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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EBBETTS PASS FOREST WATCH et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION,

Defendant and Respondent;

SIERRA PACIFIC INDUSTRIES,

Real Party in Interest and Respondent.

F042896

(Super. Ct. No. CV48910)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. William G. Polley, Judge.

Law Offices of Thomas N. Lippe, Thomas N. Lippe and Michael W. Graf for Plaintiffs and Appellants.

Bill Lockyer, Attorney General, Mary E. Hackenbracht, Assistant Attorney General, and Charles W. Getz IV, Deputy Attorney General, for Defendant and Respondent.

Jay-Allen Eisen Law Corporation, Jay-Allen Eisen, C. Athena Roussos; Dun & Martinek, David H. Dun and David E. Martinek for Real Party in Interest and Respondent.

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Plaintiffs appeal the denial of their petition for a writ of mandate, by which they sought to overturn the California Department of Forestry and Fire Protection's (CDF) approval of three timber harvesting plans (THP) covering timberland in Tuolumne County. The issues raised by plaintiffs on appeal include (1) whether CDF failed to follow provisions of California's Forest Practice Rules[1] when reviewing the geographical areas chosen in the three THP's for assessing cumulative impacts on the California spotted owl and the Pacific fisher, and (2) whether CDF proceeded in a manner required by law with respect to obtaining, considering, and disclosing information regarding the environmental effects of possible herbicide use after harvest.

Based on the rulings summarized below, we will reverse and direct CDF to rescind approval of the THP's.

SUMMARY

Assessment Areas. The regulatory provision that "[b]iological assessment areas will vary with the species being evaluated and its habitat" (Cal. Code Regs., tit. 14, § 952.9, Technical Rule Addendum No. 2[2]) was violated by the use of the same cumulative impacts assessment area for all species. Also, the error in selecting assessment areas necessarily caused the required explanation of the rationale for establishing the assessment areas to be inadequate. By failing to enforce these

[1]Forest Practice Rules refers to the rules promulgated by the Board of Forestry under the Z'berg-Nejedly Forest Practice Act of 1973 (Forest Practice Act), Public Resources Code section 4511 et seq., and set forth in California Code of Regulations, title 14, section 895 et seq.

[2]Technical Rule Addendum No. 2 is included in three separate sections of the Forest Practice Rules because the three districts separately set forth the rule that addresses cumulative impacts. (See fn. 11, *post*.) All subsequent references to Technical Rule Addendum No. 2 shall be as set forth in California Code of Regulations, title 14, section 952.9.

requirements, CDF abused its discretion. Because the requirements were mandatory, prejudice is presumed. If the plans are resubmitted, the assessment area for each species evaluated must be chosen separately based in part on the characteristics and habitat needs of that species, and the rationale for each choice must be explained in the THP's.

Herbicide Use. First, because the THP's state that herbicide use is a reasonable probability and that eliminating its use is not feasible, we conclude herbicide use is reasonably foreseeable and thus part of the activity constituting the project covered by each THP. Consequently, CDF has the authority to review that use, assess the potential environmental impacts of that use, and impose feasible alternatives or mitigation measures to lessen or eliminate any substantial, or potentially substantial, adverse change in the environment.

Second, CDF's finding that certain information about herbicide use was speculative, even if supported by substantial evidence, does not preclude an inquiry into whether CDF fulfilled its procedural obligation to obtain and disclose information regarding potential herbicide use.

Third, CDF's disclosures were prejudicially inadequate. They inaccurately described the state's pesticide regulatory program, which led to the overly broad conclusion that compliance with label directions and other restrictions in applying registered herbicides would preclude a finding that such application would have a significant adverse effect on the environment. Also, CDF relied upon information about herbicide use that was not disclosed in the administrative record. The inadequate disclosures affected the usefulness of the THP's and official responses as informative documents, while adequate disclosures might have shown that further details of the prospective herbicide use were reasonably foreseeable.

Fourth, on resubmission, any finding CDF makes regarding the applicant's future compliance with herbicide regulations must be based on the evidence in a properly prepared administrative record; future compliance must not be assumed.

Publication. We publish this opinion because no other appellate decision has explicitly applied the regulation that biological assessment areas will vary with the species being evaluated to a THP that used only one assessment area for all species. (Cal. Rules of Court, rule 976(c)(1).) Also, no other appellate decision has explicitly ruled that CDF's description of the state's pesticide regulatory program was prejudicially inaccurate. (*Ibid*.)

FACTS

Parties

Plaintiff Ebbetts Pass Forest Watch is a California nonprofit public benefit corporation that alleges its purpose is to advocate for ecological sustainability and protect the health of the forests and watersheds surrounding the Ebbetts Pass corridor.

Plaintiff Central Sierra Environmental Resource Center is a California nonprofit public benefit corporation that alleges it was founded for the purpose of advocating the use of sustainable environmental practices in the Central Sierra Nevada.

Defendant CDF is an agency of the State of California. CDF is authorized by statute to engage in the management, protection, and reforestation of state forests in accordance with plans approved by the California Board of Forestry.[3] (Pub. Resources Code, § 4645.) As part of its responsibilities, CDF reviews THP's to determine whether they conform to applicable state law. (Pub. Resources Code, § 4582.7.)

Defendant Sierra Pacific Industries (SPI) is a California corporation with its principal office in Redding, California. SPI owns approximately 1.5 million acres of land in California, including more than 1.1 million acres of timberland in the Sierra Nevada and Modoc Plateau regions and approximately 400,000 acres in the region described as the Coast-Klamath-Cascade. SPI's ownership represents 3.8 percent of California's 40

[3]For convenience, CDF shall be used in this opinion to include the department, its director, and the California Board of Forestry.

million acres of forested landscape and 8.2 percent of California's 19 million acres of commercial forest land.

SPI owns more land within the range of the California spotted owl than any other private landowner. SPI's holdings account for approximately 80 percent of the habitat for the California spotted owl that is privately owned, and approximately 10 to 12 percent of the range of the California spotted owl. (68 Fed.Reg. 7580, 7606 (Feb. 14, 2003).)

SPI listed itself as the plan submitter, timber owner, timberland owner, and licensed operator (license No. A3879) in each of the three THP's that are the subject of this appeal. After submission of the initial THP's, SPI filed amendments that designated other licensed timber operators and included a signed form in which those operators acknowledged their responsibilities under applicable law. After stressing the difficulty in making long-term projections, SPI stated in one of the THP's that it "expects that its future land base (70-80 years from [2001]) would approach approximately 30% unevenaged stand structure and approximately 70% evenaged stand structure."

Wildlife Species

The THP's discuss a number of wildlife species or subspecies but the issues concerning the geographic scope of the cumulative impacts assessment areas mainly relate to the California spotted owl and the Pacific fisher.[4] The ranges of the California spotted owl and the Pacific fisher and their regulatory status are provided as background.

Spotted Owl

The historic range of the California spotted owl extends "along the west side of the Sierra Nevada from Shasta County south to Tehachapi Pass, and in all major mountains of southern California … (Beck and Gould 1992)." (70 Fed.Reg. 35607, 35608 (June 21, 2005).) Also, "a few sites have been found on the eastern side of the

[4]The wildlife discussed in the THP's included the foothill yellow-legged frog, mountain yellow-legged frog, red-legged frog, western pond turtle, willow flycatcher, northern goshawk, California mule deer, and sharp-shinned hawk, which are described as species of concern or special concern at the federal or state level.

Sierra Nevada and in the central Coast Ranges at least as far north as Monterey County (Service 2002)." (*Ibid*.)

Spotted owls (*Strix occidentalis*) are subject to a variety of regulatory schemes. For instance, spotted owls are protected by the Migratory Bird Treaty Act, 16 United States Code section 703 et seq. (See 50 C.F.R. § 10.13 (2006).)

Under the Endangered Species Act (ESA), 16 United States Code section 1531 et seq., as amended, the United States Fish and Wildlife Service of the Department of the Interior (Fish and Wildlife Service) may list a species as threatened or endangered and may designate its critical habitat. (See 50 C.F.R. §§ 17.11(h) [list of threatened and endangered wildlife] & 17.95(b) [critical habitat for various species] (2006).) The three recognized subspecies of spotted owls—the northern spotted owl (*Strix occidentalis caurina*), the California spotted owl (*Strix occidentalis occidentalis*), and the Mexican spotted owl (*Strix occidentalis lucida*) (55 Fed.Reg. 26114 (June 26, 1990))—are treated differently under the ESA. Unlike the northern and Mexican spotted owls, the California spotted owl is not listed as threatened or endangered.[5]

The listing status of the California spotted owl is the subject of a continuing controversy. In early 2003, the Fish and Wildlife Service published a 12-month finding that listing the California spotted owl under the ESA was not warranted because the overall magnitude of threats to the species did not rise to the level requiring ESA protection. (68 Fed.Reg. 7580 (Feb. 14, 2003).)[6] Litigation ensued and an updated listing petition currently is pending before the Fish and Wildlife Service. (70 Fed.Reg.

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[5]The northern spotted owl was listed in 1990. (55 Fed.Reg. 26114 (June 26, 1990).) The Mexican spotted owl was listed in 1993. (58 Fed.Reg. 14248 (Mar. 16, 1993).)

[6]Plaintiffs moved to strike the references by CDF and SPI to the Fish and Wildlife Service's 2003 listing decision. We deny the motion to strike and have included the reference only as background that shows the current legal status of the California spotted owl under federal law and describes SPI's land holdings in relation to the owl's range. (See part I., *post*.)

35607 (June 21, 2005); 70 Fed.Reg. 60051 (Oct. 14, 2005).)[7] As of the date of this opinion, the 12-month finding on that petition has not been published.

Another federal agency, the United States Forest Service, designated the California spotted owl as a "sensitive species" on its Region 5 "Sensitive Plant and Animal Species List" in October 1980. (*Wetsel-Oviatt Lumber Co., Inc. v. United States* (1998) 40 Fed.Cl. 557, 562, fn. 8; see 57 Fed.Reg. 27018, 27019 (June 17, 1992).)

From the California regulatory perspective, "the California spotted owl is a California Species of Special Concern" according to one of the THP's.

Pacific Fisher

The fisher (*Martes pennanti*) is a relative of the mink and marten.[8] Historically, the Pacific fisher ranged throughout the Sierra Nevada in Eastern California and from the Klamath Mountains and North Coast Range near the Oregon border southward to Lake and Marin Counties in Western California. (69 Fed.Reg. 18770, 18771 (Apr. 8, 2004).) Recent surveys suggest that the Pacific fisher's current range in California is divided into two distinct areas, one in Northwestern California and the other 260 miles away in the Southern Sierra Nevada mountains. (*Ibid*.) According to the THP's, which cite a 1996 publication, researchers were unable to detect Pacific fishers in the Sierra Nevada north

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[7]In October 2005, the Fish and Wildlife Service reopened the public comment period, stating: "Because of the large volume of information relating to forest management activities within the range of the California spotted owl, and the number of scientists involved in monitoring the status of the California spotted owl and its habitat, we seek additional time to receive information and comments relating to the status of the owl from federal, state, and private scientists." (70 Fed.Reg. 60051, 60052 (Oct. 14, 2005).) The public comment period is now closed and the Fish and Wildlife Service expected to make a 12-month finding on the status of the California spotted owl on or before March 14, 2006. (*Ibid*.)

[8]Whether the Pacific fisher (*Martes pennanti pacifica*) is a distinct subspecies is a controversy described by the Fish and Wildlife Service in a 1991 notice of its 90-day finding not to list the Pacific fisher under the ESA. (56 Fed.Reg. 1159 (Jan. 11, 1991).) Subsequently, the Fish and Wildlife Service stated that "the taxonomic distinctness of fisher subspecies including the Pacific fisher is questionable." (61 Fed.Reg. 8016, 8017 (Mar. 1, 1996).) We note this controversy of taxonomy and take no position on it. The parties to this appeal use the term Pacific fisher and, for convenience, so does this opinion.

of Yosemite National Park but did detect significant Pacific fisher populations in the Southern Sierra Nevada.

One THP summarized the regulatory status of the Pacific fisher by stating "[t]he Pacific fisher is a Forest Service Sensitive Species, a California Species of Special Concern, and a Federal Species of Special Concern-Category 2."[9]

The fisher's status under the ESA has changed since the preparation of the THP's. In April 2004, the Fish and Wildlife Service announced that listing of the West Coast population of the fisher under the ESA was warranted but precluded by higher priority actions to amend the "List of Threatened and Endangered Species." (69 Fed.Reg. 18770 (Apr. 8, 2004); see *Center for Biological Diversity v. Norton* (N.D.Cal. 2002) 208 F.Supp.2d 1044, 1048-1050 [discussion of budgetary problem of Fish and Wildlife Service and its impact on the review of listing petitions].) Consequently, the Fish and Wildlife Service recently summarized the status and listing priority number for the West Coast population segment of the fisher as follows: "The listing priority number for this [distinct population segment] remains a 6 (threats are of a high magnitude but are nonimminent)." (70 Fed.Reg. 24870, 24891-24892 (May 11, 2005).)

Timber Harvesting Plans

Cedar Flat THP

The Cedar Flat THP (No. 4-01-37/TUO-2) was received by CDF on June 19, 2001, and was filed on June 28, 2001.

The Cedar Flat THP concerns the harvest of 534 acres of timberland divided into 30 harvest units that are located in 10 different sections of land in township 5 north,[10]

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[9]The United States Forest Service's designation of the Pacific fisher as a "sensitive species" on its Region 5 "Sensitive Plant and Animal Species List" occurred in December 1984. (*Wetsel-Oviatt Lumber Co., Inc. v. United States, supra*, 40 Fed.Cl. at p. 562, fn. 8.)

[10]The harvest units are loosely arranged within a band about one and a half miles wide and three and a half miles long. This band runs southwest to northeast in sections 22, 23, 24, 25, 26, 27, 28, 33, 34, and 35 of the township.

range 16 east, Mount Diablo Meridian, which are part of the Southern Forest District[11] and are approximately eight miles east of Arnold, California. Eight acres covered by the Cedar Flat THP are within 200 feet of the boundary of Calaveras Big Trees State Park and, thus, are considered to be in a special treatment area. (See Cal. Code Regs., tit. 14, § 895.1 [definition of special treatment area].)

The harvest units are separated by enough loggable land to subsequently place at least one harvest unit between the units that are being logged under the Cedar Flat THP. This layout of harvest units creates a checkerboard-like pattern of irregularly shaped units.

