both "informal" and "formal" consultation as defined by the USFWS trigger the requirements of section 7(d).[62]

On March 1, 2000, EPIC and 19 other groups filed a section 9 suit against CDF alleging that CDF's approval of timber harvest plans in areas occupied by coho salmon would cause "take" of this species. Plaintiffs sought an injunction against CDF approving timber harvest plans in those areas. On January 22, 2001, the District Court dismissed this lawsuit on grounds that plaintiffs' challenge to previously approved timber harvest plans was barred by the Eleventh Amendment of the United States Constitution, and that plaintiffs' request for an injunction against CDF's future approval of timber harvest plans was not ripe for review under the standards announced in *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).[63]

Murrelet II").

[62] *See* Environmental Protection Information Center v. Pacific Lumber Co., 67 F. Supp. 2d 1090 (N.D.Cal. 1999). On May 5, 1999, the District Court dismissed the case as moot after the USFWS completed the section 7 consultation procedure, issued its biological opinion and issued the section 10 incidental take permit.

[63] *See* Order Granting Motion for Summary Judgement, EPIC v. Tuttle, No. 00-0713-SC (N.D. Cal. 2001).

III. ENTER THE DAVIS ADMINISTRATION

A. BOARD OF FORESTRY APPOINTMENTS

Under the FPA the California Board of Forestry is required to adopt regulations governing the conduct of timber operations.[64] These forest practice rules ("FPRs") are, according to the FPA, the only criteria employed by the director when reviewing timber harvest plans.[65] The Board is made up of nine people, all appointed by the Governor. By law, three are representatives of the timber industry, one is a representative of the range (cattle and sheep) industry, and five are to be chosen from the public at large.[66] All are supposed to represent the interests of the public. Historically, except for one brief period in the mid-1990s, the timber representatives have voted as a block, the range representative has overwhelmingly voted with timber, and since at least 1990, there has always been at least one public member on the Board who also consistently voted with the timber industry. As a result, the Board's actions have reflected the timber industry's substantial influence on forest policy.

Just prior to the Davis inaugural in January of 1999, former Governor Pete Wilson re-appointed one public member, Nikki Clay, and appointed Charlie Brown, an executive with Fruit Growers Supply, a large timber owner, to an industry seat. Governor Davis quickly rescinded these appointments prior to their confirmation by the Senate, leaving the Board with seven members. Due to expiring terms and resignations, within two months the Board was down to four people, two public and two industry representatives. Since a quorum is five members and a majority vote of all nine members is required for rule adoption,[67] the Board was crippled while critical matters such the adoption of rules to protect endangered species languished.

Faced with pressure by the NMFS and others to begin meeting California's commitments to improve logging rules to conserve ESA-listed anadromous fish species, Governor Davis

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[64] *See* CAL. PUB. RES. CODE § 4551 (West 1984).

[65] *See* CAL. PUB. RES. CODE § 4582.75 (West 1984).

[66] *See* CAL. PUB. RES. CODE §§ 730, 731 (West 1984).

[67] *See* CAL. PUB. RES. CODE § 736 (West 1984).

appointed a temporary Board member (acting chief of the Office of Planning and Research, Darryl Young) so a proposed rule package could be noticed for public review at the June 1999 meeting.[68] Young then left the Board in November of 1999 to become Director of the Department of Conservation.

Davis' next Board appointment, in July of 1999, was longtime associate Andrew "Kirk" Marckwald, a respected air quality and energy lobbyist, to a public seat. Marckwald has been a moderate consensus builder who often provides leadership on the Board. At the same time Davis appointed Humboldt County Supervisor Stan Dixon to a public seat.

Then in December 1999 Davis appointed Mark Bosetti, a forester with Sierra Pacific Industries ("SPI"), to an industry seat on the Board. SPI is the state's largest private timberland owner, and with the exception of the first year of the Davis administration, SPI has held a Board seat since 1992. At the same time, Davis re-appointed public member Robert Heald, a professional forester who runs the University of California's Blodgett Experimental Forest in the central Sierra. Heald is respected by the conservation community for his technical expertise and his attempts to convince other members of the Board to strengthen environmental protections in the forest practice program.

Governor Davis did not re-appoint Board Chairman Robert Kersteins, who represented the range industry, when his term expired in January 2000, although he continued on the Board through March 2000. Although he had often voted with the timber industry, some in the conservation community supported Kerstein's re-appointment because he was relatively moderate and embodied much-needed institutional memory. His seat remained vacant until January 29, 2001, when the Governor appointed Norman S. Waters.

Mr. Waters, 75, of Amador County, has been the owner of Waters Livestock since 1976. He served in the California Assembly from 1976 to 1990 and is a member of the Cattlemen's

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[68] New forest practice rules take effect only on January 1 of the year following their adoption. *See* CAL. PUB. RES. CODE § 4554.5 (California Codes at http://www.leginfo.ca.gov/calaw.html, last visited February 22, 2001); Therefore, in order to meet legally mandated timelines, the Board typically introduces a rule no later than the June Board meeting for implementation the following January. *See* e.g. CAL. GOV. CODE §§ 11346.4(a), 11349.3(a) (Matthew Bender 2001).

Association, the Farm Bureau, and the Grange. Although his environmental voting record is mixed, the California League of Conservation Voters notes that on one of its key scorecard votes in 1989, he voted to defeat a measure by Senator Byron Sher that would have banned clearcutting of ancient redwood forests.[69]

In April 2000, Davis appointed Gary Rynearson, a Registered Professional Forester and timber consultant based in Humboldt County, to an industry seat. Rynearson had been a member of the Wilson-era "Scientific Review Panel," which concluded that the Board's rules did not adequately protect endangered fish.[70] After publication of this report, the timber industry severely criticized Mr. Rynearson. Since then Rynearson's votes on the Board have been consistent with industry's positions.

In January 2001, Governor Davis re-appointed Simpson Timber Company executive Tharon O'Dell, first appointed in 1993 to an industry seat. Also in January 2001, the term of public representative and former Humboldt County Assessor Ray Flynn expired. Since Flynn's votes were always consistent with industry's position, Governor Davis had an opportunity to provide some balance to the Board with this appointment. Instead, on January 29, 2001, the Governor appointed Paula M. Ross, a long-time employee of the International Association of Machinists and Aerospace Workers (IAMAW).[71] The Machinists Union is one of the few unions representing timber workers. It has been active in recent years lobbying against timber reform both at the Board and in the Legislature as part of the Forest Products Industry National Labor Management Committee.[72] Although the Labor Management

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[69] *See* THE 1989 LEGISLATIVE VOTING CHART, CALIFORNIA LEAGUE OF CONSERVATION VOTERS, 7 and 18.

[70] *See infra* Section III.C.2.

[71] *See* Press Release of the Office of the Governor, *Governor Davis Names Members to the State Board of Forestry and Fire Protection* (last visited January 29, 2001) <http://www.governor.ca.gov/pressroom>.

[72] *See* letter signed by Art Carter for the Forest Products Industry Labor Management Committee to Assemblymember Fred Keeley re: Oppose AB 717 (April 6, 2000) (on file with author); Memorandum signed by Art Carter on behalf of the Forest Products Industry National Labor Management Committee, Jim Holmes for the Forest Resources Council, Matt McKinnon for the Machinists Union, and Dave Bischel for the CA Forestry Association, the industry's principal lobbying group to "All

Committee has been active in other states for a number of years, the California Chapter first surfaced after Governor Davis was elected. Many in the conservation community question whether the appointment of Ms. Ross to one of the public seats on the Board is inconsistent with at least the spirit of the statute reserving public seats on the Board for those with no financial interest in timberlands.[73]

As of this writing, one public seat still remains vacant. With industry control of the Board so easy to attain because of the Board's structure, if the Board is to represent the interests of Californians in general, every public representative must provide balance. There is no more direct way to affect timber policy than the Governor's Board of Forestry appointments.

B. THE CALIFORNIA DEPARTMENT OF FORESTRY

1. CDF regulation of logging on private land

The Board of Forestry makes the rules, but they are interpreted and implemented by CDF. With a budget of $622 million (1999/2000) and 3,800 permanent employees, the department has emergency service responsibility for 31 million acres and timber harvest plan review jurisdiction over 7.8 million acres. CDF approves on average over a thousand timber harvest plans covering approximately 285,000 acres of land each year in California.[74] CDF is the lead agency under CEQA for approving timber harvest plans. As CDF has discretion in applying the forest practice rules and to require both more information and additional mitigation measures beyond standard rules, CDF plays a crucial role in forest regulation.

In March 1999, Governor Davis announced the appointment of Andrea Tuttle, Ph.D., as director of CDF. With a background in environmental planning, at the time of her appointment Dr. Tuttle was a forestry consultant in Humboldt

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Members of the Legislature" re: Oppose AB 717 (Aug. 9, 2000) (on file with author).

[73] *See* CAL. PUB. RES. CODE § 731 (West 1984); *See also* CAL. GOV'T CODE §§ 87100, 87103(d) (West 1993).

[74] *See* Declaration of Cynthia Elkins In Support of Motion for Preliminary Injunction, EPA. v. Tuttle, No. 00-0713-SC, ¶9 (N.D. Cal. 2000); *See also* LITTLE HOOVER COMMISSION, TIMBER HARVEST PLANS: A FLAWED EFFORT TO BALANCE ECONOMIC AND ENVIRONMENTAL NEEDS, Tab. 4 (1994).

County with a long history of involvement in state-regulated forest issues. The department had been controlled by Republican political appointees for the previous 12 years, so many assumed there would be significant turnover in CDF management. This has not happened. The top forestry administrators under Tuttle are Ross Johnson and Dean Lucke, both longtime CDF spokesmen. In addition, CDF's forest practice policies have remained similar to those of previous administrations.

Publicly, Tuttle has promoted incentive-based and other non-regulatory programs. In a November 19, 2000, Opinion Editorial in the *San Francisco Chronicle,* Tuttle praised the newly passed California Forest Legacy Program. According to Tuttle, the program "creates financial incentives that protect oak woodlands and old-growth forests and help conserve productive timberlands. Forest Legacy accomplishes this goal by allowing the state or federal government or nonprofit land trusts to purchase a conservation easement from a timberland owner. This relieves financial pressure on the landowner to convert timberland for houses or vineyards and provides cash directly to the landowner."[75] While the conservation community solidly supports Forest Legacy, few view it as a substitute for regulatory reform.

Tuttle's OpEd also extols changes adopted this year to the California Forest Improvement Program (CFIP), which is available only to non-industrial timberland owners. The newly expanded program, according to Tuttle, "provides grants to landowners for a variety of conservation-oriented projects like developing better management plans and restoring fish and wildlife habitat." Again, environmentalists generally support the CFIP. Unfortunately, funding for CFIP comes largely from cutting the public's trees in the state forests.

2. CDF regulation of logging on state-owned land: Jackson Demonstration State Forest

CDF's management of the state-owned Jackson Demonstration State Forest (JDSF) in Mendocino County illustrates, probably better than any private timber harvest plan, the in-

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[75] *See* Andrea E. Tuttle, Editorial, *A New Future for California's Forests*, SAN FRANCISCO CHRONICLE (Nov. 19, 2000).

grained resource extraction view of forestry that prevails at the agency. At 50,000 acres, JDSF is the largest of the seven state-owned forests and the largest stand of publicly owned coastal forest between the heavily used Muir Woods in Marin County and Humboldt Redwoods State Park, far to the north. It is also the only publicly owned redwood forest close to the coast south of Redwood National Park, which is over 300 miles north of the Bay Area. JDSF is conveniently located for public use, lying just east of Mendocino and Ft. Bragg.

In spite of long-standing public criticism, CDF's management of JDSF under the Davis administration is very similar to what it has been in the past—primarily as a source of cash derived from logging. Calls for the reform of CDF's management at JDSF have been increasing since at least the mid-'90s. Critics argue that the forest is operating under an outdated 1983 management plan and that continuing to make income the forest's highest priority is short-sighted. Under the existing plan one third of logging is clearcutting or similarly harsh logging methods.

CDF has stated its intent to release a new draft management plan for JDSF in early 2001. Critics note, however, that CDF continues to implement new timber harvest plans at the forest, including two plans on which the NMFS requested additional mitigation measures.[76] A local environmental organization filed suit to enjoin both future timber harvest plan approvals and logging under current timber harvest plans until the management plan is updated.[77]

On the positive side, under Director Tuttle, CDF has allocated JDSF an increased share of its proceeds for reinvestment in much-needed road repair and other maintenance priorities. In addition, after a long hiatus CDF has funded a number of environmentally beneficial forest management demonstrations. Although management improvements are moving slowly, some segments of the conservation community hold out hope that significant reform can be achieved during Governor Davis' first term.

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[76] *See* THP 1-99-459 MEN (Upper Parlin), THP 1-99-483 MEN (Brandon Gulch). To date, CDF adopted the NMFS' recommendations on one plan but not the other.

[77] *See* Campaign to Restore Jackson Redwood Forest v. California Department of Forestry, Complaint for Declaratory Relief, Mendocino County Superior Court No. SCUK CVG 0083611 filed on June 14, 2000.

C. SALMON AND STEELHEAD

Anadromous fish species such as coho salmon and steelhead live for part of their life cycle in freshwater streams and part in the ocean. These fish return to the stream in which they were born to spawn. These fish need cold, clear water, sufficient pool depth, large woody debris for shelter and as nutrient sources for the insects and other invertebrates on which they feed, and clean gravel streambeds in which to lay their eggs. Streams in unlogged forests in California tend to have these qualities in abundance.[78]

Intensive logging has many deleterious effects on all of these elements of coho and steelhead habitat. Logging disturbs the soil, and on steeper slopes and in heavy rains, disturbed soil is delivered to nearby streams as sediment. Excessive sediment can embed gravel streambeds with silt or fine sediment, which can deprive fish eggs of oxygen and occupy the small spaces in the gravel where the eggs finds protective shelter while they mature. Sediment can fill stream pools, reducing the available pool depth and leading to increased water temperatures. Logging near streams reduces the canopy cover, allowing more solar radiation to reach forest streams, which also leads to increased water temperatures. When these impacts are severe, the stream may not support populations of these fish.[79]

In the 1990s, the National Marine Fisheries Service listed a number of populations of anadromous fish as threatened or endangered under the federal ESA.[80] As a result of these listings any person who "takes" (i.e., kills or injures) a listed species is subject to civil or criminal penalties or injunctive relief under § 9 of the ESA.[81] CDF Director Andrea Tuttle acknowledged this potential liability under the federal ESA, stating: "I think all of us recognize here that CDF is currently operating on a somewhat tenuous legal basis for approving Timber Harvest Plans that may result in the 'take' of salmon . . . and all landowners and timber plan operators are similarly rest-

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[78] *See supra* notes 4, 5 and 6 above.

[79] *See id.*

[80] *See id.*

[81] *See* 16 U.S.C. § 1538.

ing on a tenuous legal basis for continuing their harvest."[82] Consequently, the principal forestry-related focus of the Board of Forestry during the tenure of Governor Davis has been the listings of salmonids under the federal ESA.

1. NMFS Lists Salmonids in California as Threatened or Endangered, In Part Due to the Weakness of California Forest Practice Rules

In response to precipitously declining numbers of coho salmon in central and northern California, NMFS listed the Central California Coast population and the Southern Oregon/ Northern California Coast populations of coho salmon as threatened species under the ESA in 1996 and 1997, respectively.[83] In 1997, NMFS adopted an "interim" rule under section 4(d) of the federal ESA that prohibits most "take" of coho in both listed ESUs in California.[84] While it exempted takings incidental to certain fisheries and watershed restoration activities, NMFS prohibited other forms of take of coho, including those caused by habitat modification as a result of logging.[85] On August 18, 1997, NMFS listed the Central California Coast and South-Central California Coast populations of steelhead as "threatened."[86] On June 7, 2000, NMFS listed the Northern California population of steelhead trout as "threatened"[87] and on September 8, 2000, adopted an ESA section 4(d) rule extending the ESA section 9 prohibition on

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[82] *See* Andrea Tuttle, Director of California Department of Forestry (CDF), from testimony before the California Board of Forestry (Sept. 14, 1999).