The stands scheduled for harvest consist of five major Sierra Nevada conifer species (ponderosa pine, sugar pine, Douglas fir, white fir and incense cedar), black oak and shrub species. Ponderosa pine is the predominant species at the lower elevations and white fir is predominant at the higher elevations. The stand age ranges from 60 to 90 years, with an average for the entire THP of 70 to 75 years. The harvest will produce "conifer sawlogs, chip logs, poles, biomass chips and fuelwood."

Average slope in the THP area is 35 percent, ranging from 8 percent to 70 percent, which CDF describes as moderate to steep. Elevation of the THP area ranges from approximately 4,400 feet to 5,800 feet.

In section II of the Cedar Flat THP, titled "Plan of Timber Operations," item 14 identifies the following silvicultural methods or treatments and the related acreage: clearcutting (88 acres), selection (46 acres), group selection (10 acres), special treatment area (8 acres), alternative (382 acres). The "alternative" designation is divided between variable retention-group (VRG), which will be used for 102 acres, and variable retention-dispersed (VRD), which will be used for 288 acres, including the eight acres in the special treatment area.

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[11]For regulatory purposes, the nonfederally owned commercial forest areas of California are divided into three districts: Coast Forest District, Northern Forest District and Southern Forest District. (Cal. Code Regs., tit. 14, § 906.)

VRG and VRD are explained in the Cedar Flat THP:

> "[VRG] method is designed to have retained trees in concentrated groups, and would be considered closest to the clearcut silvicultural method. [¶] [VRD] method is designed to have retained trees scattered throughout the stand with a somewhat uniform spacing and would be considered closest to the seed tree seed step silvicultural method."

"Stocking standards for the Alternative Prescription method shall require [retention of] 4 to 8 trees per acre 8 inches or greater [in diameter at breast height] …, except in the Special Treatment Area where it shall be 6-8 trees per acre, with leave trees representing an even distribution of existing diameter classes and species." In units designated for VRD the trees retained may be smaller in size than those retained in units using VRG to lessen the impact of the dispersed trees on growth of the new stand.

Units harvested using alternative and clearcutting methods will need post-harvest site preparation and planting. Site preparation involves tractor ripping, tractor piling and burning of slash, or broadcast burning. Although SPI has not formed the actual intent to use herbicides in connection with replanting these units, SPI has used herbicides in the past. "Any herbicide treatment will be done under specifications from a licensed Pest Control Advisor and with materials that have been approved by the appropriate State and Federal agencies." More information on SPI's potential herbicide use is set forth in part V.A, *post*.

Timber operations are expected to be completed within three years from the date of THP conformance. Site preparation will be done within one year after logging operations are finished. Broadcast burning generally will be completed within two years after logging. Prepared sites will be replanted with two or more species of tree. The species composition of the plantations will favor superior one- and two-year-old ponderosa pine, sugar pine, white fir and Douglas fir. CDF states that replanting must be done after site preparation operations; there must be 300 seedlings established per acre that are live, healthy and two years old within five years after completion of timber operations.

SPI anticipates that the tree plantations created under its management practices would have an average rotation of 80 years, but would be commercially reentered at about 30 years for thinning.[12]

Wildlife Impacts

Item 32a of the THP form asks:

> "Are any plant or animal species, including their habitat, which are listed as rare, threatened or endangered under federal or state law, or a sensitive species by the Board, associated with the THP area? If yes, identify the species and the provisions to be taken for the protection of the species."

Item 32b asks:

> "Are there any non-listed species which will be significantly impacted by the operation? If yes, identify the species and the provisions to be taken for the protection of the species."

SPI marked the "yes" box for both items 32a and 32b in the Cedar Flat THP. Underneath these items, SPI included the following explanation:

> "Prior to start of operations, surveys for Northern Goshawk shall be performed in selected suitable habitat as defined with consultation between [Department of Fish and Game (DFG)] and the Plan Submitter. Survey protocol shall be as defined by DFG. Site specific mitigations shall be incorporated into the Plan with consultation between DFG, CDF, and the Plan Submitter if goshawks are located in, or immediately adjacent to any harvest unit. [¶] Refer to THP Section IV: Biological Resources."

Later in the Cedar Flat THP, the following discussion of wildlife and plants is included in section III under the heading "Listed and Non-listed Species":

> "The biological assessment area was checked for rare, threatened, or endangered and sensitive species of wildlife and plants. The Rarefind program and the SPI database were queried to identify those special-status species that may occur within the assessment areas. The query returned one hit within this [cumulative impacts assessment area (CIAA)]: A Northern Goshawk which is located more than three-quarters of a mile from the nearest unit. The database was queried for plant species

[12]California Code of Regulations, title 14, section 953.3 defines the concept of "commercial thinning."

(including CNPS and USFS sensitive) using the biological assessment area and all the adjacent State Planning Watersheds. No hits were returned for the plant query. Past harvest plans were examined, and company personnel familiar with the area were consulted to better explore existence of possible sensitive species. During field set-up personnel were instructed to look for signs of any sensitive species. No other listed species are known to occur within the CIAA.

"Approximately 94.7 percent of the assessment area will not be impacted by this plan.[13] Approximately 95.1 percent of the assessment area will not have any significant change from its present condition. Therefore, it is unlikely this plan will have a significant impact on any listed or non-listed species."

Section IV of the Cedar Flat THP contains SPI's cumulative impacts assessment, which identifies the Upper Griswold Creek State Planning Watershed as the CIAA. This CIAA contains 10,140 acres, 73 percent of which is owned by SPI, 26 percent of which is national forest, and 1 percent of which is state park.

The Cedar Flat THP "[p]rovide[s] a brief description of the assessment area for each resource subject" by stating: "The CIAA is comprised [*sic*] of six assessment areas. The assessment areas are the Watershed, Biological, Soil Productivity, Recreational, Visual, and Traffic." To clarify the choice of assessment area, the THP described SPI's ownership of forest land in California and ownership percentages within certain categories of land and within certain areas. For example, SPI owns 7.1 percent of the 15.6 million acres in hydrologic basins within the Sierra Nevada Modoc Plateau region. According to the THP, (1) use of such a region as an assessment area "could serve to dilute any impacts estimated to insignificance" and (2) conversely, "if the assessment area were too small, (say one acre), minor impacts could be viewed as long-term, significant adverse impacts …."

With respect to particular assessment areas, the THP states that the Upper Griswold Creek State Planning Watershed was chosen as the watershed assessment area

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[13]This percentage was calculated by comparing the 534 acres in the units designated for harvest to the 10,140 acres in the assessment area.

using major breaks in the landscape, such as ridges, and watercourses that have the same drainage pattern.

The Upper Griswold Creek State Planning Watershed also was chosen as the only biological assessment area. The Cedar Flat THP explained the use of the Upper Griswold Creek State Planning Watershed as the CIAA for biological resources as follows:

> "The area is chosen to reflect a watershed or landscape approach to habitat usage and would not necessarily equate to home ranges. The intent is to evaluate the habitat before and after harvest within a large enough area to detect significant impacts to those species with a large home range. See Cumulative Impacts Assessment Area Map."[14]

The use of the watershed as the CIAA for biological species was explained further by reference to the statistical approach to the assessment areas stated earlier in the THP. In conjunction with the small percentages of SPI's ownership listed, the THP observed that the federal government owns "the overwhelming preponderance of the land area" in the Sierra Nevada region and manages its land to maintain viable populations of various species, including those that prefer mature forest habitat. These observations are used to imply that SPI's harvest activities on a small percentage of land within the region cannot significantly impact wildlife species because vast federal lands are maintained to support viable populations.

In addressing impacts to the California spotted owl, the THP states that SPI's management practices will improve owl habitat because (1) in the long term, the average diameter of trees on SPI's land actually will increase so large-tree nesting habitat will continue to exist; (2) in the meantime, nesting and roosting habitat will continue to exist on the lands because large snags and larger trees near streamside protection zones will

[14]SPI chose a single assessment area for all species without any mention of the regulation that states biological assessment areas will vary with the species being evaluated and its habitat. (Technical Rule Addendum No. 2.) As a result, the rationale does not relate the geographical area chosen to how incremental effects of projects and other activities within that area will combine to impact the species being evaluated and its habitat needs.

not be harvested; and (3) owl food supplies will increase because harvesting creates forest edge that leads to the development of habitat that produces prey species.

Public Comments

A July 7, 2001, comment letter from plaintiff Central Sierra Environmental Resource Center raised a number of concerns about the Cedar Flat THP, including the claim that cumulative impacts were inadequately considered:

> "The cumulative disturbance to wildlife of past projects, this project, and all the SPI clearcutting that has recently been done to the west, south, and southeast, all combines to be significant. The THP should give broader discussion to the cumulative impacts of all of these activities."

Other comment letters raised concerns about the cumulative impacts of harvesting activity on the movement of wildlife species. For example, a July 22, 2001, letter asserted that the "loss of so many large trees and the creation of so much fragmentation (in combination with existing and past fragmentation that has occurred within the assessment area) would greatly diminish the suitability of connecting corridors for wildlife moving from the State Park core area to outlying habitat on U.S. Forest Service or private timberlands."

A July 26, 2001, comment letter to CDF from the attorney for Ebbetts Pass Forest Watch referred to a 1992 report produced by the United States Forest Service titled The California Spotted Owl: A Technical Assessment of its Current Status (1992 Report) and attached excerpts as an exhibit. The letter stated that "[i]n the judgment of the authors of the [1992] Report, timber harvest plans such as [the Cedar Flat THP] do not assess the impact of incremental cutting of owl [habitat] on the long term survival of the owl in the region, and in the Sierra Nevada; … 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."

Chapter 3 of the 1992 Report includes a discussion of the California spotted owl distribution in the Sierra Nevada, and figure 3A identifies gaps in the distribution as well as "[a]reas of current and potential concern for the California spotted owl." The three

THP's in this case are located in area 5, which is described as having habitat fragmentation and low population densities that make successful dispersal more difficult and reduce the likelihood that vacated sites will be reoccupied. Table 3G of the 1992 Report states that area 5 is generally located in the northwestern Stanislaus National Forest and consists of land owned by the United States Forest Service, private industry, and multiple, small, private owners. Table 3G also states the "[r]easons for concern" are that area 5 "[h]as large private inholdings; owl densities unknown on most private lands." A footnote to table 3G indicates that areas designated by letters are gaps and bottlenecks and those designated by numbers are population areas. Based on this lettering and numbering system, the THP's involved in this case were not part of, or located near, an area identified as a gap or bottleneck in the 1992 Report.[15]

Preharvest Inspection by CDF

In July 2001, an area forester with CDF conducted a preharvest inspection as part of CDF's review of the Cedar Flat THP. (Cal. Code Regs., tit. 14, § 1037.) The area forester's review was conducted with three people from SPI, one from CDF, an ecologist from the California Department of Parks and Recreation (State Parks), three people from the California DFG, and two people from the Department of Mines and Geology.

During the preharvest inspection, a biologist for SPI and Kevin O'Connor of DFG discussed spotted owl surveys the biologist conducted between 1990 and 1995 and the need for a survey for the northern goshawk. As a result of O'Connor's desire for more information, he and the biologist developed a strategy to gather and report more information regarding spotted owls and northern goshawks.

With respect to the Pacific fisher and American marten, SPI's biologist indicated that he surveyed for these species using track plates in 1995 and no signs were found.

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[15]Thus, plaintiffs' statement in their opening brief that "the U.S. Forest Service has identified the area in which these THPs are located as 'Area of Concern No. 5,' described as a 'bottleneck[] in distribution …'" is not an accurate representation of the administrative record. Nevertheless, the 1992 Report does describe area 5 as having habitat fragmentation and low population densities.

SPI's biologist and O'Connor agreed there was suitable habitat for marten and it would not be affected by the proposed harvest, and O'Connor stated the belief that there was no prime fisher habitat involved.

The memorandum reporting on the preharvest inspection (PHI Report) summarized comments of the ecologist from State Parks as follows:

> "[T]he THP area is not unique by itself. Timber harvest does contribute to overall fragmentation, and there could be a long term cumulative effect. Big Trees State Park is basically an island of biological diversity and continued fragmentation around the park may someday disrupt population stability by making travel difficult from and to the park. This could create genetic inbreeding. Someday, there may even be species extirpation. [The ecologist] did not state that this specific harvest would create these conditions."[16]

The PHI Report did not address the use of a one-size-fits-all biological assessment area or explain why the assessment area did not vary by species.

The area forester concluded the PHI Report by recommending approval of the Cedar Flat THP, subject to various proposed changes being made, and stating:

> "I feel that no adverse cumulative impacts will occur from this THP by itself or in combination with other THPs assuming all work is properly implemented, especially road and culvert maintenance. I base this on my personal involvement since 1993 with [preharvest inspections] and inspections of active and past THPs; as well as mitigations proposed by the [registered professional forester] for this THP, and changes resulting from this site specific [preharvest inspection]."

CDF's Response to THP

In connection with its review of the Cedar Flat THP, CDF prepared a 116-page official response that contained its discussion and analysis of major aspects of the THP and its responses to 26 issues distilled from 70 comment letters. In a summary of the

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[16]The PHI Report did not proceed to address whether the specific harvest, when combined with past, present and reasonably foreseeable probable future projects, would disrupt wildlife travel to and from the state park in a way that would harm population stability, and whether such a cumulative impact on wildlife travel, if found to exist, would reach the level of being significant to one or more species of wildlife.

actions proposed by the Cedar Flat THP, the official response includes the following under the heading "Wildlife Protection":

> "This THP examines the potential impact of the logging on wildlife and concludes that no sensitive species will be significantly impacted by the timber operation. A check of the Natural Diversity Database does not show any listed animal species that would be expected to be in the project area. However, there are numerous locations of known occurrences of California Spotted Owl sightings within the biological assessment area. Three of the nest sites were active in the past calendar year. None of the sites actually exist on areas of the project itself, however. Additional surveys were done in July to insure that owls were not present in units close to known activity centers. It is noted that the California Spotted Owl does not currently have a status in the Forest Practice Rules as a listed species nor is there any specific regulations that pertain to the species. CDF has been treating the owl with special concern when they are known to exist near a project area, but in the case of this THP, it could not be confirmed that any owls were present on areas of the project. The THP was mitigated on request of DFG to insure that SPI shall monitor each of three historic owl sites that are within 1/4 mile of harvesting units for nesting activity prior to commencement of operations during the year of harvesting activity. Such surveys shall include up to three visits per season and shall follow standard protocol approved by [Fish and Wildlife Service] for detection of owl. If an active nest is located, then a limited operational period will be established to take effect between March 15th and August 15th. In general, harvesting can have the effect of increasing the prey base for the California spotted owl by creating more habitat for some of its prey species. Where there is adequate nesting and roosting habitat, increasing the prey base generally enhances owl viability. [¶] …
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> "Regarding Pacific fisher and pine marten, the biologist for SPI has surveyed for these species in the area in 1995 using track plates. There were no signs at that time. These animals are midsize predators and can utilize a good mix of seral habitats. According to DFG, there is no prime fisher habitat on the project area and there is ample habitat for marten in the vicinity of the project outside the even-aged units."

The official response also reflects CDF's consideration of the mule deer and, in particular, the Stanislaus deer herd. The harvest units in the Cedar Flat THP are part of the herd's intermediate range, which is located between its higher summer range and lower winter range. The migration route of the deer goes through the CIAA. Harvest

unit 499 is near the migration route and oak trees will be retained in that unit because acorns that accumulate on the ground are a primary fall-winter food item for deer.

CDF summarized the concerns raised in the comment letters, regarding the particular geographic area chosen by SPI as the biological assessment area for the California spotted owl and Pacific fisher, as follows:

> "ISSUE 4: There was a concern that the THP fails to use a biological assessment area broad enough to account for the impacts of SPI's logging plans throughout the Sierra Nevada. By limiting the assessment of biological impacts of each of SPI's timber harvest projects to individual watersheds, CDF is unable to ensure that fragmentation of habitat on a regional scale will not occur. The biological assessment area must be defined to include the entire Sierra Nevada ecosystem, so as to include the entire range of the California spotted owl and the potential historical range of the Pacific fisher's Sierra Nevada population, as well as all of SPI's foreseeable projects in the Sierra Nevada, in combination with the management alternatives developed in the Forest Service [Environmental Impact Statement]."

Although the issue is framed to mention "fragmentation of habitat on a regional scale," CDF appears to have interpreted "regional scale" to mean "an assessment area the size of the entire Sierra Nevada." CDF discussed five factors that justified rejecting the entire Sierra Nevada as an assessment area. Despite this rejection, CDF's official response did not consider an intermediate-sized assessment area smaller than the Sierra Nevada and larger than the watershed assessment area selected by SPI. Nor did CDF's official response discuss fragmentation and the related issue regarding the dispersal of juvenile owls.

CDF approved the Cedar Flat THP on April 24, 2002.

Curry THP

The Curry THP (No. 4-01-64/TUO-3) was received by CDF on August 29, 2001, and filed on September 7, 2001. Because of their similarities, this THP and the next will not be described in as much detail as the Cedar Flat THP.

The Curry THP covers 441 acres of timberland divided into 27 harvest units located in 12 different sections of land in two townships in Tuolumne County. The THP

area is about 11 miles east-northeast of Arnold, California and is north and northeast of the Cedar Flat THP. The elevations of the harvest units range from 5,400 feet on the west side of the plan area to 7,400 feet above sea level on the east side.

In section II of the Curry THP, titled "Plan of Timber Operations," item 14 identifies the following silvicultural methods or treatments and the related acreage: clearcutting (38 acres); selection (20 acres); commercial thinning (30 acres); road right of way (2 acres); and alternative (351 acres). Alternative VRG will be used for 105 acres and alternative VRD will be used for 246 acres. The THP also proposes to build five segments of new road totaling 3,600 feet.

SPI answered "yes" to item 32a in the THP, regarding the presence of listed species, and mentioned an historic northern goshawk nest existing within the CIAA. SPI answered "no" to item 32b regarding significant impacts on non-listed species. SPI indicated that, if a nest of a northern goshawk, California spotted owl, or other large bird of prey is discovered during timber operation, the nest tree, screening trees, perch trees, and replacement trees will be protected and operation will be suspended in the proximity of the nest.

The general CIAA for the Curry THP was identified as the Upper Beaver Creek State Planning Watershed (No. 6534.500401) containing 9,281 acres. The Upper Beaver Creek State Planning Watershed was used as the watershed assessment area and as the only assessment area for wildlife. A botanical CIAA was chosen that included the Upper Beaver Creek and seven adjacent state planning watersheds.

The Curry THP discusses a number of wildlife species, including the mule deer, California spotted owl, and Pacific fisher, and concludes that the activity proposed in the THP will not have a significant adverse impact on them. SPI also stated that its management practices will gradually improve the habitat of species that use dense forest with a large tree component, such as the California spotted owl and Pacific fisher. When future harvest plans are proposed by SPI, it will, as required by law, again conduct a cumulative impacts analysis designed to respond to conditions existing at that time.

An addendum regarding site preparation provides additional information about the use of herbicides in response to item 14i of the THP form. We will discuss SPI's potential herbicide application in more detail later in this opinion. (See part V.A, *post*.)

CDF assigned an area forester to conduct a preharvest inspection in October 2001, and he produced a memorandum dated October 19, 2001, reporting on that inspection (PHI Report). The PHI Report described the discussions the area forester had with SPI's representatives and O'Connor of DFG, and it indicated that O'Connor was concerned that there was not enough information about the surveys for spotted owls and two other species for an adequate California Environmental Quality Act (CEQA) analysis. O'Connor needed more information to be able to state whether there would be significant or insignificant impacts from the Curry THP.[17] The information needed included details about the survey methodologies, which were not to professional protocols but might be acceptable if properly justified. As a result, the area forester recommended that SPI provide more information by either (1) updating the surveys or (2) justifying why updated surveys were not needed. The area forester recommended approval only upon the satisfaction of conditions regarding the submission by SPI and acceptance by CDF of certain replacement pages to the THP, as well as DFG's review and acceptance of wildlife surveys or justifications for the lack of surveys.

In November 2001, SPI submitted revisions to the THP. These included the pages that addressed biological resources, including the California spotted owl and the Pacific fisher. The discussion of the California spotted owl stated that "[t]he SPI database indicated three sightings within the CIAA. There are no known nesting pairs within harvest units." With respect to a nest located a half mile east of the THP area on United States Forest Service land, the THP states that the nest was last known to be occupied in 1999 and that SPI's biologist briefly checked the site late in the summer of 2001 and

[17]The PHI Report states that the area forester confirmed with an assistant chief of CDF "that CDF relies on DFG as CDF's biological experts regarding the adequacy of the survey protocol and determination of significance."

found no signs of owl occupation. The THP further states: "In the event that owls reoccupy this nest stand no direct impact would be expected due to the distance from the nearest harvest units."

CDF prepared an official response that reviewed issues raised by public comments and on April 12, 2002, approved the Curry THP.

Base Camp THP

The Base Camp THP (No. 4-01-80/TUO-6) was received by CDF on October 19, 2001, and filed on October 29, 2001.

The Base Camp THP covers 394 acres of timberland located to the east of the Curry THP and northeast of the Cedar Flat THP. It is about 17 miles east of Dorrington, California and is north of Lake Beardsley. The topography of this THP ranges from flat to a slope of 45 percent, and its elevation ranges from 5,500 feet in the south to 6,800 feet in the north. The mean annual precipitation for this THP is 50 to 55 inches, much of which falls as snow.

The Base Camp THP states its CIAA is the Basin Creek and Campoodle Creek State Planning Watersheds. These planning watersheds contain 7,212 acres and 18,618 acres, respectively. The Base Camp THP states these planning watersheds also are the biological assessment area and that "[b]iological issues outside of this watershed assessment area will be considered if the required protection overlaps this assessment area or impacts a haul road."

The Base Camp THP states that the "California spotted owl is a California Species of Special Concern, which usually nests in a tree or snag cavity in the broken top of a large tree." SPI's database indicated that there were two California spotted owl territories within the biological assessment area. Also, a reproductive pair and young were observed during 2001 owl surveys, within 480 feet of harvest unit 376, but no nest was found during the surveys. In response to this sighting, the THP states that before operations begin in harvest unit 376, a survey will be conducted to locate a nest and, if

found, a protective buffer will be left around the nest. If a nest is not found, SPI will assume it is too far from the harvest unit to justify any mitigation measures.

CDF determined the Base Camp THP was in conformance with the Forest Practice Act and approved it on April 5, 2002.

PROCEEDINGS

Plaintiffs challenged CDF's April 2002 approvals of the three THP's at issue in this case by filing suit on May 15, 2002. Trial was held on December 20, 2002. On March 5, 2003, the superior court found that "[CDF has] not acted in excess of [its] jurisdiction in approving the subject timber harvest plans; and [¶] [CDF's] approval of the subject timber harvest plans is supported by [its] findings and [its] findings are supported by substantial evidence in light of the whole record." Thereafter, the superior court filed a judgment denying the petitions for writ of mandate. Plaintiffs filed a timely notice of appeal on April 16, 2003.

On May 5, 2003, counsel for plaintiffs filed a Judicial Council form Civil Case Information Statement (APP-001) that indicated two similar cases had been appealed to the Third District Court of Appeal. The Third Appellate District affirmed the decisions of the lower courts to deny plaintiffs' petitions for writs of mandate and published its opinion. (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331 (*Ebbetts Pass I*).)

DISCUSSION

I. Requests for Judicial Notice

The parties submitted requests for judicial notice. To assist the preparation of the parties for oral argument, on December 6, 2005, we ruled on these requests as well as a partially related motion to strike by plaintiffs.

Ordinarily, a court's review of the approval of a THP should be confined to the administrative record. (See *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1392 [addressing approval of modified THP].) The parties did not convince us that a departure from the usual rule was justified in this

case. Accordingly, except for the limited purpose of providing background on the regulatory status of the California spotted owl and the Pacific fisher, we denied the requests for judicial notice and granted the motion to strike. (See Evid. Code, §§ 459, subd. (a) & 452, subd. (c).)

II. State Oversight of Timber Harvesting

The harvesting of timber on private lands in California is regulated through (1) the Forest Practice Act, (2) the Forest Practice Rules, (3) CEQA, Public Resources Code section 21000 et seq., and (4) regulations promulgated under CEQA by the California Resources Agency (Cal. Code Regs., tit. 14, § 15000 et seq. [hereafter Guidelines]). (See *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1014.)

The intent of the Legislature in enacting the Forest Practice Act was

> "to create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to assure that: [¶] (a) Where feasible, the productivity of timberlands is restored, enhanced, and maintained. [¶] (b) The goal 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, … and aesthetic enjoyment." (Pub. Resources Code, § 4513.)

The Legislature neither attempted to define how much consideration was to be given to these values nor established any criteria for resolving conflicts between (1) the goal of maximum sustained timber production and (2) protecting recreation, wildlife, and other values realized from California's timberlands. CDF attempted to provide some guidance for implementing the Legislature's intent and resolving conflicting objectives by adopting section 897 of title 14 of the California Code of Regulations.

Timber operations on private land may not be started until the timber owner or operator has submitted a THP for review and received the approval of the CDF. (See Pub. Resources Code, § 4581; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1226-1227.) The California Supreme Court held "that in approving timber harvesting plans, the [CDF] must conform not only to the detailed and exhaustive provisions of the

[Forest Practice Act], but also to those provisions of CEQA from which it has not been specifically exempted by the Legislature." (*Sierra Club v. State Bd. of Forestry*, *supra*, at p. 1228.) THP's are exempt from chapters 3 and 4 of CEQA,[18] which deal with various requirements of an environmental impact report (EIR). (See *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 566.) Notwithstanding the exemption from some chapters of CEQA, "[t]he THP preparation and approval process is the functional equivalent of the preparation of an [EIR] contemplated by CEQA." (*County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 830.)

> "[T]he purpose of a THP is to identify the proposed harvest plan, provide public and governmental decisionmakers with detailed information on the project's likely effect on the environment, describe ways of minimizing any significant impacts, point out mitigation measures, and identify any alternatives that are less environmentally destructive." (*County of Santa Cruz v. State Bd. of Forestry*, *supra*, 64 Cal.App.4th at p. 830.)

A THP must be available to the public and to other public agencies for review and comment. (Pub. Resources Code, § 4582.6.) CDF must invite, consider and make written responses to comments received from certain public agencies and must consult with those agencies at their request. (*Id.*, subd. (a).)

Upon approving a THP, CDF issues a notice of approval which must include a written response to significant environmental issues raised by the general public and others during the evaluation process. (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 611-612.)

When the plans proposed in a THP change, additional submissions to CDF may be required. Substantial deviations from the original plan may not be undertaken until an amendment detailing the proposed changes has been submitted and approved. (Pub. Resources Code, § 4591; *Public Resource Protection Assn. v. Department of Forestry &*

[18]These chapters include Public Resources Code sections 21100 through 21154.

Fire Protection, *supra*, 7 Cal.4th at pp. 122-123.)[19] Minor deviations may be undertaken by a timber harvester without an amendment, provided that those deviations are reported immediately in writing to CDF. (Cal. Code Regs., tit. 14, § 1040; *Public Resource Protection Assn. v. Department of Forestry & Fire Protection*, *supra*, at p. 123; see Pub. Resources Code, § 4591.1 [CDF may designate by regulation those deviations that do not require submission of an amendment].)[20]

A THP is effective for not more than three years, but may be extended for up to two additional years in certain situations to allow the completion of work. (Pub. Resources Code, § 4590, subd. (a); Cal. Code Regs., tit. 14, § 1039.1 [effective period of THP].) Within a month after completion of the work described in the THP, the timber owner must file a report of completion of work, excluding work for stocking, site preparation, and certain other matters. (Pub. Resources Code, § 4585, subd. (a).) After this report is filed, CDF shall inspect the work and determine whether it was completed in conformity with applicable law. (*Id.*, § 4586.)

A timber owner must file a report of stocking with CDF within five years after completion of timber operations on an area identified in a work completion report. (Pub.

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[19]Public Resources Code section 4591 provides: "Amendments to the original timber harvesting plan may be submitted detailing proposed changes from the original plan. Substantial deviations from the original plan shall not be undertaken until the amendment has been filed with, and acted upon, by the department in accordance with Sections 4582.7 and 4583. An amendment may not extend the effective period of the plan, except as provided in Section 4590."

As used in this section, the word "shall" is mandatory and the word "may" is permissive, "[u]nless the context otherwise requires …." (Pub. Resources Code, §§ 5, 15.)

[20]Minor deviation means "any change, minor in scope, in a plan which can reasonably be presumed not to make a significant change in the conduct of timber operations and which can reasonably be expected not to significantly adversely affect timberland productivity or values relating to soil, water quality, watershed, wildlife, fisheries, range and forage, recreation, and aesthetic enjoyment." (Cal. Code Regs., tit. 14, § 895.1.)

"Substantial deviation" is defined as "changes that are not 'minor deviations' as defined in 895.1 and are presumed to be substantial deviations because they could significantly affect the conduct of timber operations and potentially could have a significant adverse affect on timber productivity or values relating to soil, water quality, watershed, wildlife, fisheries, range and forage, recreation and aesthetic enjoyment." (Cal. Code Regs., tit. 14, § 895.1.)