[83] *See* Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56138 (1996); Endangered and Threatened Species: Threatened Status for Southern Oregon/ Northern California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 62 Fed. Reg. 24588 (1996).

[84] *See* Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56138 (1996); Endangered and Threatened Species: Interim Rule Governing Take of the Threatened Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 38479 (1997).

[85] *See id.* at 38483-84.

[86] *See Endangered and Threatened Species: Listing of Several Evolutionarily Significant Units (ESUs) of West Coast Steelhead, 62 Fed. Reg. 43937-43954 (1997).*

[87] *See* Endangered and Threatened Species: Threatened Status for One Steelhead Evolutionarily Significant Unit (ESU) in California, 65 Fed. Reg. 36074-36094 (2000).

"take" of these species to these populations.[88]

NMFS has repeatedly noted that human-caused factors underlie the threatened extinction of the coho salmon.[89] In particular, NMFS specified that logging, removal of large woody debris, and destruction of riparian shade canopy constitute activities that adversely affect and potentially "take" coho salmon.[90] NMFS also determined that existing regulatory mechanisms governing timber harvest on non-federal land—namely the California forest practice rules—were inadequate to protecting the species, and consequently activities such as logging and related activities on state and private land continue to represent a threat to the existence of coho salmon.[91]

In its listing determinations, NMFS provided detailed critiques of the inadequacy of California's regulation of logging practices. NMFS criticized the forest practice rules for allowing activities within watercourse and lake protection zones (WLPZs) that harm coho habitat[92]; noted that the rules "do not adequately address" recruitment of large woody debris, streamside tree retention to ensure bank stability, or canopy retention to maintain proper water temperature[93]; called monitoring of logging operations under the rules "insufficient" to

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[88] *See* Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs) 65 Fed. Reg. 42421-42481 (2000).

[89] *See* Designated Critical Habitat: Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24056 (1999).

[90] See Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56147 (1996); *See also* Endangered and Threatened Species: Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24592 (1997).

[91] *See* Designated Critical Habitat: Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24049, 24057 (1999); *See also* Endangered and Threatened Species: Threatened Status for Southern Oregon/ Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24596 (1997).

[92] *See* Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56138 (1996) 61 Fed. Reg. 56140-56141 (1996).

[93] *See* Endangered and Threatened Species: Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24596 (1997).

determine whether logging damaged coho habitat[94]; decried the rules' exceptions that allow salvage logging without environmental review and monitoring[95]; and generally criticized the process prescribed by the rules for approving timber harvest plans (THPs). NMFS concluded its evaluation of the substance of the rules by noting that "[a]lthough several commentators describe the [rules] as being capable of protecting coho salmon and their ecosystems, little evidence has been provided to support these claims."[96]

In its June 7, 2000, rule listing steelhead trout as "threatened" in northern and central California, NMFS specifically cites the inadequacy of the forest practice rules as a contributing factor in the listing.[97] The listing notes that 81% of the land ownership in this northern Evolutionarily Significant Unit (ESU) is non-federal. Therefore the actions of the state play an extremely significant role in conservation for steelhead. The decision states:

> Because of NMFS' concerns regarding the preponderance of private timber lands and timber harvest in the northern California ESU, the NMFS/California MOA [Memorandum of Agreement of March 11, 1998] contained several provisions calling for the review and revision of California's forest practice rules (FPRs), and a review of their implementation and enforcement by January 1, 2000. NMFS considered full implementation of these critical provisions within the specified time frame to be essential for achieving properly functioning habitat conditions for steelhead in this ESU. Because these critical conservation measures were not being implemented by the State of California, and therefore, were not reducing threats to this ESU, NMFS determined that a for-

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[94] *See* Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56143 (1996); *See also* Endangered and Threatened Species: Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24596 (1997).

[95] *See* Endangered and Threatened Species: Threatened Status for Central California Coast Coho Salmon Evolutionarily Significant Unit (ESU), 61 Fed. Reg. 56141 (1996).

[96] *See id.* at 56140.

[97] *See* Endangered and Threatened Species: Threatened Status for One Steelhead Evolutionarily Significant Unit (ESU) in California, 65 Fed. Reg. 36074, 36076 (2000).

mal reconsideration of the status of this ESU was warranted.

Although California subsequently adopted new Impaired Watershed regulations in March 2000, the NMFS representative to the Board of Forestry testified that the new rule was not adequate to avoid harm (as defined by NMFS regulation pursuant to the federal ESA) to listed salmonids.[98] On average, the CDF approves more than 1,000 logging permits, which allows logging on about 285,000 acres of land each year in California, approximately thirty percent of which takes place within the coastal watersheds of northern California.[99] An overlay of a map of coho salmon habitat north of San Francisco onto a map showing the state-regulated private forests of the California coast reveals a close correlation between coho habitat and those state-regulated forests. South of Eureka, there is virtually no federal forest component within that habitat. Thus, if the state is to ever achieve its stated goals and coho are to recover, substantial improvements must be made in timber operations regulated by the Board of Forestry.

2. NMFS and the Independent Science Review Panel Critique the Forest Practice Rules

In March 1998, CDF and NMFS entered into a Memorandum of Agreement (MOA) in which the State pledged to do the following; (1) conduct a scientific review of the forest practice rules, including their implementation and enforcement; (2) make changes in implementation and enforcement of the rules in accord with the scientific review; (3) make recommendations to the Board for changes to the forest practice rules necessary to conserve salmonids.[100] The purpose of the MOA was to avoid listing steelhead and to provide an outline of

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[98] *See* Declaration of Joseph Blum, filed in *EPIC, et al. v. Tuttle, et al.*, U.S. District Court for the Northern District of California, Case No. 00-0713-SC.

[99] *See* Declaration of Cynthia Elkins In Support of Motion for Preliminary Injunction filed in *EPIC, et al. v. Tuttle, et al.*, U.S. District Court for the Northern District of California, Case No. 00-0713-SC, ¶9.

[100] *See* Endangered and Threatened Species: Threatened Status for One Evolutionarily Significant Unit of Steelhead in California, 65 Fed. Reg. 6960 at 6972 (2000).

steps that would lead to the issuance of a federal Endangered Species Act Section 4(d) rule authorizing incidental take of listed salmonids during logging operations conducted in compliance with state forest practice rules.

The MOA called for the Board to complete action on the recommended changes by January 2000.[101] Pursuant to the MOA, in May 1998 NMFS provided California with a detailed critique of the forest practice rules.[102] It concluded that of the 51 aquatics-related rules NMFS examined, only nine were "adequate to provide for the conservation of aquatic resources." Twenty rules were termed "inadequate"; 39 relied "on a high level of technical expertise that the Registered Professional Forester (RPF) may not have"; and 36 relied on "agency review that is not consistent." CDF under the Wilson administration responded by attempting to rebut virtually every criticism.[103] Nevertheless, the Wilson administration did initiate a significant increase in funding for timber harvest plan review personnel in CDF, the Department of Fish and Game, Water Quality Control, and the Division of Mines and Geology.

Again pursuant to the MOA, the Wilson administration appointed a Scientific Review Panel, which was highly critical of the forest practice rules and made many recommendations for strengthening the rules to increase protections for fish habitat. However, the Board has thus far failed to amend the rules to address the majority of their identified shortcomings. NMFS cited the Board's inaction as a major factor in its recent decision to propose adding steelhead in northern Califor-

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[101] *See id.*

[102] *See* National Marine Fisheries Service Protected Resources Division, Santa Rosa and Arcata, California, Effectiveness of the California Forest Practice Rules to Conserve Anadromous Salmonids (May 22, 1998) (unpublished report, on file with author).

[103] *See* RESOURCES AGENCY'S RESPONSE TO NMFS CALIFORNIA FOREST PRACTICE RULES (1998). The Resources Agency response reprinted every paragraph of the NMFS critique, then rebutted each assertion. The July 10, 1998, transmission letter from then Undersecretary for Resources Jim Branham to then NMFS Southwest Regional Director Bill Hogarth states: "While your review and our response remain in draft form, I believe it is important that we share this information with the public and appreciate your agreement on this matter." The CA document was subsequently distributed without a "draft" designation, still dated July 10, 1998.

nia to the ESA's threatened species list.[104]

The Scientific Review Panel first convened in November of 1998. Then in March of 1999, the Environmental Protection Information Center (EPIC), the Pacific Coast Federation of Fishermen's Associations (PCFFA) and nearly two dozen other groups notified CDF and the Board of their intent to sue the state on the ground that CDF's approval of timber harvest plans causes "take" of coho salmon in violation of section 9 of the federal ESA.

In June of 1999 the Scientific Review Panel concluded, on a consensus basis, that "the cumulative effects of multiple logging operations on watersheds, water quality, and aquatic resources are not adequately analyzed and mitigated under current law."[105] The panel made three primary recommendations: (1) the Board should adopt interim rule changes to protect watershed resources while the state conducted watershed assessments that would lead to site-specific management recommendations; (2) the state should develop and implement a "watershed analysis" program for the purpose of assessing these impacts and developing appropriate mitigation measures at a watershed scale; and (3) the appointment of a "blue-ribbon science panel" to examine whether "a harvest limitation based on percent of watershed area is warranted."[106]

In response to the first recommendation, the Resources Agency and CalEPA jointly submitted interim rule change proposals, the original Threatened and Impaired Watershed rules, at the July 1999 Board of Forestry meeting. Governor Davis has done little to implement the third recommendation, though many in the conservation community believe that limiting the percentage of a watershed area that can be logged in a given time period is the most effective way to limit damage to watershed resources. With respect to the second recommendation, the Board's unsuccessful effort in the year 2000 to

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[104] *See id.* at 6961.

[105] *See* Executive Summary. Report of the Scientific Review Panel on California Forest Practice Rules and Salmonid Habitat. June 1999. Prepared for the Resources Agency of California and the National Marine Fisheries Service, Sacramento, CA. Scientific Review Panel: Frank Ligon; Alice Rich, PhD; Gary Rynearson, RPF, Coordinator; Dale Thornburgh, PhD, RPF; William Trush, PhD.

[106] *See id.*

adopt rules requiring watershed-specific analyses is discussed in section III.C.4 below.

3. The Board of Forestry Adopts the Impaired Watershed Rules

When the Resources Agency and CalEPA presented the proposed Impaired Watershed rules to the Board in July of 1999, members of the Scientific Review Panel and NMFS' representative Joe Blum testified that the proposal would not be sufficient to avoid "take" of listed salmonids. Rather, they testified that the rules were "a step" toward improving conditions for salmon.[107]

NMFS made specific suggestions for improvements to the rules. The Sierra Club submitted an alternative "no-take" draft rule proposal based on the federal Standards and Guidelines for the Northwest Forest Plan and guidelines that, at that point, had been released in very limited fashion by NMFS. At the October 1999 Board hearing, the Board put off action on adoption of the Impaired Watershed rule, guaranteeing that there would be no operational rule improvements for the first six months of the year 2000.

At the December 1999 Board meeting, NMFS representative Joe Blum presented the Board with his agency's much-anticipated "short-term Habitat Conservation Plan [HCP] guidelines," which were characterized as "as close to a no-take standard as we have."[108] These guidelines provided for significant no-cut buffers on both Class I fish-bearing streams and Class II tributaries, as well as significant protection for seasonal streams and steep and unstable slopes. The guidelines

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[107] Personal observation of author, Kathy Bailey.

[108] *See* Salmonid Conservation Measures: Forestry Activities for a short-term HCP, 1999. [The name of the landowner has been redacted from the title of this document.] In the December 3, 1999, cover later from Rodney R. McInnis, Acting Regional Administrator of NMFS, to Board Executive Officer, Christopher P. Rowney, accompanying the guidelines, NMFS states: "The National Marine Fisheries Service (NMFS) is in the process of developing a set of forestry standards and guidelines that will exemplify conservation measures necessary for the conservation of Federally listed salmon. This action is necessary due to the recent decision of the Board of Forestry (BOF) not to address additional conservation measures through either emergency rules, or through promulgation of new Forest Practice Rules (FPRs) for January 2000.Enclosed is the first of two documents you will receive from NMFS. These measures are an indication of the types of conservation practices that NMFS would like to see incorporated into individual THPs."

cover road maintenance, fish passage and many other relevant topics in detail. Since an HCP provides the basis for a federal Incidental Take Permit pursuant to Section 10(a) of the federal ESA, these guidelines may be somewhat less stringent than what would be necessary to avoid "take" of listed salmon. Nevertheless, the guidelines were much more protective of salmonid habitat than anything previously considered by the Board.

In January 2000, the Board noticed a version of the Threatened and Impaired Watershed rule that reflected revisions proposed by the Board's Interim Committee and included some of the NMFS' suggestions from previous hearings, but nothing from the HCP Guidelines, as possible alternative rule language. In February 2000, NMFS released its "Conservation Guidelines."[109] These guidelines, according to a letter from NMFS, describe "practices that reflect current scientific information on cumulative watershed impacts, and impacts to salmonids and water quality." These generic guidelines are designed to be applied to specific sites depending on the availability of information and analysis.

On March 1, 2000, EPIC, PCFFA and 18 other groups filed their previously noticed suit in federal court to seek an injunction against CDF approving timber harvest plans in the range of listed coho salmon.[110] On Sunday, March 12, 2000, timber industry representatives met privately with Cabinet Secretary Susan Kennedy and others from the Davis Administration to discuss the Impaired Watershed rules.

On Tuesday, March 14, 2000, the Board convened a hearing on the Impaired Watershed rules that carried over into Wednesday due to the large public turn-out. Environmentally oriented speakers called for much stronger rules than those proposed. Timber industry speakers, some of whom had been

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[109] *See* NATIONAL MARINE FISHERIES SERVICE, SALMONID GUIDELINES FOR FORESTRY PRACTICES IN CALIFORNIA (2000).

[110] Order Granting Motion for Summary Judgement, EPIC v. Tuttle, No. 00-0713-SC (N.D. Cal. 2001). On January 22, 2001, the U.S. District Court dismissed this lawsuit on grounds that plaintiffs' challenge to CDF's approval of previously approved timber harvest plans was barred by the Eleventh Amendment and that plaintiffs' request for an injunction against CDF's future approval of timber harvest plans was not ripe for review under the standards announced in Ohio Forestry Association v. Sierra Club, 523 U.S. 726 (1998).

circling the Capitol with loaded log trucks, testified that the Impaired Watershed rules were onerous and that "one size fits all" rules would not work. Although some modest improvements were made for fish-bearing streams, the Board sided mostly with industry and adopted only a fraction of the proposed rules, eliminating all proposed protections for important perennial and seasonal tributaries to fish-bearing streams. Additionally, the Board put a "sunset" on the adopted rules so they would expire in December 2000. (In November of 2000 the Board extended the sunset date to December 31, 2001.)[111] The Board also made a commitment to create a "flexible, site-specific" watershed analysis rule alternative for implementation in 2001. The truncated Impaired Watershed rules passed unanimously.[112]

After evaluating these modifications to the forest practice rules, however, NMFS concluded in a March 30, 2000, letter to the Board that these changes "do not go far enough in providing for properly functioning riparian and aquatic habitat."[113] The letter also stated: "As we have testified in the past, the current California Forest Practice Rules do not adequately protect anadromous salmonids and we have requested that you adopt measures to provide the protections required under the Endangered Species Act . . . ."[114]

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[111] *See* Watershed Protection Extension, *Notice of Decision For Amendments to The Forest Practice Rules* (last visited February 20, 2000) <http://www.fire.ca.gov/BOF/board/ProposedRule/DOC/ NODZ00071702.dot>.