Resources Code, § 4587, subd. (a); see Cal. Code Regs., tit. 14, § 953.5 [preliminary report of stocking status due two years after completion of logging where artificial regeneration methods used].) "Within six months of the receipt of the stocking report, the director [of CDF] shall determine, by inspection, whether the stocking has been properly completed. If so, he shall issue a report of satisfactory completion of stocking. If not, he shall take such corrective action as he deems appropriate in accordance with the provisions of Article 8 (commencing with Section 4601) of this chapter." (Pub. Resources Code, § 4588.)

III. Standard of Review

CDF's approval of a THP is "subject to judicial review under the mandate procedure established by Code of Civil Procedure section 1094.5" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1235), which contains an abuse of discretion standard. "Abuse of discretion is established if the respondent [agency] 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 the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) When an agency fails to proceed in a manner required by law, its decision is set aside only if such failure "is shown to be prejudicial, or is presumptively prejudicial, as when the department or the board fails to comply with mandatory procedures." (*Sierra Club v. State Bd. of Forestry*, *supra*, at p. 1236.)

IV. Geographical Area of Assessment

A. Contentions and Analytical Approach

Plaintiffs' opening brief asserts that "CDF failed to proceed in the manner required by law when it failed to consider information that would be provided by using a larger geographic area than the Biological Assessment Area chosen by SPI." More specifically, plaintiffs' opening brief refers to three provisions in CDF's regulations that plaintiffs contend were not followed. At oral argument, plaintiffs cited this court's decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1216 as support for their broader position that the geographic area used to assess

cumulative impacts on the California spotted owl and Pacific fisher was so narrowly drawn that it precluded CDF from considering relevant information about the significance of the impact on owl and fisher dispersal habitat.

Our approach to the topic of CDF's determination of the assessment areas for the California spotted owl and Pacific fisher will be markedly different from the analysis of the topic conducted by the Third Appellate District in *Ebbetts Pass I*. We introduce our approach by delineating its steps: (1) Provide an overview of the Forest Practice Rules and related Guidelines that apply to the analysis of cumulative impacts; (2) identify with particularity the provisions plaintiffs contend were violated; (3) analyze the regulatory language to determine what was required; (4) identify from the administrative record what CDF did and did not do in applying that language; (5) reach a conclusion about whether CDF's acts or omissions violated those requirements—that is, decide whether CDF "has not proceeded in the manner required by law" (Code Civ. Proc., § 1094.5, subd. (b)); and (6) determine whether any failure by CDF to follow the law was prejudicial.

B. Application of the Six-Step Approach

1. Overview of Forest Practice Rules concerning cumulative impacts

California Code of Regulations, title 14, section 895.1 defines "cumulative impacts" to mean those impacts defined in section 15355 of the Guidelines, which provides in part:

> "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. [¶] … [¶] (b) 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."

Using some of the same language, California Code of Regulations, title 14, section 898 provides in part:

> "Cumulative impacts shall be assessed based upon the methodology described in Board Technical Rule Addendum Number 2, Forest Practice Cumulative Impacts Assessment Process and shall be guided by standards of practicality and reasonableness. The [registered professional forester (RPF)]'s and plan submitter's duties under this section shall be limited to closely related past, present and reasonably foreseeable probable future projects within the same ownership and to matters of public record."

California Code of Regulations, title 14, section 952.9 (Southern Forest District Rules) contains a cumulative impacts assessment checklist followed by Technical Rule Addendum No. 2. For ease of reference and in anticipation of the second step of our approach, the three specific provisions in the appendix to Technical Rule Addendum No. 2 that plaintiffs claim were violated are italicized in the following excerpt from Technical Rule Addendum No. 2:

> "Introduction
>
> "The purpose of this addendum is to guide the assessment of cumulative impacts as required in 14 CCR 898 and 1034 that may occur as a result of proposed timber operations. This assessment shall include evaluation of both on-site and off-site interactions of proposed project activities with the impacts of past and reasonably foreseeable future projects. [¶] …
>
> "The Department, as lead agency, shall make the final determination regarding assessment sufficiency and the presence or absence of significant cumulative impacts. This determination shall be based on a review of all sources of information provided and developed during review of the Timber Harvesting Plan.
>
> "Identification of Resource Areas
>
> "The RPF shall establish and briefly describe the geographic assessment area within or surrounding the plan for each resource subject to be assessed and shall briefly explain the rationale for establishing the resource area. This shall be a narrative description and shall be shown on a map where a map adds clarity to the assessment. [¶] …
>
> "APPENDIX
>
> "In evaluating cumulative impacts, the RPF shall consider the factors set forth herein.

"A. Watershed Resources [¶] …

"C. Biological Resources

"*Biological assessment areas will vary with the species being evaluated and its habitat*. Factors to consider in the evaluation of cumulative biological impacts include:

"1. Any known rare, threatened, or endangered species or sensitive species (as described in the Forest Practice Rules) that may be directly or indirectly affected by project activities.

"Significant cumulative effects on listed 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.

"2. Any significant, known wildlife or fisheries resource concerns within the immediate project area and the biological assessment area (e.g. loss of oaks creating forage problems for a local deer herd, species requiring special elements, sensitive species, and significant natural areas).

"Significant cumulative effects may be expected where there is a *substantial reduction in required habitat* or the project will result in *substantial interference with the movement of resident or migratory species*.

"The significance of cumulative impacts on non-listed species viability should be determined relative to the benefits to other non-listed species. For example, the manipulation of habitat results in conditions which discourage the presence of some species while encouraging the presence of others." (Italics added.)

2. Specific provisions plaintiffs contend were violated

Of the three italicized provisions that plaintiffs contend were violated, we turn to the provision that is expressed in the most straightforward terms: "Biological assessment areas will vary with the species being evaluated and its habitat." (Technical Rule Addendum No. 2.) The alleged violations of the other, more flexible provisions need not be addressed in this opinion.[21]

[21]Because we determine that SPI and CDF failed to comply with the provision stating that biological assessment areas will vary with the species being evaluated, we need not determine if the other two provisions were violated. We do observe, however, that the violation

3. What is required by the provision that states biological assessment areas will vary by species

We begin the third step of our approach—that is, determining what the provision in Technical Rule Addendum No. 2 requires—by reviewing the positions set forth by the parties in their appellate briefs.[22]

Noting that "[t]he Rules require CDF to assess cumulative impacts to 'biological resources' on a scale that 'will vary with the species being evaluated and its habitat[,]'" plaintiffs complain that the planning watershed areas selected by SPI for assessment of cumulative impacts to biological resources and then approved by CDF "are the same as the 'watershed' assessment areas for each plan, designed to measure cumulative impacts on water resources but in no way correlated with the biological life cycle or habitat needs of the California spotted owl or Pacific fisher."

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of the first provision may have tainted the subsequent application of the other two provisions. (See part IV.B.6, *post*.)

[22]Because the third and subsequent steps of our approach are focused on a provision in Technical Rule Addendum No. 2, the case of *Kleppe v. Sierra Club* (1976) 427 U.S. 390, which was relied upon by the Third Appellate District in its analysis of SPI's choice of geographical assessment areas (*Ebbetts Pass I*, *supra*, 123 Cal.App.4th at pp. 1345, 1350-1351) provides little guidance. In *Kleppe*, the United States Supreme Court discussed the identification of geographic areas where cumulative environmental impacts may occur, but it did so in the context of a statutory provision in the National Environmental Policy Act of 1969, 42 United States Code section 4321 et seq. (NEPA), that addressed when the preparation of a "comprehensive" environmental impact statement (EIS) was appropriate. The text of the federal statutory provision at issue in *Kleppe* is not similar to the provision from Technical Rule Addendum No. 2 that states biological assessment areas will vary with the species being evaluated and its habitat. Therefore, *Kleppe* tells us little about whether CDF properly followed a provision that explicitly states biological assessment areas will vary with the species being evaluated and its habitat.

A subtle distinction exists between the cumulative impacts analysis required by CEQA and the cumulative impacts analysis done to determine if a comprehensive EIS is required by NEPA. The purpose of the assessment area required by CEQA is to identify other projects and activities that may cause incremental environmental impacts, which means that *indirect* environmental impacts may combine and be felt outside the assessment area. In contrast, the identification of the geographic area discussed in *Kleppe* appears to be concerned with where the cumulative environmental impacts may occur. (*Kleppe v. Sierra Club*, *supra*, 427 U.S. at p. 414.)

Though CDF, on the other hand, twice mentions the requirement that biological assessment areas will vary by species, it makes no attempt to interpret the regulatory language in a way that would authorize the use of a single, unvarying biological assessment area for all species of plants and animals. Instead, CDF attempts to sidestep SPI's use of only one biological assessment area by stating:

> "The Technical Addendum set forth at California Code of Regulations, Title 14, section 952.9(c) in addressing biological resources, does note that the assessment area can and will vary with the species being evaluated [and] its habitat, but this does not create a binding requirement that CDF must employ a particular assessment area based upon input with which the agency does not necessarily agree. That is the focus of [plaintiffs'] argument however."

Although CDF correctly asserts that it is not compelled by law to use a particular assessment area advocated in public comments, the assertion is beside the point. The question is not whether CDF can or does disagree with plaintiffs as to the suggested CIAA but, instead, whether the one-size-fits-all-species assessment area selected by SPI and approved by CDF complies with the provision that biological assessment areas will vary with the species being evaluated.

SPI is even less direct than CDF in addressing the provision that states biological assessment areas will vary with the species being evaluated. SPI sets forth no interpretation of the regulatory language and offers no explanation of how a single biological assessment area that does not vary by species complies with the language in Technical Rule Addendum No. 2. Rather, SPI makes the general assertion that it "and CDF followed th[e Technical Rule Addendum No. 2] methodology in analyzing cumulative impacts of the THPs, and in fact exceeded it." SPI asserts that it "and CDF went beyond the planning watersheds in considering effects to the California spotted owl. They considered the federal trend analysis for the entire Sierras [*sic*] and described these projects in the context of that trend analysis." This assertion also is beside the point. A broad statement about what was considered does not establish that SPI and CDF followed the steps that the law requires.

A geographical assessment area is chosen to identify other projects and matters that may produce a particular type of environmental impact. Once all the projects and matters occurring within that area are identified, their incremental environmental impacts are combined.[23] Next, the combined impacts are evaluated to determine if they reach the level of being significant. Thus, SPI's references to what it considered does not address the more specific question whether it followed the legal requirements that govern the choice of an assessment area. Nor does SPI's argument address whether it correctly completed the steps that must be taken after an appropriate assessment area is chosen, such as providing an adequate explanation of the rationale for choosing a particular assessment area.

Although neither CDF nor SPI explicitly interpreted the language of the regulatory provision in question, we will treat their positions as implicitly arguing that the provision should be regarded as merely advisory and not mandatory. This implicit argument requires the interpretation of a regulation, which is a question of law subject to our independent review. (*Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234.) The parties have not cited and we are not aware of any published opinion that has interpreted and applied the regulatory provision that states biological assessment areas will vary with the species being evaluated. Accordingly, this question of law appears to be one of first impression.

Usually, the construction of a statute or regulation begins with the actual words used. (*Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing* (2004) 119 Cal.App.4th 1038, 1060.) Our task is to determine whether the words and grammar are reasonably susceptible to the interpretation implicitly adopted by SPI and CDF. (See

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[23]The name "cumulative impacts assessment area" might mislead those not familiar with the analytical requirements of CEQA because it could cause them to infer that all environmental effects of the combined projects occur within that area. The cumulative impacts, however, are not necessarily limited to the geographical area chosen because the combined projects could cause an indirect impact to an aspect of the environment that exists outside that area.

Coburn v. Sievert (2005) 133 Cal.App.4th 1483, 1495 [a provision susceptible to more than one reasonable interpretation is ambiguous].)

We conclude that the language "[b]iological assessment areas will vary with the species being evaluated and its habitat" (Technical Rule Addendum No. 2) is not reasonably susceptible to being interpreted in such a way that a plan submitter may choose a single biological assessment area for all species being evaluated, at least not without explaining why a single assessment area is appropriate given the varying characteristics and habitats of the various species involved.

First, the plural "biological assessment areas" plainly indicates an intention that more than one biological assessment area will be chosen in a THP that evaluates potential impacts on multiple species. (See generally *Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208-1209 [use of plural in statutory requirement evidences an intent for more than one].)[24]

Second, the phrase "will vary" means there will be a natural tendency for the assessment areas to differ from one another. In this context, the word "vary" is not ambiguous. Webster's Third New International Dictionary (1986) at page 2535 defines "vary" to mean "to make differences between items in **:** insure variety in **:** make unlike in some particular" and "to exhibit or undergo change **:** break from sameness or uniformity." Listed synonyms are "change" and "differ."

Two relevant definitions of "will" from Webster's Third New International Dictionary, *supra*, at pages 2616 to 2617 are "**2**—used to express … natural tendency or disposition" and "**7**—used to express a command, exhortation, or injunction." As a

[24]Technical Rule Addendum No. 2 first mentions "[b]iological assessment areas" using the plural. In contrast, the singular is used to introduce "the Watershed Assessment Area," "[t]he recreational assessment area," "[t]he visual assessment area," and "[t]he traffic assessment area."

matter of common sense, the drafters must have used "will" to express the natural tendency of what would happen in the future.[25]

Third, the phrase "with the species being evaluated and its habitat" indicates that the cause of the natural tendency for variation among the biological assessment areas will be the differences among the species being evaluated and their habitat needs.[26] Also, the phrase "its habitat" clearly refers to the habitat of a single species and further demonstrates that the choice of an assessment area is done by evaluating each species separately.

Based on our analysis of the language, we conclude the provision in Technical Rule Addendum No. 2 that states biological assessment areas will vary with the species being evaluated and its habitat means that (1) the plan submitter is required to separately consider and choose a biological assessment area for each species being evaluated based, among other things, on the characteristics of the species and its habitat needs and (2) the assessment areas chosen on this species-by-species basis will have a natural tendency to vary from one another based on differences among the species concerned and their respective habitats.[27] Furthermore, the choices of assessment areas and corresponding

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[25]In other words, the phrase "will vary" should not be construed so rigidly as to mean that the assessment area for each species "must differ" from every other assessment area used for other species. To do so would require variance for variance's sake and not for the purpose of generating an accurate analysis of the cumulative impacts experienced by a particular species. In any event, no party has argued the drafters intended the assessment area for each species to be unique.

[26]Plaintiffs did not raise, and we do not consider, the question whether CEQA requires the geographical area used in the analysis of cumulative impacts to be chosen on an impact-by-impact basis rather than a species-by-species basis. An illustrative way to rephrase this question, in the context of a particular species, is to ask whether the geographical area appropriate for combining projects that have an incremental effect on a deer herd's use of meadows for fawning also is legally appropriate for combining projects that have an incremental effect on the production of an important food source, like acorns, within the deer herd's range.

[27]The species evaluated will be those that "may be affected by the proposed project" or those to which the proposed project, in combination with other projects and activities, will "have a reasonable potential to cause or add … significant cumulative impacts." (Cal. Code Regs., tit. 14, § 952.9 [items (1) & (3) from checklist].)

rationales will be disclosed in accordance with the mandatory requirements that appear in Technical Rule Addendum No. 2 under the heading "Identification of Resource Areas":

> "The RPF *shall* establish and briefly describe the geographic assessment area within or surrounding the plan for each resource subject to be assessed and *shall* briefly explain the rationale for establishing the resource area. This *shall* be a narrative description and *shall* be shown on a map where a map adds clarity to the assessment." (Cal. Code Regs., tit. 14, § 952.9, italics added.)[28]

Accordingly, a plan submitter must describe each assessment area geographically and explain the rationale underlying the choice of each species' assessment area. The explanation must address the characteristics and habitat needs of the particular species in the context of the THP's incremental effects on that species and the potential for those incremental effects to combine with the incremental effects of the other projects and matters located within the assessment area. In short, the regulations require that the biological assessment area for a particular species be tailored to that species and that the plan submitter explain why the assessment area chosen was appropriate.

The foregoing interpretation is consistent with the purpose of an analysis of cumulative impacts and harmonizes with the other provisions of Technical Rule Addendum No. 2

Cumulative impacts analysis, at its most fundamental level, is designed to inform the public and the responsible officials of the environmental consequences of their decisions before those decisions are made and, as a result, protect both the environment and informed self-government. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*) [discussing the purpose of an EIR, which is the functional equivalent of a THP].) In comparing

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[28] A species is a resource subject and, thus, this provision's use of the term "each resource subject" shall be construed to mean "each species" when applied to biological assessment areas. A detailed analysis of how this construction creates harmony rather than conflict within the broader regulatory scheme is possible but has been omitted because CDF and SPI have chosen not to raise any issues concerning this construction.

biological assessment areas that are tailored to each species against a single, unvarying biological assessment area, there is little doubt that the public and the responsible officials at CDF will be better informed when the plan submitter separately chooses an assessment area for each species and provides an explanation of the rationale for each choice in the THP. Consequently, the purpose underlying the cumulative impacts analysis supports an interpretation that requires the THP submitter to separately determine the assessment area for each species discussed in the THP and tailor the assessment area to that species and its habitat.

4. CDF's application of Technical Rule Addendum No. 2

The fourth step in our approach involves determining what CDF did and did not do in applying the regulatory provisions in question. The administrative record shows that the Cedar Flat and Base Camp THP's each identified only one biological assessment area and that the Curry THP identified a wildlife CIAA and a botanical CIAA.[29] Thus, it is undisputed that SPI did not vary the biological assessment areas in its THP's according to the species being evaluated and its habitat. Neither did SPI explain why a single, unvarying, CIAA for all biological species was appropriate. Instead, SPI merely explained the size of the single area selected. The Cedar Flat THP stated:

> "The area is chosen to reflect a watershed or landscape approach to habitat usage and would not necessarily equate to home ranges. The intent is to evaluate the habitat before and after harvest within a large enough area to detect significant impacts to those species with a large home range. See [CIAA] Map."

CDF reviewed the THP's and did not direct SPI to conform them to the requirement that "[b]iological assessment areas will vary with the species being evaluated

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[29]By creating a separate botanical assessment area, it appears that living organisms were divided at the kingdom level—a division far removed from the species level. Specifically, under the system of taxonomy that recognizes kingdoms, phyla, classes, orders, families, genera and species, the kingdom level is six levels above the species level. (Postlethwait & Hopson, *The Nature of Life* (1989) pp. 345-346; http://www.cartage.org.lb/en/themes/Sciences/Zoology/Biologicaldiverstity/Classification/Classification.htm [as of Apr. 14, 2006].)

and its habitat" (Technical Rule Addendum No. 2) by separately selecting an assessment area for each species. CDF also accepted SPI's inadequate explanation of the rationale for choosing a single assessment area for all species.

5. CDF failed to follow the law

Given the results of the first four steps, reaching the conclusion we have identified as the fifth step in our approach is relatively easy. CDF failed to proceed in the manner required by law and, as a result, abused its discretion because (1) the provision stating that biological assessment areas will vary with the species being evaluated and its habitat requires the THP submitter to separately tailor an assessment area for each species based on the characteristics of that species and its habitat and (2) CDF did not direct SPI to comply with this requirement.

This failure to follow a requirement in Technical Rule Addendum No. 2 resulted in another deficiency in the THP's that should be addressed in the event that SPI decides to resubmit them. Technical Rule Addendum No. 2 also states that "[t]he RPF shall establish and briefly describe the geographic assessment area … for each [species and other] resource subject to be assessed and shall briefly explain the rationale for establishing the resource area." Accordingly, after an assessment area is selected for a particular species, the considerations that resulted in its selection must then be included in the brief description of the rationale for establishing the particular assessment area. In reviewing a resubmitted THP, CDF must perform its express obligation to "make the final determination regarding assessment sufficiency and the presence or absence of significant cumulative impacts." (Technical Rule Addendum No. 2.) This broad obligation implies a more specific mandatory duty to (1) review the brief description to make sure the required information is included and (2) determine if each assessment area chosen by the plan submitter is appropriate.

6. Prejudice from failure to vary assessment areas by species

The sixth and final step of our approach involves determining whether CDF's failure to follow the law was prejudicial. CDF's failure to follow the law is an abuse of

discretion that is presumptively prejudicial "when [CDF] fails to comply with mandatory procedures." (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1236.) The rule that biological assessment areas will vary with the species being evaluated necessarily implies a mandatory obligation to separately choose an assessment area for each species.[30] CDF's failure to enforce this mandatory procedure was presumptively prejudicial.

Alternatively, even if the presumption of prejudice did not apply in this case, we would conclude the error was prejudicial because (1) it occurred so early in the application of the methodology set forth in Technical Rule Addendum No. 2 that it tainted the determinations made in the later stages of the cumulative impacts analysis and (2) it subverted the purposes of CEQA and the Forest Practice Act by causing the omission of "'material necessary to informed decisionmaking and informed public participation.'" (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106.)

The taint from the use of a single, unvarying assessment area for biological species is reflected in the way CDF addressed the argument that a larger assessment area should have been used for the California spotted owl and the Pacific fisher. CDF framed the issue using the most extreme alternative for an assessment area (i.e., the entire Sierra Nevada), concluded the entire Sierra Nevada was not the appropriate biological assessment area, and then made the large inferential leap that elimination of the entire Sierra Nevada as an appropriate assessment area meant that the watershed assessment area used by SPI was the appropriate assessment area. CDF did not discuss a possible assessment area somewhere between the size of the entire Sierra Nevada and the size of the watershed assessment area.

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[30]It is theoretically possible that this separate selection of assessment areas will result in the same geographic area being used as the assessment area for all species being evaluated, but the explanations of the rationale for selecting each assessment area would allow CDF to determine if such a coincidence was based on faulty reasoning.

A possible explanation for CDF's artificially rigid approach—treating the assessment area question as presenting a choice limited to either the entire Sierra Nevada or the watershed, instead of one that presented a wide range of possible assessment areas—is that it was unable to identify workable criteria for determining what was the appropriate single assessment area for all of the biological species mentioned in the THP's. When faced with the application of the inherently impractical and unreasonable concept of a single assessment area for all potentially affected biological species,[31] it is little wonder that CDF was unable to articulate a basis for determining whether a different area than that chosen in the THP's should have been used.

CDF's evident frustration with the process of identifying an appropriate assessment area is illustrated by the assertion in its appellate brief that plaintiffs "never suggest[], and never ha[ve] suggested either in the administrative record or in its briefing below, the 'proper' size for such a region-wide assessment area for the C[alifornia spotted owl] or Fisher." First, CDF has not cited and we have not located any statutory, regulatory, or case law authority for the proposition that a plaintiff has standing to challenge the illegal use of a one-size-fits-all-species assessment area only if that plaintiff took a definitive position on what the proper size of the assessment area for a particular species should be. CDF has not advanced a sound reason for adopting such a standing requirement and, therefore, we will not impose one here. Second, in their reply brief, plaintiffs contend that they in fact did suggest alternate areas (such as area 5 in the 1992 Report) for assessing the cumulative impacts on the ability of the juvenile owls to disperse. Thus, we conclude that plaintiffs may raise challenges to the use of a one-size-fits-all-species assessment area.

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[31]CDF's review of each of the chosen assessment areas as well as its review of the cumulative impacts that flow from the projects and other activities within those assessment areas "shall be guided by standards of practicality and reasonableness." (Cal. Code Regs., tit. 14, § 898.)

If the approach of varying assessment areas by species had been taken in the first instance, then CDF's task of reviewing the appropriateness of the assessment area chosen for each species of wildlife would have been more rational because CDF could have referred to (1) the needs and vulnerabilities of the particular species, (2) the potential ways in which the physical changes from timber harvesting and other projects could combine to impact that particular species, and (3) whether one or more of those potential "cumulative impacts" would reach the level of being a significant adverse impact on the species. (Cal. Code Regs., tit. 14, § 895.1; Guidelines, § 15355.) Furthermore, CDF would have had the benefit of the description in the THP of the plan submitter's rationale for choosing a particular assessment area for a particular species as well as any comments received from the public. In short, this fundamental change in the starting point of CDF's analysis would have affected the questions CDF addressed in the later steps of its analysis as well as the information presented to the public and responsible officials.

An example of a question that would have been addressed in more detail had the appropriate starting point for the selection of an assessment area been used concerns the cumulative impacts of the THP's and other projects on the movement of the California spotted owl. Plaintiffs argue that CDF approved an assessment area for the California spotted owl that was so small it did not consider the habitat needed for the dispersal of juveniles, which violated a principle that the area used for a cumulative impacts analysis "cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting" (*Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at p. 1216) and also violated the paragraph from Technical Rule Addendum No. 2 that states:

> "Significant cumulative effects may be expected where there is a substantial reduction in required habitat or the project will result in substantial interference with the movement of resident or migratory species."

From this paragraph, plaintiffs infer that CDF is required by law to consider whether there will be a "substantial reduction in required habitat" or a "substantial

interference with the movement of [the] species" under evaluation when determining whether cumulative biological impacts are "significant" or not. In particular, plaintiffs argue the evidence in the administrative record, including the 1992 Report, shows that "the dispersal of juvenile owls is critical to their continued viability as a species" and "juvenile owls typically disperse over much greater distances than are covered by the small assessment areas" used by CDF. Plaintiffs assert that juvenile dispersal is important to the species because it is how juveniles find mates and locate suitable nesting habitat. Difficulty in dispersal of juveniles could cause owl populations to become isolated and lead to inbreeding that weakens the isolated population.

Because the administrative record contains substantial evidence supporting a fair argument that dispersal of juvenile owls is important to the California spotted owl as a species, it follows that any explanation of the choice of the assessment area for that species should address how the controversy over the dispersal of juvenile owls influenced the choice of assessment areas. The THP's do not contain such an explanation and, as a result, correcting the error in the way the assessment areas were chosen may resolve any deficiency in the treatment of issues involving habitat fragmentation and the dispersal of juvenile owls and, thus, serve the goal of informed decisionmaking and informed public participation.[32]

In summary, we recognize that our discussion of prejudice based on the omission of material necessary to informed decisionmaking and public participation is not required because the violation of mandatory provisions in Technical Rule Addendum No. 2 is presumptively prejudicial. Nevertheless, we have included it in this opinion to show that the erroneous use of a single, unvarying biological assessment area was not a trivial or mere technical error.

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[32]The use of a solitary biological assessment area at the scale of a watershed appears to have been why CDF did not discuss the fragmentation issue and did not make explicit findings on the factual issues it presented. CDF's discussion of the mule deer illustrates that it is capable of discussing the cumulative impacts on the movement of a species of wildlife and is capable of imposing mitigation measures related to that movement.

D. Adequacy of CDF's Responses to Public Comments

Plaintiffs have raised a number of specific instances that they claim illustrate their contention that CDF "failed to issue legally adequate responses to public comments that a larger geographic area is necessary to assess the THPs' effects on the California spotted owl and Pacific fisher."

We will not address all of the issues concerning CDF's responses that were raised by plaintiffs because (1) the erroneous use of a single, unvarying biological assessment area, by itself, warrants overturning CDF's approval of the THP's and (2) that error occurred early in the analysis of cumulative impacts making it difficult to isolate that error from the other errors plaintiffs contend are connected to CDF's responses to public comments. As a result, if SPI resubmits the THP's with biological assessment areas that vary by species and adequate explanations of the rationale for selecting particular assessment areas, we cannot predict whether the alleged errors in CDF's approach to public comments will recur.

Nevertheless, plaintiffs have raised a challenge to a purported error that might recur and can be avoided if identified here. Specifically, plaintiffs challenge CDF's statement that a "fourth factor [for rejecting an assessment area the size of the entire Sierra Nevada] is that an analysis of the impacts for the entire Sierra Nevada would not be complete at any rate by just using the information known on lands owned by the plan submitter." CDF's statement may reflect an error of law because CDF's analysis of any assessment area is never limited to "just using the information known on lands owned by the plan submitter."

The Forest Practice Rules explicitly state that the "plan submitter's duties under this section shall be limited to closely related past, present and reasonably foreseeable probable future projects within the same ownership *and to matters of public record*." (Cal. Code Regs., tit. 14, §§ 898, italics added, 895.1 [definition of "reasonably foreseeable probable future projects" includes, *but is not limited to*, four listed categories of projects].) Thus, a plan submitter must consider and identify its own projects as well

as projects and activities that are "matters of public record." If CDF were to analyze an assessment area based just on information known about projects on the lands owned by the plan submitter, then CDF would have failed to fulfill its mandatory obligations in two respects.