[112] Compare the proposed rules at Notice of Proposed Rulemaking, January 28, 2000 at http://www.fire.ca.gov/BOF/pdfs/45DayNotice.pdf with the adopted rules at Title 14, CCR, § 916.9, 936.9, and 956.9. The new rules continue to allow logging adjacent to fish-bearing streams in impaired watersheds. The minimum streamside canopy cover was increased, though only 25% of the streamside canopy need be in commercially valuable conifers. The new rule's most significant features were the requirement to keep 10 large trees per 330 feet on both sides of fish-bearing streams; to require timber harvest plans before salvage logging in watercourse protection zones; to add small new protection zones for stream gorges; and to add new road construction requirements.

[113] *See* Letter from NMFS to the Board of Forestry (Mar. 30, 2000) (on file with author).

[114] *See id.*

4. The Board Does Not Adopt the Watershed Evaluation and Mitigation Analysis (WEMA) Rule

The Board then turned its attention to the development of what would ultimately become the Watershed Evaluation and Mitigation Analysis (WEMA) rule, the Board's attempt to fulfill its commitment to provide a "flexible" alternative to the Impaired Watershed rule. By May of 2000, language began circulating at the Board for a watershed assessment-based rule that would allow plan submitters to propose alternative mitigation measures instead of complying with the new Impaired Watershed rules. In several Board Interim Committee meetings the timber industry and conservation representatives were unable to agree on meaningful watershed assessment rules as an alternative to compliance with the Impaired Watershed rules.

In August of 2000, the Board Interim Committee met twice to review final proposals. EPIC, Sierra Club and others submitted voluminous objections to the proposed WEMA rules, including:

> (1) the proposal did not require independent scientific review of watershed analysis methodologies or of the evaluations; (2) the proposal did not provide sufficient opportunity for public comment; and (3) the proposal did not provide a clear standard to guide the CDF Director's approval decision.

Nevertheless, the Board issued a 45-day notice of hearing for the WEMA rule proposal.[115] At the September 13, 2000, Board hearing, the industry introduced an entirely new proposal. The industry WEMA provided no review standard other than the information should be "adequate to support its findings and recommended mitigations." The industry alternative eliminated the requirement that the WEMA provisions provide "equal or greater" protection for imperiled salmon to that provided by the Impaired Watershed rule. Rather than proposing specific alternatives to specific parts of the standard rule, the industry alternative allowed submitters to start from square one and design every aspect of how they proposed to protect imperiled salmon. As the industry stands alone in maintaining that its current operations do not harm salmon,

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[115] *See* CAL GOV'T CODE § 11346.5 (West 1992).

environmentalists were dubious that an industry-designed WEMA would protect salmon.

Also at the September hearing, the Humboldt Watershed Council proposed a third alternative that attempted to meld the WEMA concept into the existing, much-criticized cumulative impact analysis rule. In urging rejection of all three alternatives, the Sierra Club wrote to the Board:

> In summary, WEMA's only purpose is to allow the timber industry to avoid implementation of a weak Impaired Watershed rule that is only a fraction of the rule that its framers readily admit was, in its un-truncated form, far short of meeting the applicable standards of state and federal law to avoid take of or harm to listed salmon, many species of which are poised on the brink of extinction both regionally and statewide due in major part to the activities of the timber industry.

The seven-person Board was in a difficult position. There was a serious question regarding the legality of the Board considering the industry proposal on 15 days' notice. Under the Administrative Procedures Act new rule proposals may be noticed for hearing in 15 days only where the changes "are sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action."[116] Yet, at the October hearing on the WEMA proposal, the industry was adamant that the only acceptable WEMA proposal was its own, and the three timber industry representatives on the Board were not likely to vote otherwise.

The morning of the final hearing, CDF indicated that it would support the industry proposal if five specific changes were made regarding road building and maintenance, monitoring protocols, CEQA-related documentation problems, and elimination of a provision that would have allowed previously approved permit documents to substitute for a WEMA. But key Board members stated their concern that the industry version was legally vulnerable due to the use of a 15-day notice for such significant changes.

The legal vulnerability of the industry option was particularly important in light of the fact that the conservation com-

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[116] *See* CAL. GOV'T CODE § 11346.8 (West 1992).

munity, by submitting a careful legal critique of every aspect of the WEMA, including the notice deficiencies, had signaled its intent to challenge the WEMA rules in court, if adopted. Additionally, the "reject WEMA and do more for watercourse protection, not less" message was consistently articulated by all the environmental interests that traditionally follow state-regulated forestry issues, including Sierra Club, EPIC, PCFFA, Redwood Coast Watersheds Alliance, Klamath Forest Alliance, Salmonid Restoration Federation, California Public Interest Research Group (CalPirg), California League of Conservation Voters, Central Sierra Environmental Resource Center, State Senator Byron Sher, Assembly Speaker Pro-tem Fred Keeley and others.

NMFS testified in support of the Humboldt Watershed Council alternative, stating it would rather wait a little longer for something that worked than rush into approving something that was not ready. The Department of Fish and Game followed NMFS' lead and supported the Humboldt Watershed Council's alternative. The State and Regional Water Quality Control Board representative stated they were "unable to take a position at this time," and the Division of Mines and Geology was absent.

Board member Kirk Marckwald recommended that the Board adopt the original Board proposal that had 45 days' notice. Two other public members, Bob Heald and Stan Dixon, agreed with that position in spite of what must have been significant industry pressure, particularly on Dixon, a Humboldt County Supervisor. As Chair of the Board's Interim Committee, Heald had invested a substantial amount of time and energy into trying to craft a rule package that would increase protection for salmonids. Public member Ray Flynn, a retired Humboldt County Assessor and Wilson administration holdover, had already stated his intent to support the industry alternative, as he had throughout his tenure on the Board.

Ultimately, after multiple attempts to come to some sort of compromise, the industry alternative received four votes—three from industry reps Tharon O'Dell, Mark Bosetti and Gary Rynearson, and the fourth from Ray Flynn. Public representatives Kirk Marckwald, Bob Heald, and Stan Dixon voted for the Board's version. Since five affirmative votes are needed to adopt regulations, nothing was adopted. The vote

leaves the Impaired Watershed rule in effect through 2001, as the sunset on that rule had been extended the previous month for an additional year.

D. ANCIENT FORESTS

1. *The Headwaters Forest*

The California forestry issue that has generated by far the most litigation, proposed legislation and newsprint is the Pacific Lumber Company's logging of its remaining old-growth redwood forests. While this plan was announced in 1986, when Houston-based Maxxam, Inc., purchased Pacific Lumber in a "junk bond"-financed tender offer, Governor Davis' first weeks in office coincided with the final weeks prior to the closing of the Headwaters Forest Agreement between Pacific Lumber, the state of California and the federal government.

One of the principal legal points of reference for this agreement is the decision by the U.S. Fish & Wildlife Service, in 1992, to list the marbled murrelet as a threatened species under the federal ESA.[117] The marbled murrelet is a small seabird that ranges from Monterey County in central California to Alaska. In California this species lays its eggs almost exclusively on the widest and highest branches of old-growth redwood, and possibly Douglas fir, trees within 30 to 40 miles of the ocean.[118] Pacific Lumber's timberland in the Headwaters Forest area provides breeding habitat for one of several remaining populations of marbled murrelets left in California.[119]

Despite these facts, in the early 1990s CDF continued to approve Pacific Lumber timber harvest plans that would further fragment and destroy murrelet habitat on Pacific Lumber lands. In 1993 EPIC brought suit against Pacific Lumber in

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[117] *See* Endangered and Threatened Wildlife and Plants: Determination of Threatened Status for the Washington, Oregon, and California Population of the Marbled Murrelet, 57 Fed. Reg. 45328 (1992).

[118] *See id. See also* FINAL ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT FOR THE HEADWATERS FOREST ACQUISITION AND THE PALCO SUSTAINED YIELD PLAN AND HABITAT CONSERVATION PLAN 3.10-42.

[119] *See id. See also* Marbled Murrelet v. Pacific Lumber Co. ("Owl Creek"), 880 F. Supp. 1343, 1348 (N.D. Cal. 1995). *See also* U.S. FISH AND WILDLIFE SERVICE, RECOVERY PLAN FOR THE MARBLED MURRELET 133.

federal court alleging that the Owl Creek timber harvest plan approved by CDF would cause "take" of marbled murrelet in violation of section 9 of the federal Endangered Species Act. In 1995 the U.S. District Court found in favor of EPIC and entered a permanent injunction against logging the plan.[120]

CDF responded to this ruling by denying a subsequent Pacific Lumber timber harvest plan, No. 1-95-099 HUM, in the Headwaters Forest area, citing U.S. Fish and Wildlife Service concern that the plan could cause "take" of marbled murrelet. Pacific Lumber appealed this decision to the Board of Forestry, but the Board upheld CDF's denial of the plan. Pacific Lumber then sued both the state of California and the federal government, alleging that their combined actions amounted to a taking of Pacific Lumber's property for a public use without just compensation in violation of the Fifth Amendment to the U.S. Constitution and Article 1, section 19, of the California Constitution.

At the same time, grassroots activism against Pacific Lumber and CDF, including direct action demonstrations and civil disobedience campaigns, was in high gear in Humboldt County and Sacramento, including the September 15, 1996, arrest of 1033 people who peacefully stepped across the Pacific Lumber property line in Carlotta. The Clinton administration responded by brokering an agreement between Pacific Lumber, the state and the federal government, signed on September 26, 1996, that included (1) the federal and state governments' agreement to purchase 7,470 acres of Pacific Lumber-owned old-growth redwood forest in the Headwaters Forest area (consisting of two specific old-growth groves including the Headwaters Grove); (2) the USFWS' agreement to approve a Habitat Conservation Plan covering Pacific Lumber's remaining 211,000 acres under section 10 of the federal ESA that would provide Pacific Lumber with immunity from liability for "take" (i.e., harm, harass, kill or injure) of all listed species, including listed fish species, and is supposed to provide for "conservation"[121] of the marbled murrelet and

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[120] *See id.*

[121] The ESA defines "conservation" as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."

other listed species; and (3) Pacific Lumber's agreement to withdraw its Fifth Amendment-based lawsuits.[122]

In 1997 Congress approved funding for the federal government's portion of the acquisition but specified that the funding would expire on March 1, 1999. On September 1, 1998, the California legislature passed Assembly Bill 1986 (Migden). AB 1986 provided the state's $130 million share for the acquisition, but made the funding contingent on Pacific Lumber agreeing to additional logging restrictions to protect endangered salmonids and certainty that specified old-growth redwood groves remaining in company ownership would be off limits to logging for 50 years, as had been promised by the proponents of the deal. The bill also provided an additional $100 million for outright purchase of two of Pacific Lumber's other ancient redwood groves.

Governor Davis took office in January of 1999, less than two months before the deadline for federal funding of the agreement. The California Wildlife Conservation Board ("WCB") decided that to enforce the conditions for state funding in AB 1986, the state required an enforceable, recorded contract with Pacific Lumber guaranteeing protection for salmonids and specified old-growth redwood groves. The Governor assembled a legal team that included the California Attorney General's office, DFG, WCB, CDF, the State Lands Commission, and Senator Byron Sher, in consultation with the federal fish and wildlife agencies and the Department of the Interior. The Governor chose State Lands chief Robert Hight to head the team.

This team negotiated a contract with Pacific Lumber that enforces the AB 1986 protections for endangered salmonids and the old-growth redwood groves. The contract had to be approved by the WCB in open session, so a meeting was called for February 24, 2000. There were two major areas of contention: the level of certainty that the smaller ancient redwood groves would be protected for 50 years; and whether the terms of the contract would be recorded as deed restrictions on the Pacific Lumber property and become binding on subse-

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[122] *See* FINAL ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT REPORT FOR THE HEADWATERS FOREST ACQUISITION AND THE PALCO SUSTAINED YIELD PLAN AND HABITAT CONSERVATION PLAN, AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE STATE OF CALIFORNIA AND THE PACIFIC LUMBER COMPANY, App. A, Vol. II (1996).

quent owners. The duration of the logging limits on the redwood groves had become an issue because the federal HCP could be amended during its 50-year term, but the public had been repeatedly promised the groves would be protected.

Meanwhile, public pressure was building for a strong state contract. Editorials urging the Governor to be tough appeared in most of the state's major daily newspapers, including the *Los Angeles Times*. On February 24, 2000, the Governor returned from abroad and called in his advisors. In what is surely his finest hour in the forestry area, Governor Davis gave the order to stick with the tough version of the state contract. The next day the WCB approved the contract and adjourned, making additional contract changes impossible. The company would have to take it or leave it.

The same day, CDF director Richard Wilson, a holdover from the previous administration, signed a determination approving Pacific Lumber's state Sustained Yield Plan as consistent with the provisions of the federal HCP, and authorizing an allowable harvest of 136 million board feet. The company was apoplectic and issued a press statement saying the Headwaters deal was off. The company had expected authorization to log 176 million board feet, which, through use of allowable variances, could be stretched to 194 million board feet a year. A weekend of scrambling ensued, with letters from DFG, USFWS, and NMFS to Wilson purporting to explain why the HCP allowed the company to log the higher board-foot figure. Finally, on Monday, March 1, 2000, CDF director Wilson relented and certified Pacific Lumber's Sustained Yield Plan at 176 million board feet.[123] He resigned within days.

To further reassure Pacific Lumber, on March 1 the federal Departments of Interior and Commerce gave the company a letter that was countersigned by the state "interpreting" certain provisions of the federal Implementation Agreement. The letter emphasized adaptive management (post-approval changes) and logging levels, giving assurances that the federal government intended to work with the company to meet its financial goals.[124] That night, at three min-

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[123] *See* Letter from Richard A. Wilson, Director, *CDF*, to John Campbell, President and CEO, *Pacific Lumber Company* (Mar. 1, 1999) (on file with author).

[124] *See* Letter to John Campbell, President, *The Pacific Lumber Company*, from David J. Hayes, Counselor to the Secretary of the Interior, and Terry D. Garcia, As-

utes to midnight, Pacific Standard Time, the deed to the Headwaters Forest Reserve was recorded at the Humboldt County Courthouse, open late for the long-awaited occasion.

For most people, the Headwaters deal was over. But for the Davis administration, the timber harvest plan review staff at CDF, DFG, Water Quality, and the Division of Mines and Geology, as well as for Pacific Lumber's neighbors and the North Coast environmental community, it was only the close of another chapter in the Pacific Lumber/ Maxxam/ Hurwitz saga. The book, however, continues, with no glimmer of a resolution.

Pacific Lumber and the USFWS and various state agencies spent three years negotiating the written terms of the HCP prior to its approval on March 1, 1999. They have spent the last two years since then negotiating the application of those terms to the forest. Never has the old saw that "the devil is in the details" been more true. While most people assumed that the complex terms of the Pacific Lumber HCP would require a "break-in" period in the implementation phase, few anticipated how long that would take, and how much disagreement there would be between the regulators and the company on what the terms actually mean. Privately, some regulators characterize many Pacific Lumber interpretations as language torture. Pacific Lumber officials charge agency foot-dragging.

Regardless of who may be at fault, before two months had elapsed serious disagreements arose regarding HCP implementation. To date the company has challenged agency determinations regarding restrictions on geographic concentration of logging operations, logging on steep slopes, winter road work and use, logging adjacent to parks, allowable size of clearcuts, geological review of unstable areas, murrelet nest

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sistant Secretary for Oceans and Atmosphere of the US Department of Commerce (Mar. 1, 1999) (on file with author). Below the first set of signatures the letter states: "The undersigned parties agree that this letter represents an interpretation of the IA and the HCP which is a part of the record of this transaction, notwithstanding Section 10.4 of the Implementation Agreement." This portion was signed by Hayes, Garcia, and Campbell. Below these signatures the letter states: "The California Department of Fish and Game and the California Department of Forestry and Fire Protection agree and concur in paragraphs four, five, six and nine of this letter." This last endorsement was signed by CDF Chief Counsel Norman Hill, and Department of Fish and Game Director Ryan Broderick.

set-backs during helicopter operations, northern spotted owl nest protection, snag (dying tree) retention for wildlife, monitoring, and more. Most of these concerns are directly addressed by the text of the HCP. Nevertheless, agency personnel and Pacific Lumber attorneys often disagree over interpretation.

Although the timber harvest plan review process allows the public the opportunity to review the company's specific logging plans, there is no forum for public participation in the discussions between the company and the agencies regarding the interpretation of HCP provisions. This provides a significant advantage to the company, which has the opportunity to make its case unchecked by the public's potential support for the agencies' interpretation. In the years leading to the Headwaters Agreement, public participation was critical in providing evidentiary and political support for agency positions.

Pacific Limber has used its potential influence in this dispute. By the fall of 1999, Pacific Lumber had augmented its advocacy team with the addition of Jeremiah Hallisey, a well-known Democratic fundraiser with strong ties to the Governor. Although Hallisey had no previous known involvement in timber issues, he attended numerous meetings regarding the HCP's implementation and other matters on behalf of Pacific Lumber. By the end of 1999, letters from Pacific Lumber to state department heads were also being copied to Senator Dianne Feinstein, the Department of the Interior, Hallisey, and Maxxam's Washington D.C. lobbyist, Tommy Boggs.

Matters came to a head on January 18, 2000, when Davis Cabinet Secretary Susan Kennedy assembled state agency directors and regional managers in Governor Davis' office. Also present were regional chiefs of the federal wildlife agencies, Pacific Lumber President John Campbell, Maxxam General Counsel Paul Schwartz, Pacific Lumber's General Counsel Jared Carter, and Maxxam's lobbyist Tommy Boggs. According to participants, rather than outlining the company's complaints and providing an opportunity for the state agency personnel to respond, Kennedy ripped into the agency personnel, telling them to stop "nit-picking Palco's plan" and that they needed to "become team players" on the HCP.[125]

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[125] *See* California Public Employees for Environmental Responsibility Report,

Simultaneously, a process is underway that will lead to significant changes in the HCP. The HCP provides that Pacific Lumber will modify the watershed analysis procedures used by the Washington State Department of Natural Resources (DNR) for application in California, and use the revised process to examine company lands, watershed by watershed. The results are supposed to be used to modify, if necessary, the aquatics-related protection measures. The public and outside experts such as the U.S. Forest Service's Redwood Sciences Lab participated in critiquing the revised process, but had no real say in the outcome.[126] To some observers, it appears that the company's watershed analysis contractors are ignoring the analytic framework of the HCP and are recreating the aquatics component of the HCP from scratch.

The conservation community has contended that the watershed analysis-based revisions made after HCP approval are illegal.[127] How the Davis Administration will respond to any proposed revisions remains to be seen. However, a clause in the Headwaters Agreement requires both federal and state agencies to enter into any HCP-related litigation on Pacific Lumber's side.[128]

Many of the Pacific Lumber Company's neighbors contend that the company's aggressive clearcut logging is causing or exacerbating flooding and landsliding that affect their property. Nearby residents have produced scientific studies to sup-

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California's Failed Forest Policy: State Biologists Speak Out (last visited Feb. 16 2000) <http://www.peer.org/press/127.html>.

[126] *See e.g.* DR. LESLIE M. REID, REVIEW OF: METHODS TO COMPLETE WATERSHED ANALYSIS ON PACIFIC LUMBER LANDS IN NORTHERN CALIFORNIA (1999). Review prepared for the National Marine Fisheries Service by USDA Forest Service Pacific Southwest Research Station, Redwood Sciences Laboratory.

[127] *See e.g,.* Letter to Bruce Halstead, U.S. *Fish & Wildlife Service*, and John Munn, *CDF*, re: Pacific Lumber Company Application for Incidental Take Permit, Habitat Conservation Plan and Sustained Yield Plan, Draft Environmental Impact Statement/Environmental Impact Report; Permit numbers PRT-828950 and 1157 and SYP 96-002 from the Law Offices of Thomas N. Lippe (Nov. 13, 1996) (on file with author).

[128] September 28, 1996 Headwaters Forest Agreement, Section 7: "In the event that a claim or action is brought or threatened by a third party challenging the legality, enforceability or validity of this Agreement, or any portion thereof, including the HCP, Permit or SYP, the Parties agree to cooperate and act in good faith to preserve diligently this Agreement, HCP, Permit or SYP against such third party challenge."

port their contentions.[129] In December of 1999 a group of residents from Stafford, California, who believe that Pacific Lumber's logging triggered landsliding that destroyed their homes in the early hours of January 1, 1997, filed lawsuit against the company.[130]

In response to landowner concerns, former CDF Director Wilson had imposed a moratorium on logging in some of the watersheds prior to completion of a flood study. In March 2000 a landowner inquired of CDF whether the moratorium was still in effect and received a message back assuring him that no timber harvest plans would be approved in the area prior to completion of the flood study.[131] Pacific Lumber responded in a March 28, 2000, letter to CDF Director Tuttle and DFG Director Hight, stating:

> My recollection is that this issue was raised at the principals' meeting on January 18 and resolved. [CDF director] Andrea [Tuttle] requested that Pacific Lumber Company provide CDF with new relevant information. It was agreed the moratorium would be lifted with that information. We have provided that information. We believe it is vitally important that this information be promulgated throughout CDF and other responsible agencies so that the 'moratorium' position will not be repeated. It is certainly undesirable, and inconsistent with the last paragraph of the September 1996 Headwaters Agreement, to construct a 'paper trail' that would support litigation against HCP plans in these areas. In the 'Hayes/Garcia' letter of March 1999, signed by the Davis Administration, California agreed to implement the HCP in a manner designed to assure our economic viability. We have to have plans reviewed and approved in the so-called 'impaired' watersheds to meet our operating requirements. This is not a matter that is simply desirable to us, it is a necessity.

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[129] *See e.g* THOMAS E. LISLE, JACK LEWIS, AND LESLIE M. REID, Review of Master's Thesis authored by Mr. William John Conroy: 'A Comparison of rainfall-runoff relations in Elk River, a small coastal northern California watershed.' Prepared by the USDA Forest Service, Redwood Sciences Laboratory (2000).

[130] *See* Jennie Rollins, et al., v. Charles E. Hurwitz, et al., Humboldt County Superior Court No DR9700400.

[131] *See* E-mail message dated March 24, 2000, from Clay Brandow of CDF (on behalf of Assistant Deputy Director Dean Lucke) to Alan Cook.

In spite of severe criticism of the company's flood study by federal scientists, CDF recently allowed Pacific Lumber to resume logging in one of the disputed areas.

In another Pacific Lumber-related matter, the Davis Administration has been strongly criticized for allowing Pacific Lumber to log an area that is surrounded on three sides by the Headwaters Reserve. EPIC and Sierra Club filed suit against CDF's approval of the timber harvest plan on several grounds, including that the plan must conform to the Headwaters HCP. In issuing a preliminary injunction sought by the conservation groups, the Court found that CDF had failed to follow required public review procedures, stating: "A believer in orchestration might reasonably conclude CDF's actions were intentionally executed to prevent public exposure or comment."[132]

2. The Sierra Nevada

Another ongoing source of criticism of the Davis administration's regulation of logging stems from its approval of timber harvest plans in the Sierra Nevada mountain range. The lightning rod for this controversy has been the largest private landowner in California, Sierra Pacific Industries. Two important emerging issues are SPI's announced plan to drastically increase its use of clearcutting, and the fact that the U.S. Forest Service has advanced the state of the art regarding ecologically based forest management in the Sierra Nevada far beyond anything that CDF is implementing.

a. Clearcut logging

SPI is one of the largest private landowners in the United States, with over 1.3 million acres,[133] including approximately 250,000 acres of timberlands in the Sierra Nevada region.[134]

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[132] *See* Statement of Decision and Ruling filed on July 10, 2000, in *Epic, Sierra Club v. CDF*, San Mateo Superior Court No. CV000170, case pending. The Court also noted that "The Court finds transparent CDF's post-February 11, 2000 actions to 'improve' its administrative record. Apparently, CDF believes an administrative record is what it contrives it to be."

[133] *See* GEORGE DRAFFAN, Profile of Sierra Pacific Industries, Public Information Network (Feb. 1999).

[134] *See* U.S. FOREST SERVICE, SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL EN-

In early 2000 SPI announced its intent to convert 70% of its timber holdings over the coming decades to even-aged management through clearcutting.[135] A recent CDF report indicates that SPI has already begun this process by increasing its clearcutting operations from 2% of total acres logged in 1995 to 86.7% in 1999 and increasing the number of acres clearcut between 1992 and 1999 by 2,426%.[136] Moreover, SPI continued this accelerated pace of cutting in the Sierra Nevada in the year 2000.[137]

This issue gradually picked up steam over the summer of 2000, until on October 3, 2000, the day of the Board's WEMA hearing, a large article ran on the front page of the *Sacramento Bee* under the headline, "Changing face of Sierra brings new breed of clear-cut foes." Written by the *Bee's* Stuart Leavenworth, it explains:

> "Across the Sierra Nevada, old timber towns are being transformed by small businesses, retirees and urban refugees. Now, many of them are organizing against the state's largest private landowner—Sierra Pacific Industries—which plans to clear-cut a million acres of its forests over the next century, or 1 out of every 40 acres of forest in California."[138]

VIRONMENTAL IMPACT STATEMENT Vol. 2, Cptr. 3, part 1.3, page 11 (2001).

[135] *See* Timber Harvest Plan No. 4-99-41/CAL-6 (San Antonio Creek), filed July 16, 1999, by Sierra Pacific Industries and Timber Harvest Plan No. 2-00-200-TRI(4)(Bonanza), filed August 28, 2000, by Sierra Pacific Industries.

[136] *See* Dr. Tian-Ting Shih, California Department of Forestry and Fire Protection, Fire and Resource Assessment Program, "Forest Practices by Sierra Pacific Industries in California from 1982 to 1999" (2000).

[137] The following is a partial list of timber harvest plans that SPI submitted in the Sierra Nevada in the second half of 2000: 4-00-53/ELD-29 (Oregon Gulch) 535 acres, 4-00-58/ELD-33 (Golfland) 50 acres, 4-00-68/CAL-10 (Bailey Ridge) 1913 acres, 4-00-69/ELD-3 (Stony Deer) 408 acres, 4-00-75/ELD-4 (Spur) 189 acres, 4-00-73/ELD-39 (Tear) 113 acres, 4-00-78/CAl-12 (O'Neil Creek) 101 acres; 4-00-82/ELD-44 (Buckshot) 611 acres, 4-00-85/CAL-13 (Camp Blue) 724 acres, 4-00-88/CAL-14 (Cuneo Camp) 276 acres, 4-00-91/CAL-15 (Hazel) 167 acres, 2-00-169-NEV(3) (Macklin Creek) 1,253 acres, 2-00-227/TEH-5 (Box Springs) 1415 acres, 2-00-232/BUT-1 (Humbug) 572 acres, 2-00-236/SIE-3 (Pass Creek) 1,611 acres, 2-00-237/MOD-2 (Mosquito) 924 acres, 2-00-246/MOD-2 (Ballard Ridge) 2,736 acres, 2-00-259/BUT-1 (Walker Plains) 265 acres, 2-00-268/MOD(2) (Curtis Lava) 1527 acres, 2-00-269/BUT-1 (Ewalt) 624 acres, 2-00-270/MOD(2) (Crank Mountain) 1423 acres, 2-98-274/LAS(2) 624 acres.

[138] *See* Changing face of Sierra brings new breed of clear-cut foes, SACRAMENTO BEE, Oct. 3, 2000.

The clearcutting issue had erupted in the Sierra early in the year when SPI began logging adjacent to Calavaras Big Trees State Park, a Sequoia grove that is one of the region's principal tourist attractions. To quote the *Bee's* description of company operations: "Under SPI's preferred logging method, crews generally clear tracts of 10 to 20 acres, haul out the logs, burn the stumps, spray herbicides, then replant seedlings."[139] Although clearcutting has been a focus of environmental concerns for many years, the situation in the Sierra had some new features: SPI had disclosed its long-term plans to clearcut 70% of its substantial acreage[140]; and the affluent, outraged Sierra newcomers apparently registered larger in Sacramento's political calculus than did those who had been raising the same issues on the north coast.

Privately, even CDF was concerned by SPI's plan. CDF prepared its own internal report summarizing SPI's proposed clearcutting.[141] Concerned Sierra residents used this report to catch the media's attention. In early 2000, as news of SPI's plans began to spread, business owners dependent on the scenic beauty of the area for their livelihoods demanded that the Boards of Supervisors in Nevada and Calavaras counties do something.

Another SPI clearcut plan adjacent to White Pine Lake, the drinking water supply for the town of Arnold, shocked both old-timers and the burgeoning population of retirees and other refugees from urban life. A group of women in Calaveras County produced a quilt representing the 49 clearcut blocks in this timber harvest plan and then sewed a black X across each block as it was logged.

In nearby Nevada County, SPI had submitted a 532-acre logging plan perched over the South Fork of the Yuba River. Just the previous year a local campaign succeeded in convincing the Legislature to designate the South Fork as a Wild and Scenic River.[142] The leaders of the river protection effort then spearheaded efforts to prevent SPI's logging plans from threatening the river corridor.

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[139] *See id.*

[140] *See supra* note 134.

[141] *See supra* note 135.

[142] *See* Senate Bill 496 (Byron Sher), South Yuba River, wild and scenic river bill. 1999-2000 session. Signed by the Governor on October 10, 1999.

The forest practice rules generally limit the size of clearcut blocks to 20 acres if logged with tractors or 30 acres if logged with cable systems (though exceptions are allowed up to 40 acres).[143] However, the rules do not limit the number of clearcut blocks in a timber harvest plan as long as they are separated by a block of equal size and are at least 300 feet apart. Those "buffer" areas can then be clearcut within five years. As a result, in the judgement of the conservation community, the forest practice rules provide little protection against the ecological consequences of land-extensive and time-intensive clearcutting.

Clearcutting became more common in the 1990s, led by Pacific Lumber Company on the North Coast. After Maxxam Corporation purchased the company, Pacific Lumber primarily used clearcutting to log its remaining stands of old-growth forest, largely composed of redwood trees up to 2000 years old.[144] After approval of its HCP, most of Pacific Lumber's timber harvest plans include a substantial clearcutting component. As timber volumes declined statewide, many companies turned to clearcutting, due to its greater efficiency.

Clearcutting eliminates the mix of tree species, shrubs, and downed wood normally found in a natural forest and is often accompanied by herbicide use and prescribed burning. When practiced extensively clearcutting has profound negative consequences for fish and wildlife, and the general biodiversity of the natural landscape.[145] Because industrial forest ownerships are so large, a shift in operations such as SPI

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[143] *See* CAL. CODE REGS. tit. 14, § 913.1(a)(2) (1999).

[144] *See* MAXXAM, INC., 1989 ANNUAL REPORT 17 (1990). "Basic to Pacific Lumber's long-term forest management planning is the conversion of its timberlands from old-growth redwood and Douglas fir, which have reached a stage where they grow little if at all, to fast-growing second and third generation trees."