First, assuming for purposes of argument that the limitation on a plan submitter's duties is valid, CDF is required to enforce the requirement that the plan submitter include matters of public record in its cumulative impacts analysis and then consider those matters during its review of cumulative impacts. Second, section 898 states that in analyzing cumulative impacts, the "Director [of CDF] *shall* supplement the information provided by the RPF and the plan submitter when necessary to insure that all relevant information is considered." (Cal. Code Regs., tit. 14, § 898, italics added.) Thus, CDF's mandatory obligation does not end with the projects identified by the plan submitter and matters of public record. In order to provide the required basis for an adequate analysis of potential cumulative impacts and the significance of those impacts, the phrase "all relevant information" must be construed to include information about all reasonably foreseeable projects and matters in the assessment area, even if they are not on the land of the plan submitter and are not matters of public record.[33]

Consequently, in analyzing any THP's that SPI chooses to resubmit, CDF's written reasoning should avoid the ambiguity created by its use of the phrase about "just using information known on land owned by the plan submitter" in connection with any assessment of cumulative impacts. (Cal. Code Regs., tit. 14, § 898.)

With respect to the other issues raised by plaintiffs regarding CDF's response to public comments, we will not address them at this stage of the proceedings.

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[33]In other words, because the substantive criteria of CEQA apply to the evaluation of a THP's environmental impacts (see *Schoen v. Department of Forestry & Fire Protection*, *supra*, 58 Cal.App.4th at p. 566), a possible ambiguity in the Forest Practice Rules cannot be construed to truncate CDF's analysis of cumulative impacts by excluding reasonably foreseeable projects and matters simply because they are not on the plan submitter's land or are not matters of public record.

V. Information Regarding Herbicide Use

A. Facts

1. Factual assertions in the THP's

The THP's discuss SPI's possible use of herbicides postharvest to help prepare a site for replanting and to suppress vegetation competing with the conifer seedlings planted. Each THP contains essentially the same addendum to item 14i that addresses the use of herbicide in site preparation. The information and assertions about possible herbicide use contained in the addenda are summarized in the following seven paragraphs.

First, in its operations, SPI desires to control brush and other types of vegetation. To achieve the desired control, SPI adopted an integrated program that combines physical, cultural, biological and chemical methods of vegetation management. Physical methods include manual, mechanical, and prescribed fire techniques. Chemical methods include "the judicious use of herbicides to prepare a site for burning or planting, minimize resprouting brush, release conifers to grow freely, maintain road access and roadbed integrity, or eliminate exotic invasive weeds."

Second, herbicides will be applied only to the regeneration units that will be or have been planted. The actual application of herbicides will be done "aerially (helicopter), from ground based equipment or by ground crews using backpack sprayers." "Decisions about spraying are made after harvest based on conditions on the ground. These conditions include amount of competing vegetation present and its future growth potential, level of moisture retention capability in the specific soil, survival success rates of the planted conifer seedlings, amount of insect or rodent damage, and other factors that are not known at this time."

Third, with respect to the likelihood of herbicide use, "there exists a reasonable probability that some form of herbicide may be used to control vegetation post-harvest." Indeed, "[h]erbicide use is part of SPI's required demonstration of achievement of maximum sustained production …. A policy of no herbicide use is not a feasible

alternative." Notwithstanding the likelihood of herbicide use in general, however, details of use—such as the herbicide(s) to be used, the rates of application, application method(s), the desired vegetation control for the particular location, and the conditions existing at the location at the time of application—were not known or accurately predictable at the time the THP's were prepared.

Fourth, if and when herbicides are used, "they will be applied according to the laws and regulations covering pesticide use in California."[34] These laws and regulations include the labeling requirement imposed by the federal government and the registration and permit system administered by the California Department of Pesticide Regulations (DPR). Also, a state-licensed pest control adviser must write a recommendation prior to herbicide use that certifies "that alternatives and mitigation measures that would substantially lessen any significant adverse impact on the environment have been considered and if feasible, adopted."[35] To apply the herbicides recommended by the pest control adviser, SPI will hire and supervise state-licensed pest control operators. SPI must employ pest control advisers and pest control operators regardless of whether the specific application of an herbicide requires a permit.

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[34]The term "pesticide" is broadly defined by the Food and Agricultural Code to include any substance "intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any pest as defined in Section 12754.5 …." (Food & Agr. Code, § 12753, subd. (b).) Thus, a herbicide is a specific type of pesticide. (See Food & Agr. Code, § 13190, subd. (d) [defining herbicide to mean a pesticide intended to kill weeds]; see also *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 990, fn. 1 [under the federal labeling statute, "pesticides" include herbicides, insecticides, fungicides, rodenticides and plant regulators].)

[35]Subdivision (e) of section 6556 of title 3 of the California Code of Regulations states this certification must be included in the pest control adviser's written recommendation required by Food and Agricultural Code section 12003. The wording of subdivision (e) leaves open the possibility a particular use of an herbicide will be recommended by a pest control adviser even though the use would have a significant adverse impact on the environment and even though alternatives and mitigation measures that would substantially lessen the impact are not employed because, in the judgment of the pest control adviser, they are not feasible.

Fifth, in the past, SPI has commonly used triclopyr, hexazinone, glyphosate,[36] and atrazine at varying rates and in full compliance with label requirements.[37] "Application of herbicides, with the exception of 2,4-D,[38] does not require the issuance of a permit or entitlement from one or more public agencies …."[39] The permit necessary for the application of 2,4-D is issued by the county agricultural commissioner.

Sixth, triclopyr, hexazinone, glyphosate, and atrazine are each discussed in general terms.[40] Also, the regulatory framework, both state and federal, that applies to herbicides is discussed.

Seventh, no significant cumulative impacts are anticipated from the herbicide applications based on "the extensive testing by herbicide manufacturers, the Department of Food and Agriculture, the Department of Pesticide Regulation, the application by a state licensed Pest Control Operator, and the recommendations and supervision of a state licensed Pest Control Advisor." Similarly, a watershed may experience a cumulative

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[36]Triclopyr is also known by the commercial name Garlon, hexazinone by the names Velpar or Pronone, and glyphosate by the name Roundup.

[37]A dispute concerning past violations or misuse of chemicals by SPI is discussed in part V.H, *post*.

[38]Section 14031 of the Food and Agricultural Code uses "2,4-D" to mean "any form of 2,4-dichlorophenoxyacetic acid."

[39]This general assertion, according to CDF, is subject to many exceptions. CDF's supplemental letter brief identified scenarios involving possible *governmental* site-specific reviews of proposed herbicide applications. Except for reviews by county agricultural commissioners of 2,4-D applications, none of the scenarios are relevant to SPI's possible use of triclopyr, hexazinone, glyphosate, atrazine and imazapyr under the circumstances contemplated by the THP's. Thus, the "use of [these five] herbicides by Sierra Pacific will be evaluated in the context of a specific setting under the regulatory program for the certification and use of pesticides" (*Ebbetts Pass I, supra*, 123 Cal.App.4th at p. 1362) only by a pest control adviser hired by SPI and not by a government agency because no permits are required.

[40]The general discussion does not state what happens if the pest control adviser determines the herbicide use will have a significant adverse environmental impact and any alternatives or mitigation measures are not feasible. Also, the THP's do not disclose whether any written recommendation prepared by a pest control adviser hired by SPI has ever, in fact, resulted in the implementation of "any additional restrictions and/or mitigation measures."

impact from chemical contamination caused by run-off from pesticide treatments, but SPI's "[p]esticide treatments are applied following label directions that have been designed to protect water quality among other things."

2. CDF's Findings and Analysis

In connection with its review of each of the THP's, CDF prepared an official response that contained its analysis of the THP and its responses to issues raised in comment letters. For example, the 116-page official response to the Cedar Flat THP discussed major aspects of the THP, summarized the concerns raised by 70 comment letters into 26 issues, and provided responses.

Issue 15 in each of the official responses concerned the adequacy of the information provided regarding SPI's proposed herbicide use and whether more specific information should have been obtained.

Initially, CDF's 15-page response to issue 15[41] observed that SPI both took the position that the application of herbicides was speculative and acknowledged that herbicides could not be applied in the future without a written recommendation from a licensed pest control adviser. The written recommendation "will specify the type of herbicide(s) to be used (which depends upon the target species and crop species), how they are to be applied, where they are applied and when they are to be applied. All of these types of decisions can make a significant impact on the persistence, movement and longevity of a chemical in the ecosystem, or entry into surface water runoff." CDF also observed that "ultimately even the environmental consequences of pesticides that reach ground or surface water can vary greatly depending" on many factors. Lacking the written recommendations for future applications, CDF proceeded to find that "certain generalities can be made on this issue based on past practices" of SPI, which "typically

[41]An extensive discussion is not necessarily accurate, complete, or devoid of irrelevant material. (See Guidelines, § 15006, subd. (s) [paperwork can be reduced by reducing emphasis on background material].)

included spraying of one of six different herbicides to control brush competition [in] most all of the regeneration units …."

CDF discussed the California and federal systems for pesticide regulation and the effect of those systems on its review of herbicide use in the next two pages of its response to issue 15. CDF observed that the United States Environmental Protection Agency regulates pesticide use nationwide and has exclusive authority over pesticide labeling and that the DPR regulates pesticides within California and may adopt restrictions on pesticide use that go beyond the federal regulations.

With respect to its own role, CDF stated it "is not the regulating agency for herbicide applications on private land and [does] not have the authority to approve or disapprove any project regarding the use of chemicals." CDF further stated it "faces constraints in examining the environmental effects of herbicide use" because DPR is the lead agency under CEQA for regulating herbicide use and its regulatory program has been certified as not requiring the preparation of an EIR. (See Pub. Resources Code, § 21080.5; Guidelines, § 15251, subd. (i) [listing DPR's program as certified].)[42] CDF described the constraints as follows:

> "Because DPR is the lead agency, a determination by DPR that a product is registered for a particular use is binding on CDF. [Citations.] Accordingly, if a DPR registered herbicide will be used in accordance with the directions and restrictions on the pesticide product label and any other restrictions established by DPR, CDF is barred from repeating the environmental analysis conducted by the lead agency. Because the use would not have a significant effect on the environment, CDF is not required to analyze the use in the THP. Exceptions to the lead agency's determination apply where the pesticide would be used for a non-registered purpose, [citation], or where significant new information is presented to CDF that had not been, and could not have been, presented to DPR at the time of DPR's

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[42]CDF's discussion omits any mention of appendix B to the Guidelines, titled "Statutory Authority of State Departments," which lists CDF as one of the departments with authority over herbicides and pesticides and notes the authority is only "[w]ith respect to forest land." (Guidelines, appen. B, fn. 22 <http://ceres.ca.gov/topic/env_law/ceqa/guidelines/appendices.html> [as of Apr. 14, 2006].)

registration decision. [Pub. Resources Code, § 21092.1, Guidelines, § 15162]."

After concluding that significant new information had not been presented, CDF stated that it "does have the authority to evaluate chemical use as it pertains to cumulative watershed or biological effects, and [it] has concluded that adherence to State and Federal laws pertaining to certifications and operations should prevent significant effects." CDF expressly subjected this determination to "the caveat that it is currently unknown which herbicides would be used, if any, or the amount or frequency of use of these chemicals, or whether the registration for these products would change substantially due to actions of regulatory agencies so that future use patterns might be changed."

The next 11 pages of CDF's response address the potential impacts from the potential use of six herbicides that SPI had used in the past.[43] CDF made nearly identical findings regarding the potential use of the six herbicides. These findings are illustrated in CDF's discussion of the use of glyphosate:

> "Given the scientific and toxicological information in conjunction with the speculative information that [CDF] has with respect to the timing, amount of product, weather conditions at the time of application, or even if the product would be used at all, CDF finds that there is no substantial evidence that glyphosate use would be provide [*sic*] a significant human health hazard or significant adverse environmental impact when used in accordance to label or other regulatory restrictions and when used in reforestation in the typical manner."

After recognizing an information gap about the effects that result when herbicides are applied together in mixtures, CDF finished its response to issue 15 with the following:

> "CDF can only speculate how SPI intends to use herbicides on their lands with consideration being made for past practices. CDF must assume that SPI, like any individual or corporation, will follow the law regarding

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[43]SPI's three THP's addressed possible applications of triclopyr, hexazinone, glyphosate, and atrazine. CDF's response considered these four herbicides as well as imazapyr, which is known by the commercial names Chopper and Arsenal, and 2,4-D.

> herbicide use. Any recommendation to use herbicides must be consistent with label instructions. CDF is not aware of any reported instances in the county associated with this THP where a Licensed Pest Control Advisor or Applicator working on SPI lands has been shown to be using materials in a way that is substantially inconsistent with label requirements in a manner that would result in significant environmental damage."

CDF did not explain why it "must assume" SPI would follow the law or why it limited the disclosure of its awareness of environmental damage from SPI's prior chemical use with so many qualifications.

B. Issues

Plaintiffs' opening brief raised the following issue concerning SPI's potential herbicide use: "Whether CDF failed to proceed in a manner required by law when it failed to obtain, consider and disclose information regarding SPI's post-harvest herbicide applications that is necessary to assess environmental impacts." This broadly phrased issue includes a number of more specific ones.

A threshold issue is whether SPI's potential herbicide use is part of the "project" covered by the THP, which includes identifying the appropriate legal test and applying it to the facts in the administrative record. The threshold issue is intertwined with the controversy regarding the existence and extent of CDF's authority to consider potential herbicide use, require the disclosure of additional information, and impose mitigation measures.

Part V.F, *post*, addresses whether CDF's findings about speculation, if supported by substantial evidence, terminate our inquiry into whether CDF fulfilled its obligation to obtain and disclose more details about SPI's potential herbicide use.

Part V.G, *post*, focuses on the disclosures CDF actually made in addressing whether CDF fulfilled its obligation to obtain and disclose information. Particular questions are (1) whether CDF's description of DPR's program for regulating herbicides was accurate and (2) whether CDF committed legal error by relying on information that was not in the administrative record and, thus, was not available for review by either the

public or the courts. Also, if inadequacies existed in the disclosures, were they prejudicial?

Part V.H, *post*, addresses the dispute raised by plaintiffs' allegations, and SPI's denial, that SPI misused herbicides in the past.

C. Background

The case of *Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th 1215 is relevant to our review because it contains the California Supreme Court's views on CDF's authority and obligation to obtain and disclose information necessary to determining whether a THP will have a significant adverse environmental impact.

In *Sierra Club*, a lumber company proposed to log old-growth redwoods and submitted plans that did not include information about the presence of old-growth-dependent species in the subject area. When CDF asked for this information, the lumber company refused to provide it on the ground that its submission was not required by the applicable rules. (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1222.)

The California Supreme Court addressed whether CDF had the authority to require a plan submitter to provide information not specified in the Forest Practice Rules. The court concluded that CDF had "the authority to require the submission of information … necessary to enable [it] to determine whether a timber harvest plan will have a significant adverse impact on the environment." (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1220.) In describing the limits on CDF's power to compel information, the court stated "the information sought … must be information that will reveal effects of timber harvesting that can be fairly described as 'significant.' [Public Resources Code s]ection 21068 defines 'significant effect on the environment' as 'a substantial, or potentially substantial, adverse change in the environment.'" (*Id*. at p. 1234.)