[145] *See* CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION, CALIFORNIA'S FORESTS AND RANGELANDS: GROWING CONFLICT OVER CHANGING USES. FOREST AND RANGELAND RESOURCES ASSESSMENT PROGRAM (FRRAP) (1988). "Timber harvesting, particularly old-growth harvest and even-aged management, can permanently change habitats. Even-aged management changes multi-story, multi-aged stands of timber to single-story, single-age stands. The goal of intensive timber management is often to shorten the time it takes to grow trees. This is accomplished by eliminating successional stages dominated by shrubs, grass, or hardwoods, in the process of forest regrowth (Long, 1977; Meslow, 1978; Edgerton and Thomas, 1978)." Page 313.The most sterile successional stage, in terms of diversity of both plant and animal species, is a dense, rapidly growing young conifer forest.

has disclosed signals a major shift in the ecology of the state, one that the conservation community views with alarm.

b. Federal forest management in the Sierra Nevada

In approving timber harvest plans in the Sierra Nevada, CDF has failed to consider readily available information developed by the federal government regarding the ecology of Sierran forests and their importance to wildlife. For more than ten years, the U.S. Forest Service has conducted a continuous planning process in which it has treated the entire Sierra Nevada bioregion as one integrated ecosystem, especially with respect to old forests and wildlife species associated with old-forest habitat. This process has resulted in several different management regimes, most of which have been keyed to protecting old-forest habitat needed by the California spotted owl and Pacific fisher. For example, in the 1980s the Forest Service used its Spotted Owl Habitat Area ("SOHA") management strategy, which was based on retaining SOHAs capable of supporting one to three pairs of owls separated from each other by anywhere from 6 to 12 miles.[146]

In 1993, after determining that this was a "prescription for extinction," the Forest Service replaced the SOHA strategy with the California Spotted Owl ("CASPO") Interim Guidelines.[147] The Interim Guidelines amended the forest plans of ten national forests in the Sierra Nevada range, and were intended to be in effect for only two years, until the adoption of permanent amendments.[148] The interim guidelines required maintaining the SOHA network, but added provisions establishing 300-acre Protected Activity Centers around all spotted owl nest sites in which no logging would occur (except for light fuel management); prohibiting removal of trees over 30" diameter at breast height in "strata" preferred or utilized by owls for nesting; retaining 40% of the basal area in preferred

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[146] *See* U.S. FOREST SERVICE, PSW CALIFORNIA SPOTTED OWL SIERRAN PROVINCE INTERIM GUIDELINES ENVIRONMENTAL ASSESSMENT 1-1 - 1-3 (1993).

[147] *See id. See also* U.S. FOREST SERVICE, PSW DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT FOR CALIFORNIA SPOTTED OWL SIERRAN PROVINCE INTERIM GUIDELINES (1993).

[148] *See id.* at DN-2.

strata and 30% in utilized strata; and retaining of snags and dead and downed wood.

In 1995 the Forest Service issued a draft Environmental Impact Statement for a new proposed amendment to these forest plans to replace the Interim Guidelines with a permanent spotted owl conservation strategy. However, in 1996, the federally funded Sierra Nevada Ecosystem Project ("SNEP") issued its report, which emphasized the need to preserve functional late successional habitat for the owl and other associated species on a regional basis.[149] Late successional habitat refers to both old growth and older forest stands that have reached an advanced degree of maturity. To achieve this goal, the SNEP report recommended a range-wide strategy in which "areas of late successional emphasis" (or "ALSEs") would be interspersed with "matrix" lands to provide non-fragmented habitats necessary to maintain long-term viability for sensitive species in the Sierra Nevada. While "matrix" lands could be logged to some degree, the SNEP report recommends that matrix lands be managed to attain higher levels of structural complexity than typically found in managed stands in order to maintain biodiversity and necessary forest functions.[150]

In response to the SNEP report, the Service prepared a revised draft EIS for the California spotted owl in 1996. Instead of releasing it, the Secretary of Agriculture chartered a Federal Advisory Committee ("Advisory Committee") in 1997 to review the revised draft EIS. The Advisory Committee critiqued the revised draft EIS for failing to consider late successional habitat preferred by the California spotted owl as either an "affected environment" or as a primary objective of a specific plan alternative.[151] According to the Advisory Committee, the draft EIS had failed to assess the possibility of significant adverse impacts to the California spotted owl and to

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[149] *See* UNIVERSITY OF CALIFORNIA, DAVIS, CALIFORNIA, SIERRA NEVADA ECOSYSTEM PROJECT, FINAL REPORT TO CONGRESS: STATUS OF THE SIERRA NEVADA, WILDLAND RESOURCES CENTER REPORT NO. 36 (1996).

[150] *See id.* at 101-102.

[151] *See* Federal Advisory Committee Report on the U.S. Forest Service Revised Draft Environmental Impact Statement for Managing California Spotted Owl Habitat in the Sierra Nevada National Forests of California (last modified 1997) <http://www.fs.fed.us/pnw/owl/chpt3.htm>.

furbearers such as the Pacific fisher as a result of habitat fragmentation.[152]

At this point the Forest Service went back to the drawing board, and after reviewing the Advisory Committee's findings, the Chief of the U.S. Forest Service instructed the Forest Service, Pacific Southwest Region Office, to "significantly improve the conservation strategy for California spotted owls and all forest resources through strong collaboration with partners and researchers."[153] In 1998 and 1999 the Forest Service commissioned three separate spotted owl demographic studies covering the northern, central and southern Sierra Nevada. The results indicate that despite application of the Interim Guidelines, spotted owl populations have been declining in the Sierra Nevada at a rate of between 7 to 10% per year. The 1998 study for the southern Sierra estimated that the rate of population change from 1988 to 1998 was a decline of approximately 10% per year.[154] Similarly, the central Sierra study found an annual decline of approximately 7% over the 12 years of study.[155] Finally, the northern Sierra study found that "the territorial population [of California spotted owls] experienced a 7.7% annual rate of decline from 1990-1998 on the Lassen National Forest."[156]

The Forest Service recently rejected the CASPO Interim Guidelines as inadequate to conserve California spotted owls, yet CDF has yet to adopt any comprehensive approach to protecting the species. In April 2000 the Service issued its Draft Environmental Impact Statement for the Sierra Nevada For-

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[152] *See id.* at 25. *See also* SIERRA NEVADA FOREST PLAN AMENDMENT, DRAFT ENVIRONMENTAL IMPACT STATEMENT, U.S. FOREST SERVICE 1-2 (2000).

[153] *See* SIERRA NEVADA FOREST PLAN AMENDMENT, DRAFT ENVIRONMENTAL IMPACT STATEMENT, U.S. FOREST SERVICE 2 (2000).

[154] *See* GEORGE M. STEGER, THOMAS E. MUNTON, GARY P. EBERLINE AND KENNETH D. JOHNSON, commissioned by the U.S. Forest Service, Pacific Southwest Research Station, Fresno, California. A Study of Spotted Owl Demographics in the Sierra National Forest and Sequoia and Kings Canyon National Parks (1998).

[155] *See* USDA FOREST SERVICE, PRINCIPAL INVESTIGATOR: DR. R.J. GUTIERREZ, POPULATION ECOLOGY OF THE CALIFORNIA SPOTTED OWL IN THE CENTRAL SIERRA NEVADA, ANNUAL RESULTS 1998 , REGION 5 (1999).

[156] *See* JENNIFER A BLAKESLEY AND DR. BARRY R. NOON, U.S. FOREST SERVICE, PACIFIC SOUTHWEST RESEARCH STATION, REDWOOD SCIENCES LABORATORY, SUMMARY REPORT: DEMOGRAPHIC PARAMETERS OF THE CALIFORNIA SPOTTED OWL ON THE LASSEN NATIONAL FOREST; PRELIMINARY RESULTS (1990-1998) (1999).

est Plan Amendment (the "Framework Amendment"), which analyzed eight alternative forest management scenarios. On January 12, 2001, the Forest Service issued its Final Environmental Impact Statement and Record of Decision amending eleven forest plans in the Sierra Nevada.[157] The FEIS describes Alternative 1, which consists of continuing to use the CASPO Interim Guidelines, as follows:

> ALTERNATIVE 1: The abundance and distribution of suitable environments for the spotted owl is expected to decline from current conditions, with increased likelihood of population isolation, for the following reasons:
>
> - Alternative 1 lacks provisions addressing the distribution of habitat within owl home ranges, sufficient to maintain occupancy and productivity of spotted owl sites.
> - Alternative 1 lacks provisions ensuring adequate retention of important structural elements of owl habitat, particularly canopy cover and layering, during vegetation treatments (except within the relatively few acres occurring in PACs).
> - Ninety-six percent of owl activity centers occur in allocations where more intensive vegetation treatments are permitted to occur.
>
> The factors listed above result in uncertainty about the future quality of habitat that would be provided within owl home ranges under Alternative 1. Currently, suitable environments are estimated to occur in approximately half of the spotted owl home ranges in the Sierra Nevada (considering results reported in Hunsaker et al. *in press*); there is a likelihood that this proportion would decrease under Alternative 1. Alternative 1 has the potential to result in subtle but uniform decreases in habitat quality across the owl's range (changes that may not be readily displayed by CWHR habitat projections) . . . . Given these considerations, suitable environments for productive owl sites are estimated to become patchy or unevenly distributed under Alternative 1 and may be reduced to low abundance, particularly within certain geographic areas of concern. Spotted owl population outcomes in 50 years are rated at outcome D [A is most opti-

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[157] *See* U.S. FOREST SERVICE, SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL ENVIRONMENTAL IMPACT STATEMENT (2001); U.S. FOREST SERVICE, RECORD OF DECISION, SIERRA NEVADA FOREST PLAN AMENDMENT (2001).

> mistic, E is probable extirpation], given current population trend estimates and assuming continuation of current levels of timber harvest on industrial timberlands across the Sierra Nevada.[158]

The Forest Service's Record of Decision for the Framework Amendment adopts a "modified alternative 8" and rejects Alternative 1. The decision establishes a number of new management directions for preserving old-forest conditions and conserving spotted owls. It adds new Protected Activity Centers and requires the establishment of 600- to 2,400-acre "Home Range Core Areas" around PACs for added protection. It establishes "Old Forest Emphasis Areas" which contain most of the remaining old forests and which cover 40% of the entire planning area. Logging in both the core and old-forest emphasis areas is limited to the removal of trees under 12" in diameter, and the canopy may not be reduced by more than 10%. No suitable owl habitat may be rendered unsuitable. Canopy cover may not be reduced by more than 20%. Canopy between 50 and 59% may not be reduced below 50%, and canopy between 40 and 50% may not be reduced at all.[159]

The federal studies have also recognized the need for non-federal land to play a role in conserving owl habitat. The SNEP Report noted that the region-wide establishment of connected habitat necessary to maintain populations of sensitive species such as the California spotted owl will require a coordinated approach from all institutions with regulatory authority over forest lands and all forest land ownerships in the Sierra Nevada, stating: "A pressing need is for development of a defensible range-wide strategy that explicitly recognizes the objective of maintaining late successional forests and is flexible enough to allow local adaptation and cross-ownership implementation."[160]

Similarly, the Draft EIS also pointed out that there "is no comprehensive public policy across all ownerships for main-

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[158] *See* U.S. FOREST SERVICE, 3 SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL ENVIRONMENTAL IMPACT STATEMENT 106-107 (2001) (emphasis added).

[159] *See* U.S. FOREST SERVICE, RECORD OF DECISION, SIERRA NEVADA FOREST PLAN AMENDMENT 38-41, APP. A (2001).

[160] *See* UNIVERSITY OF CALIFORNIA, DAVIS, CALIFORNIA, SIERRA NEVADA ECOSYSTEM PROJECT, FINAL REPORT TO CONGRESS: STATUS OF THE SIERRA NEVADA, WILDLAND RESOURCES CENTER REPORT NO. 36 111 (1996).

taining or enhancing old forest conditions on other lands in the Sierra Nevada. Timber harvest on private lands is controlled by State forest practices acts and a number of State and Federal regulations and incentives . . . . Due to variations in market conditions and the mix of national forests with other lands, it is not possible to confidently project the cumulative effects on old forests located on other lands from decisions in any of the alternatives."[161]

The Forest Service technical team that conducted the first comprehensive assessment of the habitat needs of the California spotted owl noted that most private timberlands in California possessed habitat suitable for the owl, but that sufficient monitoring information and accompanying comprehensive management was lacking.[162] Based on this assessment, the Technical Report states that any regional cumulative impact assessment for California spotted owls must include "predictable actions on private lands that will remove suitable habitat."[163] The Technical Report also emphasized the necessity of including private lands in any regional strategy to protect the owl, stating:

> [O]verall plans for management of spotted owls need to result from coordinated efforts with adjoining landowners, including all public ownerships. This recommendation is not leveled as a criticism of private landowners. On the contrary, we believe that all parties—public and private—share equally in the general failure to work cooperatively to develop solutions to common problems.[164]

c. CDF's Response to the Forest Service Planning Process

The federal planning process illustrates the need to treat the Sierra Nevada forest as one contiguous ecosystem when addressing the long-term survival of sensitive species such as

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[161] *See* U.S. FOREST SERVICE, SIERRA NEVADA FOREST PLAN AMENDMENT, DRAFT ENVIRONMENTAL IMPACT STATEMENT 3-7 (2000).

[162] *See* J. Verner et. al., "The California Spotted Owl: A Technical Assessment of its Current Status," U.S.D.A. Gen. Tech. Rep. PSW-GTR-133, July 1992, p. 16 (hereinafter "Technical Report").

[163] *See id.* at 16.

[164] *See id.* at 17.

the California spotted owl and Pacific fisher. The striking feature of CDF's response to the Forest Service's decade-long program of wildlife research and increasing protections for old forest-associated wildlife species is that CDF has not responded at all. This planning process has had virtually no impact on the timber harvest plans that CDF has continued to approve in the Sierra Nevada. Both the California spotted owl and Pacific fisher are listed as species of special concern by the California Department of Fish and Game, and as sensitive species by the U.S. Forest Service and the U.S. Bureau of Land Management, yet the Board of Forestry has not listed either as "sensitive" under the forest practice rules.[165]

Under the forest practice rules, CDF can require a cumulative impact assessment area that is region-wide, as the Forest Service has done. Under the rules, the appropriate "area" for assessing cumulative impacts on biological resources "will vary with the species being evaluated and its habitat"; significant cumulative effects on such species may be expected from the results of activities over time which combine to have a substantial effect on the species or on the habitat of the species; and a primary factor to consider in evaluating cumulative biological impacts is whether any sensitive species may be directly or indirectly affected by project activities.[166] In particular, significant cumulative impacts may be expected where the project will result in a "substantial reduction in required habitat" or "substantial interference with the movement of resident or migratory species."[167]

Cumulative impacts are defined in the forest practice rules as the impacts from "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts . . . The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."[168] The

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[165] *See* 14 Cal. Code Reg. §§ 919.12, 939.12, 959.12.

[166] *See* 14 Cal. Code Reg. §§ 932.9, 959.2, Technical Rule Addendum # 2, ¶ C.

[167] *See id.* at C.2.

[168] *See* 14 Cal. Code Reg. 895.1, adopting CEQA Guideline 15355. Cumulative

rules define "reasonably foreseeable probable future projects" as "projects with activities that may add or lessen impact(s) of the proposed THP including but not limited to: 1) if the project is a THP on land which is controlled by the THP submitter, the THP is currently expected to commence within, *but not limited to*, 5 years . . . ."[169] (emphasis added)

The typical SPI Sierra timber harvest plan defines its "biological assessment area" the same as the watershed assessment area, which typically is in the range of 5,000 to 15,000 acres in size.[170] In other words, these timber harvest plans collide with the CEQA "principle that 'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.'"[171] In the judgement of the conservation organizations that are following SPI's plans in the Sierra Nevada, these small assessment areas cannot account for the cumulative impacts of each timber harvest plan in combination with other reasonably foreseeable probable future projects on the biological resources of the Sierra Nevada ecosystem.