The court also addressed the extent to which the law required CDF to exercise that authority: "Only with that information is [CDF] able to adequately discharge the obligation … to determine whether a timber harvest plan incorporates feasible mitigation measures that substantially lessen the effects of the plan on the environment. [Citation.]"

(*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1220.) Thus, CDF's *authority* to obtain the described information has the same scope as its *obligation* to obtain it.

The rulings by the California Supreme Court can be described at a more fundamental level by restating them using the components of the inquiry whether an activity will have a significant adverse effect on the environment. The particular component at issue in *Sierra Club v. State Bd. of Forestry* was the *environment* because old-growth-dependent wildlife species are, by definition, part of the environment. (See Cal. Code Reg., tit. 14, § 895.1 [fauna is among the items composing the environment].) Thus, when the California Supreme Court "conclude[d] that the board did abuse its discretion when it evaluated and approved the plans on the basis of a record which lacked information regarding the presence in the subject areas of some old-growth-dependent species" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1220), it effectively affirmed the basic propositions that (1) the affected environment must be adequately described in the THP and (2) the record must contain the information necessary to complete that description.

These two basic propositions can be used to illustrate differences and similarities between *Sierra Club v. State Bd. of Forestry* and this appeal. This appeal is different because the primary dispute concerns a different component—the activity instead of the environment. Similarities exist because the arguments raised by plaintiffs can be framed using the two propositions enumerated above and substituting the activity for the environment. This produces the following contentions: (1) the activity [SPI's potential herbicide applications] was not adequately described in the THP, and (2) the record lacked information necessary to complete an adequate description. These similarities are important to note because the decision in *Sierra Club v. State Bd. of Forestry* provides guidance for our analysis of whether *the record* lacked information necessary to complete an adequate description of SPI's potential herbicide use. Specifically, a failure to accurately describe the DPR regulatory program could be phrased in terms of the record lacking the information that an accurate description would have provided. (See part

V.G.1, *post*.) Also, the failure to disclose information upon which CDF relied also involves a lack of information in the record. (See part V.G.2, *post*.)

D. The Separate Project Theory of Herbicide Use

As noted previously, a threshold issue concerns how the concept of a "project" should apply to SPI's potential herbicide applications.

The THP's initially set forth the claim that "the use of herbicides post harvest to suppress competing vegetation, is … not a project under CEQA," using the rationale that "[a]pplication of herbicides, with the exception of 2,4-D, does not require issuance of a permit or entitlement from one or more public agencies …." In its appellate brief, SPI contends that plaintiffs "concoct another straw man dispute in arguing that potential post-harvest application of herbicides is a 'project' subject to environmental review during the THP approval process."

SPI's contention mischaracterizes the position taken by plaintiffs in this appeal. Plaintiffs argue CDF has the legal authority to assess the potential herbicide applications, not because those applications are separate projects that require CDF's approval, but because the herbicide use is part of the larger, single project covered by the THP and subject to approval by CDF.

Because plaintiffs have not advanced the theory that potential herbicide use is a stand-alone project subject to CDF review, we need not address SPI's contentions that its application of atrazine, hexazinone, triclopyr, or glyphosate does not constitute a "project" for purposes of CEQA or the Forest Practice Rules.[44] (See Pub. Resources Code, § 21065.) Similarly, it is not necessary to resolve the dispute between CDF and SPI over whether the county agricultural commissioner's issuance of a permit for the

[44]SPI contends the definition of a "project," which encompasses activity that "requires the applicant to obtain a lease, permit, license or entitlement from one or more public agencies" (Cal. Code Regs., tit. 14, § 895.1) is not met with respect to these chemicals because they may be applied without a permit from the county agricultural commissioner and without further approval from any public agency.

application of 2,4-D is ministerial or discretionary.[45] (See Cal. Code Regs., tit. 3, § 6432 [permit evaluation by commissioners]; see generally *id.*, §§ 6420-6444 [these sections compose the article titled Permit System].)

E. Herbicide Use Is Part of the Project Covered by the THP

Plaintiffs contend that the potential herbicide applications are part of the broad project covered by the THP and therefore subject to review by CDF. (See Guidelines, appen. B [with respect to forest land, CDF listed as having authority over herbicides and pesticides].) This contention challenges the position stated in the THP's that "the use of herbicides post harvest … is not part of the THP project because the critical details of use are unknown at the present time," and the related assertion that "the use of herbicides is entirely too speculative to be considered as part of a THP project." Plaintiffs argue that the term "project" must be broadly construed and applied to maximize protection of the environment[46] and that SPI uses herbicides as an integral component of its efforts to maximize timber production.

Because the appellate briefs did not explicitly address the matter, we sent the parties a letter before oral argument asking:

> "[P]lease consider the case law that discusses how two different aspects of uncertainty affect what parts of a proposed action are reasonably foreseeable and what parts are speculative. [¶] The first aspect of uncertainty concerns whether or not the act will be taken, a question that is

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[45]In footnote 9 of its supplemental brief, CDF disagrees with SPI's characterization of permit issuance as ministerial and asserts that the agricultural commissioner must do an independent evaluation. (59 Ops.Cal.Atty.Gen. 300, 304 (1976) [under prior regulatory program, "issuance of such a permit is discretionary, as the commissioner is required to consider a variety of factors beforehand"]; see also Guidelines, § 15268 [ministerial projects are exempt]; *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118 [trial court's finding that issuance of hotel building permit was a ministerial act was reversible error because issuing agency had to exercise its discretion].)

[46]The principle that the term "project" is broadly construed to protect the environment is well established. (E.g., *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 720.)

general in nature. Where it is reasonably foreseeable that an act will be taken, the second aspect of uncertainty relates to the specific details of (i) how the act itself will be carried out and (ii) the conditions under which the act will be completed. The distinction between these two aspects of uncertainty is discussed and applied in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights I*), *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 903-905, and *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397."

The distinction between these two types of uncertainty[47] was a concern because of the possibility to foresee, in general terms, that a proposed act will be done even though the specific details of how it will be accomplished are speculative. (See *Laurel Heights I*, *supra*, 47 Cal.3d 376; see part V.E.1.b., *post*.)

1. Definition of "project"

To place our analysis of uncertainty in context, we begin with the definitions of the term "project." Under CEQA, a "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and … [¶] … [¶] that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Resources Code, § 21065.) Similarly, the Forest Practice Rules define "project" to mean "an activity which has the potential to cause a physical change in the environment, directly or ultimately, and that … requires the applicant to obtain a lease, permit, license or entitlement from one or more public agencies. This includes Timber Harvesting Plans." (Cal. Code Regs., tit. 14, § 895.1.)

The Guidelines provide some insight into the scope of "an activity" that constitutes a project by stating that a project encompasses "the whole of an action." (Guidelines, § 15378, subd. (a).) Also, "[t]he term 'project' refers to the activity [that] is

[47]For purposes of this opinion, the terms "uncertain" and "uncertainty" are not used to mean speculative or speculation. For example, a degree of uncertainty exists for something that is reasonably foreseeable because of the possibility it might not occur.

being approved and [that] may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (*Id.*, subd. (c).)

From these definitions, it follows that a proposed act is not part of a "project" unless it is part of "an activity." Before turning to (1) whether the potential application of herbicides is part of "an activity" and (2) whether the potential application has the requisite level of certainty to be part of the project, we note that herbicide use easily meets the other requirements in the definition of a project.[48]

a. "An activity" includes acts taken towards the project's objective

In this case, the "project" is the THP. (Cal. Code Regs., tit. 14, § 895.1.) To be part of "an activity" as that term is used in the definition of a "project," the proposed physical act must be among the "various steps which taken together obtain an objective." (Robie et al., Cal. Civil Practice–Environmental Litigation (2005) § 8.7.) Restated more generally, the proposed physical act must be "part of a single, coordinated endeavor." (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 639-640.)

In this case, SPI's objective under the THP's is clear. Moreover, it is mandated by the Legislature—"maximum sustained production of high-quality timber products" from its timberland (Pub. Resources Code, § 4513, subd. (b)). Achieving that objective involves harvesting trees, preparing the harvested sites for planting, and caring for the replanted areas so that they may be harvested in the future. SPI stated in the THP's that harvesting under the Forest Practice Act requires successful restocking of cleared sites to meet the combined objectives of the landowner and the Legislature. The preparation of,

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[48]Those requirements are that herbicide use "has the potential to cause a physical change in the environment." (Cal. Code Regs., tit. 14, § 895.1 [definition of project].) The purpose of herbicide use is to kill or stunt the growth of flora. Killing and stunting growth are physical changes. Flora is, by definition, part of the environment. (Pub. Resources Code, § 21060.5.) Therefore, the other requirements in the definition of "project" are met.

and caring for, replanted areas includes managing the vegetation that competes with the seedlings. SPI plans to control vegetation using a variety of practices, including herbicide application. CDF expressly found that "the purpose of herbicide use on these forestlands is … to give the tree seedlings an opportunity to outgrow the competition and get up to a superior height w[h]ere the trees are able to control the site by the natural process of dominating available sunlight."

Therefore, the administrative record clearly established that SPI's use of herbicides is a step designed to achieve the objective of the THP. Accordingly, the proposed use of herbicides is part of "an activity" that constitutes a project, provided that the proposed use has the requisite level of certainty.

b. Test for requisite level of certainty

Plaintiffs and SPI vigorously contest whether the proposed application of herbicides is sufficiently certain to be part of the project. Neither CEQA, the Forest Practice Rules, nor the Guidelines address how to determine what proposed acts are excluded from the project because of either (1) uncertainty over whether the act will be done or (2) uncertainty over specific details, such as (a) how the act itself will be carried out and (b) the conditions that will exist when the act commences. Consequently, we turn to the case law to see how other courts have analyzed both types of uncertainty when deciding the scope of the project.

Two cases concerning the possible future construction of oil pipelines involve both types of uncertainty and illustrate the principle that a high degree of uncertainty regarding the specific details does not, by itself, justify excluding a discussion of the proposed act from the EIR.

In *Whitman v. Board of Supervisors, supra*, 88 Cal.App.3d 397, an oil company prepared an EIR in connection with its application for a conditional use permit to drill a single exploratory oil and gas well. The EIR stated that, if the well proved successful, the production from the well would be transported from the site by pipeline, although a truck would be used until the pipeline was constructed. (*Id*. at p. 414.) The EIR was silent on

the environmental effects of such a pipeline.[49] The petitioners challenged the EIR as "deficient for its failure to consider the environmental impacts associated with an oil pipeline contemplated as an addition to the project." (*Whitman v. Board of Supervisors*, *supra*, at p. 414.)

The Second Appellate District agreed with this challenge and stated:

> "The record before us reflects that the construction of a pipeline was, from the very beginning, within the contemplation of [the project proponent] should its well prove productive. Although admittedly contingent on the happening of certain occurrences, the pipeline was, nevertheless, part of [the proponent's] overall plan for the project and could have been discussed in the EIR in *at least general terms*." (*Whitman v. Board of Supervisors*, *supra*, 88 Cal.App.3d at pp. 414-415, fn. omitted, italics added.)

For this and other reasons, the court held the EIR was legally deficient and remanded the matter so the deficiencies could be corrected.

In *No Oil, Inc. v. City of Los Angeles, supra*, 196 Cal.App.3d 223, Occidental Petroleum Corporation (Occidental) proposed drilling two exploration wells, establishing three oil drilling districts, developing a permanent drilling and project site in the Pacific Palisades area, and constructing a pipeline to transport the oil. These plans required the city to pass ordinances allowing the drilling and the transportation by pipeline of any oil found. An EIR was prepared and considered by the city council in conjunction with its approval of the ordinances.

The administrative record "indicate[d] that until the quantity and quality of the oil extracted during the exploration phase [wa]s analyzed, Occidental w[ould] not know whether it [wa]s financially desirable to proceed with the project, where the oil w[ould]

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[49]Similar to SPI's argument that certain herbicides can be applied without a permit and therefore need not be analyzed in the THP, the reviewing agency in the *Whitman* case stated that the pipeline's expected environmental effects did not need to be dealt with in the EIR because no permit was required for the placement of the pipeline. (*Whitman v. Board of Supervisors*, *supra*, 88 Cal.App.3d at pp. 414-415.) Consistent with the result in the *Whitman* case, we conclude that whether a proposed act requires a permit when considered separately is not dispositive of the question whether that act is among the various acts included in the project.

be transported, or the specifications of the pipeline to be constructed." (*No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at p. 237.) Therefore, uncertainty existed as to (1) whether the pipeline would be constructed at all and (2) the specific details of its construction. Despite the uncertainty, the "draft EIR discussed the pipeline in terms of construction noise, risk of upset, mitigation measures, and impact on traffic and aesthetics." (*Id*. at p. 234.) The final EIR responded to comments and provided information on topics related to the potential pipeline construction, such as a description of its effect on traffic, the risk of polluting the City of Santa Monica's water supply, and the risk of spills, fires, and explosions. (*Ibid*.)

The Second Appellate District concluded that the pipeline was "a single facet of a large project" (*No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at p. 235) and that "the EIR must, at a minimum, contain some discussion of the pipeline's effects if it is to satisfy CEQA's requirements." (*Id*. at p. 233.) The court further concluded that the general discussion regarding the pipeline adequately informed the city council of the environmental risks associated with the pipeline. (*Id*. at p. 237.)

The appellate court also considered whether the trial court had erred in concluding "that, since there were only four possible pipeline routes contemplated by the project, the EIR should have contained a detailed description of the environmental effects of each route." (*No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at p. 232.) The high degree of uncertainty over the specific details regarding the pipeline's construction, such as which of four alternate routes would be used, caused the appellate court to conclude that, until the production from the oil well was analyzed, "any *in-depth* discussion of the proposed pipeline would be mere speculation." (*Id*. at p. 237, italics added.) Stated otherwise, "while the EIR had to contain a discussion of the pipeline's environmental effects, there was no need to discuss every potential route the pipeline may take." (*Id*. at p. 235.)

With respect to prospects for future environmental review, the court observed that the specific route for the pipeline required the authorization of the city's board of

transportation and, at the time the decision would be made to authorize the route, an EIR containing a detailed analysis of the environmental effects of the specific proposed route would be prepared. (*No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at p. 237.) "Thus, the EIR in the case at bench properly deferred an in-depth consideration of the environmental effects of each proposed pipeline route until such time as a marketable amount of oil is verified to exist and an application for approval of a pipeline is presented to the board of transportation." (*Id*. at p. 237.)