Despite these rules, CDF continues to approve timber harvest plans without any comprehensive regional assessment of the environmental impact of the loss of older forests. This is also despite the fact that significantly more timber is logged from private land than from federal land. In 1993, 28% of the timber volume harvested in the Sierra Nevada came from the national forests, and 72% came from private land. In 1998, timber harvest from private lands accounted for 82% of the timber volume logged in the Sierra Nevada, as compared to only 18% from federal land, and the percentage on private land will continue to increase.[172]

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impacts for THPs are assessed according to the methodology described in Board Technical Rule Addendum Number 2, Cumulative Impacts Assessment Process ("Addendum Number 2") at 14 C.C. R. § 912.9.

[169] *See* 14 Cal. Code Reg. § 895.1 (emphasis added).

[170] *See e.g.* Timber Harvest Plan 2-00-277/BUT-1, pp. 26, 28-29.

[171] *See* Laurel Heights Improvement Ass'n v. Regents of the University of California, 47 Cal. 3d 376, 396 (1988). ("This standard is consistent with the principle that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.")

[172] See U.S. FOREST SERVICE, 2 SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL

Despite SPI's large ownership, CDF regularly approves SPI timber harvest plans that contain no assessment of their own contribution to the decline and fragmentation of old-forest habitat in the Sierra Nevada ecosystem. Despite the fact that SPI possesses information regarding its future harvesting in the Sierra Nevada region, SPI does not provide and CDF does not require that SPI provide that information to CDF or the public in connection with its timber harvest plan submissions, or that SPI provide an ownership-wide assessment of the water quality, wildlife, and biodiversity impacts of their clearcutting plans.

Moreover, the CASPO Interim Guidelines (Alternative 1 in the Framework EIS) are significantly more protective of old-forest habitat than the state forest practice rules. Yet the Forest Service has now adopted an entirely new management direction for the eleven national forests in the Sierra Nevada range that is significantly more protective of old-forest ecosystems than the Guidelines.[173] By contrast, the Board of Forestry has not adopted any rules to protect habitat or populations of the California spotted owl or Pacific fisher.

In addition, while SPI has proposed to clearcut the majority of its timber holdings, in its 1998 report the U.S. Forest Service scientific advisory committee found that the historical lack of clearcutting in the Sierra Nevada is arguably the principal reason why the California spotted owl has thus far not required listing under the federal Endangered Species Act:

> It is well known that fragmentation and loss of habitat at larger scales (e.g., clear cutting *per se*) in the Pacific Northwest had deleterious effects on [northern] spotted owl populations and consequently led to the listing of that subspecies. One of the primary facts that led to the CASPO strategy was that massive clearcutting had not occurred in the Sierra Nevada in a manner spatially resembling the Pacific Northwest situation. Fine scale fragmentation may have other unknown effects on spotted owls. For example, it may facilitate

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ENVIRONMENTAL IMPACT STATEMENT 29 (2001).

[173] Compare U.S. FOREST SERVICE, PSW DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT FOR CALIFORNIA SPOTTED OWL SIERRAN PROVINCE INTERIM GUIDELINES (1993) and U.S. FOREST SERVICE, 3 SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL ENVIRONMENTAL IMPACT STATEMENT 106-107 (2001) and U.S. FOREST SERVICE, RECORD OF DECISION, SIERRA NEVADA FOREST PLAN AMENDMENT 38-41, APP. A (2001).

> the occupation of sites by spotted owl predators or competitors. [citations omitted][174]

Despite this assessment and the Technical Report's concern over landscape fragmentation of spotted owl habitat, SPI timber harvest plans contain no analysis of how the reduction in habitat caused by its plans, in conjunction with other past, present and foreseeable future logging operations, will avoid having a significant impact on the California spotted owl. These plans propose to substantially reduce canopy cover on thousands of acres, but provide no assessment of the degree of this impact on owls, both within the watershed and in the Sierra Nevada.

Early attempts to protect the owl envisioned the establishment of at least 1,000 acres of suitable habitat within a 1.5-mile radius of known or potential nest sites.[175] Subsequent research has shown that connective lands between these protected Spotted Owl Habitat Areas must also be maintained in suitable condition for foraging and dispersal, in order to avoid fragmented habitat islands that researchers agree will lead to the extinction of the owl in the Sierra.[176]

SPI's plans adopt an even less protective version of the discredited SOHA strategy by proposing to eliminate areas of suitable owl habitat without any analysis of how owls can continue to survive in the region and in the Sierra Nevada. Instead of assessing the habitat needs of the owl, SPI's plans note simply:

> The California spotted owl is not a threatened species . . . . California spotted owl nest sites are managed under the FPR Wildlife Protection Practices for the protection of any active nest sites, designated perch trees, and screening trees. If any active nests are found within the project area during

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[174] *See* Federal Advisory Committee Report on the U.S. Forest Service Revised Draft Environmental Impact Statement for Managing California Spotted Owl Habitat in the Sierra Nevada National Forests of California, 1997. Chapter 3, section entitled "Misinterpretation and Non-Use of Existing Information." <http://www.fs.fed.us/pnw/owl/chpt3.htm>.

[175] *See supra* note 163.

[176] *See id.* "We agree that a SOHA strategy, culminating in a network of small, relatively isolated 'islands' of older forest suitable for breeding by spotted owls and separated by a 'sea' of younger, less suitable or unsuitable habitat, is not a workable strategy to assure long-term maintenance of spotted owls."

> project activities, these protection measures will be put in place. (THP-277, p. 55).

In fact, however, the state forest practice rules do not provide any protection specifically designed to protect California spotted owl nest sites or other habitat components. Therefore, in the judgement of the authors, timber harvest plans taking SPI's approach do not assess or mitigate the impact of incremental cutting on the long-term survival of the owl habitat in the biological assessment area, and in the Sierra Nevada; they do not provide information regarding the eventual amount of cutting that will occur within the watershed; nor do they provide information regarding the potential for continued harvesting to create islands of habitat surrounded by a sea of unsuitable habitat, thereby eliminating spotted owls from the region.[177]

In light of the federal government's advances in regional ecological research, cumulative impact risk assessment and conservation strategies, the authors of this article suggest that the small geographic and short temporal scales that CDF utilizes to assess the cumulative impacts of Sierra Nevada timber harvest plans on old forest-associated wildlife species is inconsistent with the requirements of the Forest Practice Act. CDF's decision to reject the Forest Service's impact assessment methods, impact assessment conclusions and mitigation measures is not supported by substantial evidence, and does not accord with the procedures required by law. At a minimum, the selection of the impact assessment area would not be "appropriate" for the affected resource under Forest Practice Rule 912.7, Technical Rule Addendum No. 2.[178] The authors, therefore, recommend that CDF adapt the Forest Service approach for application to its regulation of logging on private land. CDF should also consider portions of SPI's timber holdings in California as late successional reserves or at

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[177] *See* Timber Harvest Plan No. 4-99-41/CAL-6 (San Antonio Creek), filed July 16, 1999, Timber Harvest Plan No. 4-00-53/ELD-29 (Oregon Gulch), filed July 5, 2000, Timber Harvest Plan No. 4-00-58/ELD-33 (Golfland), filed August 3, 2000, Timber Harvest Plan No. 4-00-68/CAL-10 (Bailey Ridge), filed August 25, 2000, and Timber Harvest Plan No. 2-00-200-TRI(4)(Bonanza), filed August 28, 2000, describing SPI lands recently proposed for timber operations.

[178] *See* CAL. PUB. RES. CODE § 21168 (West 1996); *See also* CAL. CIV. PROC. § 1094.5(c) (West 1980).

least high-quality "matrix" corridors in order to protect sensitive species such as the California spotted owl and Pacific fisher over the long term.

E. OAK WOODLANDS AND HARDWOODS

Virtually all of the litigation involving the state's regulation of logging has involved CDF's approval of timber harvest plans and the Board's adoption of forest practice rules. This may seem surprising given the extensive controversy and public concern generated by the widespread conversion of lower-elevation oak woodlands in California to alternate land uses, such as housing subdivisions and vineyards. However, until recently the Board has avoided litigation involving these issues by exempting the logging of lower-elevation oak woodlands in California from the regulatory scope of the FPA by excluding oak trees from the definition of "commercial" species.[179]

Oak woodlands and other hardwood occupying "rangelands" that the Board of Forestry has excluded from the timber harvest plan requirement comprise approximately 11,057,870 acres in California, of which CDF estimates there are about 76,450 acres of Valley oak woodlands and 3,596,060 of Blue oak woodlands.[180] The Forest Service estimates that private Blue oak woodlands in the Sierra Nevada comprise approximately 2,461,753 acres.[181] Oak woodlands provide a host of environmental values, including wildlife habitat and water quality protection.[182] Therefore, while this article primarily discusses the Davis administration's performance in approving timber harvest plans, the continued exemption of oak woodland logging from state regulatory control stands out as one of the principal failures of the Davis administration in achieving the FPA-envisioned balance between commercial and environmental interests.

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[179] *See* discussion, *infra*, regarding the pending litigation entitled California Oak Foundation v. CDF, San Francisco Superior Court No. 314859.

[180] *See* CALIFORNIA DEPARTMENT OF FORESTRY, GUIDELINES FOR MANAGING CALIFORNIA'S HARDWOOD RANGELANDS 13 Tab. 2.2 (1996).

[181] *See* 2 U.S. FOREST SERVICE, SIERRA NEVADA FOREST PLAN AMENDMENT, FINAL ENVIRONMENTAL IMPACT STATEMENT 23 (2001).

[182] *See* CALIFORNIA DEPARTMENT OF FORESTRY, GUIDELINES FOR MANAGING CALIFORNIA'S HARDWOOD RANGELANDS (1996).

On February 3, 1987, the Board of Forestry adopted a resolution that acknowledged the Board's authority and obligation to protect hardwood forest resources, including oak woodlands, under the FPA, but that opted for an approach to oak conservation based on "research, monitoring and education" instead of regulation.[183] The Board then established a two-part approach to logging of oak trees depending on their location, by defining oaks as a "Group B commercial species."[184] The definition of commercial species is critical under the FPA, because land is only considered "timberland" under the FPA if it is "available for, and capable of, growing a crop of trees of any commercial species used to produce lumber and other forest products."[185] Further, land must be considered "timberland" in order for logging operations on that land to be considered "timber operations" subject to the FPA's timber harvest plan or timberland conversion permit requirements.[186]

The Board has excluded millions of acres of oak woodlands from the definition of commercial species. Thus, as a matter of departmental policy, CDF and the Board do not require timber harvest plans for most timber operations involving the removal of oak trees.

As a practical matter, this means that millions of acres of lower-elevation oak woodlands in California may be logged without any review or investigation of environmental impacts. Instead, these forests are subject to the Board's Integrated Hardwood Range Management Program, which consists of CDF-funded research, monitoring and education efforts to encourage and assist local governments and landowners to voluntarily protect this resource.

Conservation organizations, based on their perception that this voluntary approach is not working, have requested that the Board of Forestry define oaks as a commercial species in order to bring them within the FPA's timber harvest plan requirements.[187] Concern about this policy has recently

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[183] *See* BOARD OF FORESTRY, HARDWOOD POLICY: CURRENT STATUS OF THE INTEGRATED HARDWOOD RANGE MANAGEMENT PROGRAM (1993).

[184] *See* CAL CODE REGS. tit. 14, § 895.1 (2000).

[185] *See* CAL. PUB. RES. CODE §§ 4526 (WEST 1984)

[186] *See* CAL. PUB. RES. CODE §§ 4527, 4561, 4581 (West 1984); CAL CODE REGS. tit. 14, § 895.1 (2000).

[187] *See e.g.,* BOARD OF FORESTRY, HARDWOOD POLICY: CURRENT STATUS OF THE INTE-

been heightened by the emergence of a statewide epidemic of sudden oak death syndrome.[188] On September 8, 2000, the California Oak Foundation and Mountain Lion Foundation filed suit in San Francisco Superior Court seeking a declaratory judgment against CDF and the Board that their failure to require timber harvest plans for logging oak woodlands violates the FPA.[189]

F. SUSTAINED YIELD

The timber industry in California has gone through several waves of acquisitions and mergers, many of them financed by significant debt. One consequence of this debt burden is the practice of many companies to increase the volume of trees logged by reducing the average age of the trees harvested. These "rotation" ages, as they are known, dropped in many locations from as long as 100 years to as low as 40 years. Cutting a "crop" on a tree farm after 40 years causes much greater damage to watershed values and wildlife habitat than cutting a second-growth forest every 100 years. Logging forests at an older age allows time for watersheds to heal and for wildlife habitat to recover and develop. In addition, short-rotation plantation trees generally produce inferior wood products, not the "high-quality" wood products referenced in the FPA, because they are growing too fast to produce dense and fine-grained wood. Thus, the seemingly incompatible twin goals of the FPA to achieve the maximum production of high-quality timber products and to protect the environment are not as difficult to reconcile as they might appear.

This issue came to a head in Mendocino County, where the old-growth forests had been mostly logged by the early 1900s and what remained had been cut after World War II. Nevertheless, the recovering 100-year-old second-growth redwood forests were impressive. They had many of the same wildlife characteristics as old-growth groves. With many trees

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GRATED HARDWOOD RANGE MANAGEMENT PROGRAM (1993).

[188] Sudden Oak Death Syndrome is a virulent, often fatal fungus that is currently destroying oak trees across California.

[189] *See* California Oak Foundation v. CDF, San Francisco Superior Court No. 314859. Case pending.

over four feet in diameter, these forests were a haven for many, but not all, of the species usually associated with coastal old-growth. But by the late 1980s the second-growth forests were disappearing fast as the tendency toward short-rotation logging took hold with a vengeance on lands in the county owned by large industrial companies like Georgia Pacific and Louisiana-Pacific.

In response, forestry activists in Mendocino County filed a lawsuit in which the San Francisco Superior Court, and later the First District Court of Appeal, held that the Board of Forestry has an affirmative obligation to adopt rules to implement the stated goal of the FPA to achieve the "maximum production of high-quality timber products."[190] As a result, in 1994 the Board adopted regulations, often referred to as the "sustained yield" regulations, that require timber harvest plan submitters to demonstrate how they will attain "Maximum Sustained Production of High-Quality Timber Products (MSP)" by "balancing growth and harvest over time."[191] This rule requires that:

> The projected inventory resulting from harvesting over time shall be capable of sustaining the average annual yield achieved during the last decade of the planning horizon. The average annual projected yield over any rolling 10-year period, or over appropriately longer time periods for ownerships which project harvesting at intervals less frequently than once every ten years, shall not exceed the projected long-term sustained yield.

Broken down, this rather impenetrable language allows the timberland owner great latitude in selecting the volume of timber to be considered as his or her annual "long-term sustained yield" target. Once this figure is set, the regulation requires that any ten-year average of annual yields shall not ex-

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[190] *See* Redwood Coast Watersheds Alliance v. State Board of Forestry and Fire Protection, 70 Cal. App. 4th 962, 970 (1999). ("The trial court stated: the conclusion that is most consistent with the apparent intention of the Legislature, and essential to accomplish the long-term objectives of the statute, is that the FPA must be read to demand of the Board of Forestry that it adopt and enforce regulations which ensure that aggregate timber harvest on private lands do not outstrip growth and lead to an ever-diminishing supply of timber . . . . ")

[191] *See* CAL CODE REGS. tit. 14, § 913.11 (California Code of Regulations at http://www.calregs.com last visited February 22, 2001).

ceed the target. Since the target can be set as high as the owner decides, the sustained yield regulations have been widely viewed as a toothless exercise in generating paper, with virtually no effect on increasing the age at which forests are logged. Sustained yield documents routinely show the ownership's merchantable timber volumes declining in the first one to three decades, i.e. the foreseeable future, but then recovering in the distant future sufficiently to meet the theoretical target in year 100.[192] However, the documents are not binding on future owners so nothing prevents timber companies from harvesting as much merchantable timber as they can now and then selling the timberlands. Many activists charge that Louisiana-Pacific and Georgia Pacific did exactly that in Mendocino County, California.[193]

Also, rather than making a determination that "high-quality timber products" means lumber, the Board adopted regulations that allow each company to choose the products it will produce over the 100-year planning period. As timber stands are depleted of larger timber stock, companies more and more are harvesting formerly unmarketable trees to turn into chips for particleboard, or as fuel for co-generation of electricity.

While Governor Davis' administration inherited this situation, neither his Board of Forestry nor CDF has taken any action to remedy what many in the environmental community view as the single most important failure of the state government to enforce the FPA.

G. PEER REVIEW OF THE DAVIS ADMINISTRATION

In the summer of 2000, Public Employees for Environmental Responsibility ("PEER"), a non-profit membership organization of publicly employed resource professionals, released a report presenting the results of a survey of state-

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[192] *See* Final Environmental Impact Statement/Environmental Impact Report and Habitat Conservation Plan/Sustained Yield Plan for the Headwaters Forest Project. Volume I, Chapter 3, page 3.9, Table 3.9-6c. Alternative 2 Projected Harvest, Growth and Inventory Volumes, PALCO Lands Only.

[193] *See* The Forestry Source, Newsletter of the Society of American Foresters, "The Timber Company to Sell California Timberlands" (1999). *See also* Mike Geniella, "L-P Confirms Property Sales to Two Buyers," The SANTA ROSA PRESS DEMOCRAT, May 5, 1998.

employed biologists and other resource professionals on the extent to which this administration has helped or hindered them in their efforts to protect environmental and public trust resources.[194] The results indicate that Governor Davis and his cabinet-level appointees consistently take positions that are industry-friendly and deleterious to the environment, even to the point of backing the logging industry in virtually every major conflict with state-employed biologists. PEER conducted a survey of biologists employed by the California Department of Fish and Game to assess their perception of the Davis administration's commitment to protecting California's environment and natural resources from damage by logging. The following is an excerpt from the report:

> In the Fall of 1998, Public Employees for Environmental Responsibility surveyed the 1600 employees of the California Department of Fish and Game (DFG) at the request of agency employees.
>
> The findings were troubling. Respondents reported that under the Pete Wilson administration, politics routinely overrode science in agency decision making, and that efforts to protect California's wildlife resources were often obstructed by DFG's own chain of command. Further, employees feared retaliation from management for advocating the enforcement of environmental laws. Tellingly, 89% of the survey respondents stated that agency morale was low.
>
> When Gray Davis won the Governor's seat in 1998, DFG employees expected that things would change rapidly for the state's resource management agencies. Davis pledged his support for environmental enforcement, and shunned the Wilson administration's open disdain for environmental professionals.
>
> To research this report, California PEER conducted extensive one-on-one interviews with 70 current DFG employees, as well as other state employees. This report summarizes the most consistent themes from the interviews.

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[194] *See* California Public Employees for Environmental Responsibility Report, *California's Failed Forest Policy: State Biologists Speak Out* (last modified Summer 2000) <http://www.peer.org/press/127.html>.

EXECUTIVE SUMMARY

Resource professionals at the California Department of Fish and Game (DFG) say good economic times have provided more money for state agencies charged with resource protection, but also say they are still unable to review the vast majority of the state's Timber Harvest Plans. They cite serious deficiencies in the State's Forest Practice Rules, and claim that staff in the Governor's office are obstructing the Department's ability to carry out their Public Trust duties of protecting fish and wildlife, by intervening on behalf of the timber industry.

When Governor Gray Davis came to office nearly two years ago, DFG employees anticipated sweeping policy and leadership changes. This has not been the case, although employees cite some positive changes: substantial and long-overdue pay increases have boosted morale, as has the appropriation of the largest budget in DFG history, a 30% increase over 1999/2000 funding. Still, biologists say the state's important biological resources are still being denied the political protections desperately needed to stem their declines.

Employees call DFG Director Robert C. Hight a "nice guy," but believe the scientific advisors on whom he relies are politically motivated, often to the detriment of sound science. Initial support for Hight also appears to be waning as employees increasingly see him as a "good soldier" for a Davis administration pro-timber industry position.

DFG's 2000-2001 budget increased by $71 million, primarily for administrative support and CEQA and Timber Harvest Plan (THP) review. The bad news is that Governor Davis vetoed an additional $34 million proposed by the legislature, which would have increased DFG staff by 243 people. These positions would have included 60 new wardens and 76 persons to conduct monitoring of habitat losses and wildlife populations.

Davis also vetoed 16 of 20 proposed DFG positions to manage state-owned land. In addition, 109 of the approved positions are "redirected," meaning DFG must identify 109 presently existing but vacant positions and fill those. According to one DFG manager, the department will be hard pressed to identify the 109 vacancies. The department will still be able to review only a fraction of the projects proposed every year that impact fish, plants or wildlife.

DFG employees say the Davis administration is more receptive to Fish and Game critics than his predecessor. Certainly this administration's methods of dealing with the conflicts between fish, plant and wildlife protection and the many projects that impact resources differ dramatically from the Wilson administration, which denied DFG the funds necessary to protect fish, plants and wildlife, but otherwise essentially ignored the department. While the Wilson administration's policies were industry-friendly, it didn't generally intervene on specific projects. One DFG manager says it is "unusual" for governors to get involved at the level at which this administration does.

The Davis administration has a definite "hands on" management style; standard practice for this administration is to try get all parties to an issue into a room and make them resolve their differences. While this approach has the advantage of forcing agencies with opposite goals to compromise, DFG biologists say the results are not in the best interests of fish and wildlife, as methods for solving political conflict have inherent problems when applied to biological issues.

This consensus-based approach is contrary to assurances made by Bob Hight soon after his appointment. In the October 1999 issue of "Fish and Game Today," Hight told DFG employees "No matter what science-based task we undertake here at DFG, it should be founded on the highest of technical standards and follow the best repeatable, documented and peer-reviewed procedures we have available to us."

The Davis administration was expected to be philosophically sympathetic to resource issues, but there is a concern among DFG employees that science is kneeling before politics on high-profile issues. Employees cite many examples of natural resources suffering as a result of excessive political compromise, as well as many instances in which biologists are being told by the Governor's staff to "back off" in their efforts to protect fish and wildlife.

Several DFG employees expressed concern that Gray Davis is accepting large campaign contributions from the timber industry. Following a fundraiser by Sierra Pacific Industries, Governor Davis appointed one of SPI's directors to the State Board of Forestry. And, significantly, on June 30 Governor Davis blue-penciled budget language that would have greatly helped passage of a strong "Closing the Logging

Loopholes" bill."[195]

H. LEGISLATION

1. AB 717: Regulation of Clearcutting

In early April of 2000, Assembly Speaker Pro-tem Fred Keeley (D, Boulder Creek) responded to the lack of progress at the Board of Forestry regarding protection of watersheds and coho salmon by amending his proposed bill, AB 717, to provide standards for watershed analysis that CDF might use as a basis for approving timber harvest plans. After it became clear that the Legislature would not take action on watersheds in 2000, Assemblyman Keeley abandoned this effort.

However, after SPI's acceleration of clearcutting in the Sierra Nevada became widely publicized, Assemblyman Keeley amended AB 717 in the closing weeks of the legislative session to impose a moratorium on clearcutting while an independent panel of experts reviewed the issue and made recommendations. The Calavaras clearcut quilt went up in Assemblyman Keeley's Sacramento office. While taking no position himself, the Governor did intervene to the extent of suggesting to the major timber interests that they sit down with Assemblyman Keeley and his supporters to discuss the bill and try and work out a compromise. Although lobbyists from the timber industry and the conservation community routinely interact at the Board of Forestry, the Governor's request brought SPI owner Red Emmerson to the Capitol for a face-to-face meeting with Assemblyman Keeley. Shepherding Emmerson to Keeley's office was the man the *Los Angeles Times* described as "Davis' chief fund-raiser during his 1998 campaign," Darius Anderson.[196]

On August 31, 2000, the final day of the legislative session, Assembly Speaker Pro-tem Keeley, Senate Speaker Pro-tem John Burton, Appropriations Committee Chairman Senator Pat Johnston (in his last day as a Senator because of

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[195] *See id.*

[196] Firms Seeking State Favor Finance Davis Foundations by Dan Morain, Staff Writer, Los Angeles Times, November 15, 2000: "Darius Anderson, Davis' chief fundraiser during his 1998 campaign, established the nonprofit corporations for the governor since his election two years ago."

term-limits) and representatives from the Sierra Club sat down with three timber representatives and CDF Director Andrea Tuttle. The team present for the industry was former Congressman and Davis Industrial Relations Board appointee Doug Bosco, Davis fundraiser Jeremiah Hallisey, and timber attorney Wayne Whitlock of Pillsbury, Madison, and Sutro.[197] Although it was never clearly stated who represented whom, based on their positions it appears that the interests of Pacific Lumber, Simpson Timber, and Sierra Pacific Industries were represented.

The industry made one offer: to cap clearcut acreage at the average of the previous three years' rate, per ownership, during a study conducted by the governor-controlled Office of Planning and Research (OPR), with an exemption for owners holding a federal Habitat Conservation Plan (i.e., Simpson and Pacific Lumber). This would have modestly reduced SPI's planned clearcutting but would not have affected the major North Coast clearcutters. Even the modest reduction in SPI's clearcutting seemed questionable, however, because industry's definition of clearcutting would have allowed any reduction in clearcut acreage to be matched by logging that retained only a few trees per acre. CDF Director Tuttle responded favorably to the industry proposal. The industry refused to consider any changes in their proposal and after due consideration, Assemblyman Keeley and his supporters declined.[198] Assemblyman Keeley's bill never made it off the Senate floor.

2. Agency Budget Appropriations

In April of 2000, the Senate and the Assembly budget subcommittees added budget control language to a Resources Agency budget item; the new language required passage of a bill, prior to expenditure of the budget allocation, that would provide for peer and public review of any watershed analyses or assessments that CDF might use to make timber harvest plan decisions. Additionally, it called for the adoption of "no cut" buffers of an unspecified size adjacent to fish-bearing streams. During hearings on the budget item, Resources Agency Secretary Mary Nichols testified that the Davis ad-

[197] Personal observation of author, Kathy Bailey.

[198] *Id.*

ministration was committed to scientific peer review and public review of watershed assessments. Both houses of the Legislature adopted this budget control language as part of the final year 2000 budget bill, but Governor Davis blue-penciled the item without explanation in July 2000.

3. SB 1964: Extending Public Comment on Timber Harvest Plans

SB 1964 (Chesbro) would have extended the public comment period on timber harvest plans from 15 to 30 days. This change had been recommended by a Wilson-era Little Hoover Commission report.[199] The Legislature passed this bill over strong industry opposition. Governor Davis vetoed the bill, stating in his veto message that the bill was flawed because it did not extend the comment period for THPs that were not reviewed in the field. Constituents who had worked with Senator Chesbro to pass the bill complained bitterly that the Administration had never voiced this concern during the legislative process, and CDF had stated that it supported the bill.[200]

I. NON-REGULATORY APPROACHES TO FORESTRY ISSUES

Although the Davis administration has made only modest strides in the regulatory arena, it has continued and expanded programs begun during the Wilson administration and has taken advantage of the budget surplus to initiate others. The Davis administration has made a contribution in the effort to improve conditions for imperiled salmon by supporting a new Resources Agency program entitled the North Coast Watershed Assessment Budget Change Proposal. The Budget Change Proposal allocated $6.9 million to departments within the Resources Agency to compile existing information held by those departments and to begin to identify

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[199] *See* LITTLE HOOVER COMMISSION, TIMBER HARVEST PLANS: A FLAWED EFFORT TO BALANCE ECONOMIC AND ENVIRONMENTAL NEEDS, RECOMMENDATION #3, THE GOVERNOR AND THE LEGISLATURE SHOULD ENACT LEGISLATION TO EXTEND THE PUBLIC COMMENT PERIOD FOR TIMBER HARVEST PLAN REVIEWS AND REQUIRE NOTIFICATION OF OUTCOME, v. 44 (1994).

[200] Governor's veto message, September 29, 2000, available at www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1951-2000/sb_1964_vt_20000929.html.

critical information gaps necessary to pull together coarse-scale, "big picture" information about landscape conditions relevant to salmon.[201] For instance, although it is widely recognized that salmon are facing numerous impassable barriers in their annual upstream migration to spawn, no one has ever catalogued where these barriers are, and how much upstream habitat could become useable if the barrier were removed. The Budget Change Proposal funds the collection of this and other types of information, including mapping of landslide potential, a critical issue in the logging debate. While the Legislative Analyst's Office and others criticized the Budget Change Proposal for lack of interdepartmental coordination, it was nevertheless a step in the right direction. Additional dollars were allocated to Cal EPA for upgrading the information base at the Water Quality Control Boards. (A separate Budget Change Proposal provides funding to match federal dollars available for salmon habitat restoration.)

The Davis administration would presumably point to the following accomplishments to counter the mostly critical picture painted in this article:

- Increased level of THP review staff at CDF, DFG, DMG, and WQ
- The Year 2000 budget change to collect and graphically present existing data
- The Incentives Task Force
- Increasing digitization and web-based access to forest-related information
- Passage of the Park Bond, expected to finance purchase of some forestland
- Passage of the Impaired Watershed Rules
- Expansion of the Forest Legacy program, an initiative by a land trust group
- Expansion of the California Forest Improvement Program
- Adoption of civil penalties for Forest Practice Rule violations

In addition, in 1998 Senator Byron Sher (D-Palo Alto), a long-time forest advocate, authored SB 620, a bill authorizing civil penalties for violations of the forest practice rules. The

[201] "Watershed Assessment Initiative," 2000-01 *Analysis* by Legislative Analyst's Office (LAO), page B-32-37.

bill addressed a long-standing problem with rule enforcement. Without its adoption, it was necessary to cite violations as criminal offenses, which required prosecution by the local District Attorney. This meant that only the most egregious violations were prosecuted. Although the bill had cleared most committees, it had stalled by the middle of 1999. Meanwhile, because of strong industry opposition, the Board of Forestry was unable to act on the pending Impaired Watersheds rule in time for the rule to go into effect in January 2000. Due to NMFS' pressure on the Board of Forestry to increase protections for listed salmonid species, the Davis administration tried to find a way to buy time at the Board. The administration asked Senator Sher to amend SB 620 to allow Board rules to become operational in July as well as January for the year 2000 only. Although industry opposed the bill, it was enacted.

Despite these accomplishments, few would disagree with the assertion that the Davis administration has moved very cautiously in what is admittedly a difficult policy arena with a long history of controversy. However, substantive progress in the regulation of logging is difficult to discern, and even some of the items the administration likes to take credit for, like the increase in staff levels, were well underway prior to Davis taking office.

J. FUNDRAISING

Governor Gray Davis' extensive fundraising activities for his year 2002 reelection campaign began almost as soon as he won the election in 1998, and they have become a much-discussed topic in the last two years. In August, the *Los Angeles Times* reported that Governor Davis collected a record $13 million in campaign donations in 1999, and had raised $8.4 million more during the first six months of 2000.[202] By the midpoint of his first term, the *San Francisco Chronicle* reported that Davis had amassed nearly $26 million in campaign contributions, including $14 million raised in the year 2000.[203]

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[202] *See* Carl Ingram and Virginia Ellis, "Fund-Raising Spree for Davis: $8.4 Million in Last 6 Months," LOS ANGELES TIMES, Aug. 2, 2000.

[203] *See* Staff, "Governor Continues to Rake in Cash," SAN FRANCISCO CHRONICLE,

The press has reported extensively on the Governor's fundraising from timber companies. On July 20, 1999, the *San Francisco Chronicle* reported:

> [O]n July 7, Davis was in Anderson, the headquarters of Sierra Pacific Industries near Redding. The governor's itinerary for the week said there were 'no public events scheduled' . . . The reception was sponsored by Sierra Pacific Industries' owner, Red Emerson [sic], one of California's most influential lumber executives. The meeting coincided with the release by the state Board of Forestry of draft regulations governing logging on private lands by firms such as Emerson's Sierra Pacific Industries . . . . Several participants said Davis claimed to be unaware of the proposed rules, which were written by Mary Nichols, Davis' secretary of resources, and Winston Hickox, secretary of environmental protection, to tighten regulation of timber harvesting on private lands to protect rivers and wildlife . . . . Environmental groups, including the Sierra Club, say that the regulations are not strong enough. Yet some timber companies say the regulations go too far—-and made that point personally to Davis . . . . Although some said that the governor was surprised when timber executives told him about the regulations, Davis had sent his policy director Tal Finney to visit Sierra Pacific the day before the Emerson event, in part, to gauge the timber industry's view of the tree-cutting regulations. 'Tal went to talk to the folks from the timber industry about regulations, restrictions and the like,' said [Davis press spokesman Michael] Bustamante, who described the new regulations as a 'subset' of Finney's visit . . . . Accompanying Finney was former North Coast Rep. Doug Bosco. Finney was an aide to Democrat Bosco when he was in Congress. Bosco said he could not recall how much it cost guests to attend the event. He said that although it was held at Sierra Pacific headquarters, 'local officials and people from all over—lawyers, trucking people, local business people' attended.[204]

A search of financial disclosure records at the Secretary of State's office shows that within a month of the July fun-

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Feb. 1, 2001, at Page A15.

[204] *See* Robert B. Gunnison and Greg Lucas, "Critics Say Davis Kowtows to Donors, Access being sold, they charge," Sacramento Bureau, SAN FRANCISCO CHRONICLE, July 20, 1999.

draiser, timber interests donated $141,000 to the Governor, including $20,000 from SPI. This was on top of the approximately $28,000 that came in two months previously, including another $10,000 from SPI at that time. According to California disclosure statements, in 1999 Governor Davis received reportable contributions totaling approximately $233,000 directly from the timber industry, including $23,000 from Maxxam's Pacific Lumber Company, another key player in California timber.[205]

A preliminary review of the recent year 2000 filings indicate that Maxxam, Inc., and its affiliates the Pacific Lumber Company and MCO Properties contributed at least $19,000 to funds directly tied to Governor Davis.[206] Sierra Pacific Industries contributed an additional $19,000,[207] and the California Forestry Association chipped in $75,000 more.[208]

Direct timber industry contributions are only a subset of industry influence with Governor Davis, however. The governor has close ties with many who have strong ties to the timber industry. Tal Finney, the Governor's policy director, is known as one of the Governor's closest advisors. As the *Los Angeles Times* noted in the above passage, Finney had been an aide to former Congressman Doug Bosco, who represented the North Coast until he lost his seat in 1990.[209] Since his election loss, Bosco has represented Maxxam's Pacific Lumber Company on many occasions. For instance, the *Santa Rosa Press Democrat* reported in October 1995 that Bosco was receiving $15,000 a month to represent Pacific Lumber in relation to Headwaters Forest.[210] Bosco also represented Pacific

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[205] *See* CA Secretary of State. available at www.ss.ca.gov. 1999 contributions to the Governor Gray Davis Committee, ID #962636.

[206] *See* California Secretary of State, *Official Website* (visited February 12, 2001) <www.ss.ca.gov>. Maxxam Inc. and its affiliate, the Pacific Lumber Company and MCO Properties, Inc. ID# 478011. July 28, 2000: California Democratic Party Governor's Cup Monetary PAC, $15,000; July 21, 2000: Governor Gray Davis Committee, $4,000.00.

[207] *See id.* Sierra Pacific Industries ID# 490248 - July 24, 2000: to Governor Gray Davis Committee, $15,000.00; July 21, 2000: $4,000.00 to same committee.

[208] *See id.* California Forestry Association PAC ID# 761244 - July 20, 2000: Governor Gray Davis Committee $75,000.00. CFA also donated additional non-monetary contributions to the same committee.

[209] *See* note 204, supra.

[210] *See* Mike Geniella, *Pacific Lumber: 10 Years After*, SANTA ROSA PRESS DEMO-

Lumber as recently as the 2000 legislative session.

Bosco's associates appear to play a central role in the connection between Governor Davis and the timber industry. Besides Finney, Governor Davis appointed Bosco's former legislative director Jason Liles to the North Coast Regional Water Quality Control Board. Bosco's current law partner Daniel Crowley was also a Davis appointee to the same board. Bosco himself has been appointed to the Industrial Relations Board.

The Regional Water Boards have direct authority over logging practices, if they choose to exercise it, by virtue of the waste discharge reporting requirements in the Porter-Cologne Water Quality Act.[211] While the various regional boards in the timber areas of the state have adopted waivers of the discharge reporting requirements for logging operations,[212] they also retain authority to revoke these waivers at any time. In October, Crowley voted to delay a long-scheduled evidentiary hearing regarding the Humboldt Watershed Council's petition seeking revocation of this waiver for Pacific Lumber's logging waste discharges.[213] Subsequently, on January 4, 2001, Crow-

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CRAT, Oct. 22, 1995.

[211] *See* CAL. WATER CODE § 13000 *et. seq.* (West 1992).

[212] *See* e.g., NORTH COAST WATER QUALITY CONTROL PLAN ("BASIN PLAN").

[213] *See* The Staff Report for Proposed Regional Water Board Actions in the North Fork Elk River, Bear Creek, Freshwater Creek, Jordan Creek and Stitz Creek Watersheds (last visited Feb. 12, 2001) <http://www.swrcb.ca.gov/rwqcb1/download/FinalStaffReport.pdf >. This report states:

> During the winters of 1995/1996 and 1996/1997, significant cumulative adverse impacts to beneficial uses of waters within Bear Creek, Stitz Creek, Jordan Creek, Freshwater Creek, and the North Fork Elk River watersheds occurred from discharges of sediment from the lands owned by The Pacific Lumber Company, Scotia Pacific Company, LLC, and the Salmon Creek Corporation (hereinafter referred to as the Discharger). Staff of the Regional Water Board, the California Department of Forestry and Fire Protection (CDF), the California Department of Fish and Game, the California Division of Mines and Geology, and members of the public observed and documented these impacts to beneficial uses. Agency representatives determined that the Discharger's harvest and related activities contributed significantly to the documented adverse impacts. Technical reports submitted by the Discharger in response to various orders, requirements, and requests by the staff of the Regional Water Board and CDF confirmed staff's earlier observations, demonstrating that timber harvesting and related activities were associated with increased landsliding and sediment generation and deliveries. In order to mitigate these impacts, the Discharger was required by both the Executive Officer of the Regional Water Board and CDF to conduct watershed analyses and water quality monitoring, in order to

ley was one of two Board members sitting as a subcommittee who ruled on the petitioners' attempt to disqualify him from hearing the waiver petition and ruled that he did not need to recuse himself.[214]

At the January 26, 2001, Regional Board meeting, Board member Jason Liles unexpectedly resigned. Crowley then asserted that the previously scheduled February 15-16 hearing date should be vacated because newly seated member Dina Moore could not familiarize herself with the voluminous hearing record in time for the hearing. He then indicated that a March hearing would be impossible for him due to a conflict with his trial schedule. With Liles' resignation, there would be no quorum without Crowley. The hearing date was vacated into the indefinite future.[215]

Bosco's long-time client, the Pacific Lumber Company, has been particularly deft at catching the Governor's ear. By mid-1999, Pacific Lumber had hired long-time Davis fundraiser Jeremiah Hallisey to represent its interests with respect to the state's appraisal of the Owl Creek and Grizzly Creek Groves, which are slated for state acquisition as part of the Headwaters Forest agreement discussed in section III.D.1 above. Hallisey also has represented Pacific Lumber in meetings about implementation of the company's Habitat Conservation Plan. Apparently Hallisey's representation has been effective, as Sierra Pacific Industries subsequently hired Hallisey to represent its interests as well.[216] Jerry Hallisey and Doug Bosco were both present at the March 2000 Board of Forestry hearing when the Board unanimously adopted a portion of the Impaired Watershed rule.[217]

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identify past discharges, to prevent further discharges, and to confirm that remediation and prevention activities were resulting in restoration and protection of the impaired beneficial uses within these watersheds. Similar watershed analyses and water quality monitoring are required by the Discharger's Habitat Conservation Plan (HCP). To date, the Discharger has not adequately fulfilled these requirements.

[214] Personal communication from Cynthia Elkins.

[215] Personal knowledge of author, Kathy Bailey, based on attendance at the meeting held at the offices of the North Coast Regional Water Quality Control Board in Santa Rosa.

[216] Personal knowledge of author, Kathy Bailey, based on attendance at the AB 717 negotiations, August 31, 2000.

[217] Personal knowledge of author, Kathy Bailey.

Jeremiah Hallisey is not the only major Davis fundraiser the timber industry has hired to act on its behalf. According to records on file with the Secretary of State, the California Forestry Association, the state's principal timber industry lobbying group, is one of Darius Anderson's clients. The *Los Angeles Times* described Anderson as Davis' campaign finance chairman.[218] In the final week of the 2000 state legislative session Anderson was shepherding SPI's Red Emmerson to the Capitol for his meeting with Assemblyman Fred Keeley regarding AB 717, the bill that would have put a temporary moratorium on the practice of clearcutting.[219]

Following the intense media scrutiny of Davis fundraising among timber industry interests and others, reportable contributions from the timber industry dropped to near zero in the first half of calendar year 2000. Less than $10,000 was collected from timber industry sources by committees affiliated with Davis that are required to disclose contribution sources.[220] However, as noted above, contributions picked up again in the second half of the year.

Meanwhile, the *Los Angeles Times* reports that money coming into committees that do not have to disclose the sources of contributions appears to be burgeoning. On November 15, 2000, Dan Morain of the *Los Angeles Times* reported:

> Companies and individuals with interests before the state have funneled more than $2 million to tax-exempt corporations set up to pay for Gov. Gray Davis' travel, housing and even a party for thousands of delegates at last summer's Democratic National Convention.
>
> Unlike the $21 million the governor has raised for his reelection, the gifts to the nonprofits can be made without public disclosure and are eligible for tax write-offs as charity.

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[218] *See* Dan Morain, *It's Crunch Time as Davis Signs, Vetoes Bills*, LOS ANGELES TIMES, Sept. 25, 2000. "Several lawmakers and lobbyists assume that Darius Anderson, Davis' campaign finance chairman, can gain the governor's ear. Anderson established a lobbying firm last year. His Platinum Advisors now is one of the capital's top firms, with $2.25 million in billings reported in the first year and a half of Davis' tenure."

[219] Personal knowledge of author, Kathy Bailey, based on attendance at meeting in Assemblyman Keeley's office (Aug. 30, 2000).

[220] *See* California Secretary of State, *Official Website* (last visited February 20, 2001) <www.ss.ca.gov>.

> Davis' supporters have raised $234,000 for his Sacramento residence, which primarily goes to upkeep; $664,000 for his foreign travel and various California events; and at least $1.5 million for the bash the governor hosted at Paramount Studios for the convention delegates. . . . Darius Anderson, Davis' chief fund-raiser during his 1998 campaign, established the nonprofit corporations for the governor since his election two years ago. . . .
>
> By law, Davis cannot assert direct control over the nonprofit corporations, although they were formed with his blessing. Spokesmen for Davis and for his campaign say they have no control over the entities. They are supposed to operate independently, and each has a board of directors, made up of some of Davis' most loyal supporters.
>
> 'The governor doesn't do any soliciting,' said Anderson, who has become a prominent Capitol lobbyist since Davis took office last year. Rather, Davis' campaign fund-raisers, including Anderson, sought the money. The governor is aware of who contributes and has thanked at least some of them for helping with the events, donors say.[221]

The *Los Angeles Times* recently reported on another committee that is pulling in significant contributions, the Democratic Governors Association. Davis was Vice-chair of the Association in 2000 and became the Chair in 2001. According to *Los Angeles Times* reporter Dan Morain, writing on November 27, 2000: "Davis' fund-raising prowess is a big reason why the other governors looked to him to lead the association. As the group's vice chairman, Davis raised $750,000 of the $5.8 million the association spent on this year's 11 gubernatorial races. The sum he raised was a record for a vice chairman."[222] A new federal law requires that political organizations such as the Democratic Governors Association disclose the names of donors who gave after July 1, 2000.[223] Several out-of-state timber contributions are among those disclosed from the period after July 1.[224]

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[221] *See* Dan Morain, *Firms Seeking State Favor Finance Davis Foundations*, LOS ANGELES TIMES, Nov. 15, 2000.

[222] *See* Dan Morain, *Davis' Visibility Rises With New Leadership Post*, LOS ANGELES TIMES, Nov. 27, 2000.

[223] *See* Dan Morain, *Identities of Many Donors to Davis Foundations Remain Cloaked*, LOS ANGELES TIMES, Nov. 27, 2000.

[224] *See* RS form 8872, 3rd Quarter 2000. Democratic Governors Association.

Davis spokesman Garry South adamantly asserts that Davis' fundraising does not affect his policy decisions. Nevertheless, the connections between some of Davis' most important fundraisers and the timber industry, combined with what is known about industry contributions, are a source of discomfort for forest conservation advocates. Additionally, there is no question that key aides and appointees of the Governor's have long-standing ties to former Congressman Doug Bosco, who has been a prominent industry representative since at least 1990.

Moreover, it appears that industry representatives have a much higher degree of access to the Governor and his top aides, such as Cabinet Secretary Susan Kennedy, than do conservation advocates. Neither the Governor nor Kennedy has met with Sierra Club or other groups regarding forest regulation.

IV. CONCLUSION

The last one hundred and fifty years of logging in California's forests has caused severe, well-documented damage to many environmental values and resources. The list of endangered or threatened wildlife species is long and getting longer. Coho salmon, steelhead, northern spotted owl and marbled murrelet will probably be joined by California spotted owls and Pacific fisher. Many watersheds have suffered increases in erosion and sedimentation, bank failures, downcutting streambeds, flooding and landsliding, and the loss of their fisheries. Governor Davis cannot set all of this to rights in four, or even eight, years. However, he does have the authority and the opportunity to make meaningful changes to an ineffective regulatory system.

The public's interest in natural resources such as fish, wildlife, water quality, and biodiversity often conflicts with many traditional conceptions of private property rights. Some timber executives apparently do not believe that government regulation has a legitimate place in forest management. Similarly, some environmentalists apparently believe that the pursuit of profit must give way when it threatens the environment. While it is well established that the public "owns"

Weyerhauser, Plum Creek.

wildlife and water quality in a general way, how far the state can go to protect those resources on private property is not defined by a bright line.

These conflicts often play out in litigation. However, the legal system tends to resolve disputes one at a time. The certification of the timber harvest plan program as "functionally equivalent" under CEQA has meant that conservation organizations have, for the most part, had to litigate environmental impact issues "one timber harvest plan at a time." As a result of these constraints, major historical trends that are sweeping vast landscapes in California, such as the transformation of the primeval old-growth coastal redwood ecosystem into tree farms, have been litigated in the context of a handful of small timber harvest plans. This structural bias in the legal system gives an enormous advantage to the government agency making the decisions in the first instance, and to the beneficiaries of those decisions. To date, this structural bias has allowed the timber industry to protect its interests without undue restraint, because the environmental community cannot challenge the thousands of decisions that CDF makes every year to allow logging that affects the environment.

Governor Davis can make changes that tip the balance back towards giving equal consideration to environmental values. Previous administrations have responded by requiring more paperwork, but in the end, the trees were almost always cut. Against this background, Governor Davis' preference for consensus and incentives rather than regulation faces a severe challenge. The problems he inherited are too large to rely exclusively on financial incentives. The gap between the profit motives of the industry and the conservation ethic of the environmental community is too great to bridge by consensus. Therefore, progress in the regulatory arena is necessary if the Governor wants to avoid contributing to several environmental debacles that are currently in progress.