After the decisions in the *Whitman* and *No Oil* cases, our Supreme Court considered a case in which a university purchased a building in a residential area, intended to move research units from its school of pharmacy into a part of the building that was not occupied, and intended to occupy the entire building when the lease on the remainder of the building expired five or 10 years later. (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.) The EIR addressed the purchase and initial move but did not address the university's plan to occupy the remainder of the building when it became available. Thus, the case raised the "important and difficult question[:] what circumstances require consideration in an EIR of future action related to the proposed project." (*Id.* at p. 395.) Our Supreme Court ruled that the discussion in an EIR could not be limited to addressing situations where the project proponent had "definite plans" for the proposed act. Instead, the court held, "an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Id.* at p. 396.)

We conclude, however, that the *Laurel Heights I* test should not be used to determine whether the potential application of herbicide has the requisite level of certainty to be part of the project covered by the THP.

First, that test does not purport to address when a proposed act is part of the "project." The future expansion at issue in *Laurel Heights I* was described as "future

action *related to* the proposed project" (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 395, italics added) and the test contrasts the future expansion to "the initial project." (*Id.* at p. 396.) In this case, we are confronted with the more fundamental question whether the potential herbicide application is sufficiently likely to occur to be part of the project. If the requisite level of certainty exists, then the proposed application of herbicide would be regarded as part of the "initial project" as that phrase is used in the two-part test. (*Ibid*.)

Second, distinguishing between future action and the "initial project" may be appropriate where there is a possibility of "a subsequent EIR before the future action can be approved under CEQA." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 396.) The flexibility of CEQA presents many opportunities for subsequent environmental review by a public agency. (See generally Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999) at pp. 487-557 [discussing tiered EIR's, master EIR's, program EIR's, staged EIR's, subsequent EIR's, supplements to EIR's, and addenda to EIR's].) In contrast, when the environmental review document is a THP, there is no possibility of a subsequent THP being filed for the purpose of addressing subsequent applications of herbicide in the harvest units, and the prospects for subsequent environmental review by a government agency are limited. Governmental review by CDF would occur only if an amendment of the THP or a report of a minor deviation were submitted. (See Pub. Resources Code, § 4591 [substantial deviation from original THP requires an amendment to be submitted]; Cal. Code Regs., tit. 14, § 1040 [report for minor deviations].) Also, governmental review by a county agricultural commissioner would occur only if a permit application related to the use of a restricted herbicide were filed. (See Cal. Code Regs., tit. 3, §§ 6420 [permit required for restricted material] & 6432 [permit evaluation by commissioners].)[50] As a result, the two-part test is not

[50]Most of the chemicals SPI has used in the past can be applied without obtaining a permit from the county agricultural commissioner. To the extent such a permit might be required, such as for the proposed use of 2,4-D, SPI has contended the review conducted by the county agricultural commissioner is ministerial, that is, the county agricultural commissioner "does not exercise judgment over whether or how the [activity] should be carried out." (1

appropriate because, in the context of a THP, it could be used to argue against the need to subsequently submit an amendment or report. The argument, if made, would assert that the changes that become known when the specifics of herbicide use are decided need not be disclosed in an amendment or report because herbicide application is a matter beyond the scope of the project covered by the THP. Rather than use the two-part test to narrow the application of the term "project," we will construe the term more broadly to provide greater protection to the environment (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, *supra*, 27 Cal.App.4th at p. 720), even if that protection comes in the form of a subsequently filed amendment or report.

Having rejected the two-part test, we next consider whether reasonable foreseeability is the appropriate test for defining the requisite level of certainty an activity must attain to be part of a project. Such a test is supported by this court's analysis of uncertainty in *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544. In that case, this court considered the uncertainty of possible future acts and whether an EIR must be prepared to discuss those acts and their possible environmental impacts. The County of Kern adopted an ordinance that imposed heightened treatment standards on sewage sludge before the sludge could be applied to land within the county. The county argued that an EIR was not needed to consider the alternative methods of disposing of the sewage sludge that might be adopted in the future by those subject to the ordinance. This court rejected that argument and held that the county was required to complete an EIR that addressed the alternative methods of disposal that were reasonably foreseeable, even though the entities disposing of the sludge had not committed to detailed plans for each of those foreseeable methods. (*Id*. at pp. 1583-1587.)

Based on the foregoing cases, we reach the following legal conclusions. First, a proposed act that is reasonably foreseeable in general terms has sufficient certainty to be

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Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 4.28, p. 182; compare Guidelines, § 15357 [defining "discretionary" project] with Guidelines, § 15369 [defining "ministerial" project].)

considered part of the activity that constitutes the "project" covered by the THP. Consequently, the act, its possible environmental impacts, and any anticipated measures for mitigating those impacts must be addressed in the THP despite some uncertainty as to whether it will be taken. (See *No Oil, Inc. v. City of Los Angeles*, *supra*, 196 Cal.App.3d at p. 233.) Second, when a proposed act is reasonably foreseeable in general terms but some of the specific details of its implementation are so uncertain as to be speculative,[51] the THP need not contain an in-depth discussion of the detailed aspects of the act that are speculative, that is, not yet reasonably foreseeable. (*No Oil, Inc. v. City of Los Angeles*, *supra*, at p. 237.)

In summary, when a proposed act, such as the application of herbicides, is reasonably foreseeable in general terms, the THP must include a general discussion of the act and its possible environmental effects, but need not include a detailed analysis of specific acts that cannot reasonably be foreseen at the time the THP is prepared. (See generally *Laurel Heights I, supra*, 47 Cal.3d 376; *No Oil, Inc. v. City of Los Angeles, supra,* 196 Cal.App.3d 223; *Whitman v. Board of Supervisors*, *supra*, 88 Cal.App.3d 397.)

2. SPI's herbicide use is reasonably foreseeable in general

The THP's acknowledge that there is "a reasonable probability that some form of herbicide may be used." This statement is reinforced by SPI's assertion that "[a] policy of no herbicide use is not a feasible alternative" and CDF's finding that SPI's past practices "typically included spraying." The fact that herbicide use is a "reasonable probability" goes well beyond the reasonably foreseeable standard.

Thus, SPI's potential use of herbicide is part of the project covered by the THP's, and CEQA and the Forest Practice Rules require that such herbicide use, like the pipeline in the *Whitman* case, be "discussed in the [THP] in at least general terms." (*Whitman v.*

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[51]For purposes of CEQA, an event is speculative if it is not reasonably foreseeable. (See *County Sanitation Dist. No. 2 v. County of Kern, supra*, 127 Cal.App.4th at p. 1581.)

Board of Supervisors, *supra*, 88 Cal.App.3d at p. 415.) Accordingly, we explicitly reject the position stated in the THP's that "the use of herbicides post harvest … is not part of the THP project because the critical details of use are unknown at the present time," and the related assertion that "the use of herbicides is entirely too speculative to be considered as part of a THP project." Furthermore, we conclude that because the potential use of herbicides is part of the project covered by the THP, CDF has the authority and duty to review that use, assess the potential environmental impacts of that use, and impose mitigation measures for any substantial, or potentially substantial, adverse change in the environment. (*Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 [Department of Food and Agriculture responsible for analyzing proposed use of registered pesticides; sole reliance on DPR's certified program not adequate for purposes of CEQA; "DPR's registration does not and cannot account for specific uses of pesticides"].)

Because, as discussed *post*, approval of the THP's will be rescinded due to errors in the disclosures actually made by CDF and resubmission of the THP's will result in an administrative record with additional information, we do not proceed to the question whether other aspects of herbicide use are reasonably foreseeable under this administrative record and thus should have been included in the description of the activity covered by the THP's.

F. Findings Regarding Speculative Information

In the letter sent to counsel prior to oral argument, we asked "does a factual finding that further detailed information would be speculative effectively terminate or satisfy the duty to obtain further information?"

At oral argument, plaintiffs asserted the answer was "no" and cited *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383 (*AIR*). In *AIR*, this court stated: "Thus, the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." (*Id.* at p. 1392.)

Also, the California Supreme Court determined that CDF did not fulfill its obligation to obtain necessary information in *Sierra Club v. State Bd. of Forestry*, *supra*, despite CDF's findings that:

> "'… At best, the information [that harvesting may or may not have significant adverse effects on old-growth-dependent wildlife species or habitat] is uncertain and speculative (based on available information). Given [the plan submitter's] efforts to date, and the fact that the issue of the effects on old-growth-dependent species will still remain debatable, even with the additional surveys, it is unreasonable to request further information.'" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1224.)

Additionally, certain provisions in the Guidelines support the inference that a court should review whether CDF conducted a thorough investigation and disclosed all that it reasonably could prior to accepting a finding that certain information is speculative. Specifically, Guidelines section 15145 refers to a "thorough investigation" which precedes a finding that a particular impact is too speculative, and Guidelines section 15144 states that "an agency must use its best efforts to find out and disclose all that it reasonably can."

Consequently, based on the California Supreme Court's lack of deference to CDF's findings about speculative information and unreasonable requests, this court's statement in *AIR* about assessing the disclosure of information, and the provisions in the Guidelines, we conclude that our inquiry into whether CDF fulfilled its obligation to obtain and disclose necessary information about potential herbicide applications is not terminated by the existence of substantial evidence to support CDF's findings of fact that (1) it "can only speculate how SPI intends to use herbicides on their lands" and (2) the information it "has with respect to the timing, amount of product, weather conditions at the time of application, or even if the product would be used at all" is speculative.[52]

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[52]CDF's reference to speculative information that it has with respect to these items does not necessarily imply that CDF conducted an investigation for the purpose of determining whether other details regarding potential herbicide applications were reasonably foreseeable. (Cf. *Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1224.)

Stated otherwise, a finding by CDF or any other public agency that information is speculative does not necessarily mean that a legally adequate investigation was conducted before the finding was made.

G. Adequacy of Disclosures Made

Rather than proceeding to address what should be the legal test for determining whether CDF fulfilled its duty to obtain and disclose information relating to the scope of the activity covered by the THP and then applying that test to the record, we limit our analysis to the disclosures actually made in the administrative record.

1. Description of DPR program

Generally, plaintiffs contend that CDF's official response to the public comments about SPI's potential herbicide use contains a deep-seated misunderstanding of the role of CDF in reviewing potential herbicide use and the relationship between CDF's role and the DPR's regulatory program. (See *Californians for Alternatives to Toxics v. Department of Food & Agriculture, supra,* 136 Cal.App.4th at p. 16.)

A specific point of contention concerns (1) CDF's statement that the use of registered herbicides, in accordance with the directions on the label and other restrictions established by DPR, "would not have a significant effect on the environment"; and (2) the resulting conclusion that "CDF is not required to analyze the use in the THP." The Attorney General reiterates this position in its respondent's brief by asserting that plaintiffs are "wrong in arguing … that herbicide applications in compliance with label instructions may create 'adverse impacts on the environment' and that compliance with law is insufficient under CEQA." In addition, the Attorney General's supplemental letter brief states:

> "Concerning environmental effect of the use of herbicides which are registered and applied in accordance with their label restrictions, CDF concluded (from the legal requirements more than from a specific fact in the administrative record) and so stated [in its appellate brief], that adverse

impacts on the environment could not be expected from applying herbicides in compliance with label restrictions."[53]

Based on the wording of the statement, the context in which it was made, and the foregoing arguments, we conclude that CDF's statement that "the use [of herbicide in accordance with label instructions and DPR restrictions] would not have a significant effect on the environment" is not a finding based on an analysis of the record, but a statement that attempts to describe the legal effect of the DPR regulatory program. If the statement were a finding based on a factual analysis, CDF would not have followed it with the conclusion that it was not required to analyze the herbicide use in the THP.

Because of the importance CDF placed on the DPR regulatory program, we review the legal requirements of that program and reach the conclusion that CDF has inaccurately described the effect of those requirements.

First, the Secretary for Resources has certified the pesticide regulatory program administered by DPR and the county agricultural commissioners insofar as it involves the registration, evaluation and classification of pesticides, the regulation of pest control operators and advisers, and the regulation of the use of pesticides through the permit system administered by county agricultural commissioners. (Guidelines, § 15251, subd. (i).) As a result of this certification, the regulatory program is exempt from the requirements of EIR preparation. This exemption, however, does not justify the conclusion that the use of registered herbicides in accordance with label instructions and DPR restrictions will not cause significant adverse environmental effects. Guidelines section 15250 does not express such a proposition. Moreover, its language effectively precludes deriving such a proposition by inference. Specifically, Guidelines section 15250 states that, despite being exempt from preparing an EIR, certified programs remain

[53]Perhaps recognizing the error in CDF's broad statement that use in accordance with instructions and restrictions "would not have" a significant environmental effect, that position is now recast using the phrase "could not be expected." The position stated in the administrative record controls and is the one we must use in our analysis.

"subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible." This statement would not have been necessary if the certified program eliminated the potential for the regulated activity to cause significant adverse environmental effects.

Second, the registration of a pesticide by DPR does not mean the use of that pesticide will not cause a significant adverse environmental effect. DPR's regulations allow the opposite to occur. California Code of Regulations, title 3, section 6158 provides that the director of DPR shall consider a pesticide's potential for environmental damage when evaluating it for possible registration. (Cal. Code Regs., tit. 3, § 6158, subd. (c).) The existence of this potential does not preclude registration. Where the potential for environmental damage is "anticipated to result in significant adverse impacts which cannot be avoided or adequately mitigated, registration will not be granted unless the director makes a written finding that anticipated benefits of registration clearly outweigh the risks." (Cal. Code Regs., tit. 3, § 6158.) Accordingly, registration may be granted in situations where the pesticide may cause significant adverse environmental effects.

Third, the regulatory program's use of (1) permits issued by county agricultural commissioners and (2) written recommendations issued by licensed pest control advisers leaves open the possibility that a particular application of pesticides could be implemented despite a determination that "a substantial adverse environmental impact may result from the use of such pesticide." (Cal. Code Regs., tit. 3, § 6432, subd. (a).)

In evaluating a permit application, county agricultural commissioners are subject to the following requirement:

> "(a) Each commissioner, prior to issuing any permit to use a pesticide and when evaluating a notice of intent, shall determine if a substantial adverse environmental impact may result from the use of such pesticide. If the commissioner determines that a substantial adverse environmental impact will likely occur from the use of the pesticide, the commissioner shall determine if there is a feasible alternative, including the alternative of no pesticide application, or feasible mitigation measure that would

> substantially reduce the adverse impact. If the commissioner determines that there is a feasible alternative or feasible mitigation measure which significantly reduces the environmental impact, the permit or intended pesticide application shall be denied or conditioned on the utilization of the mitigation measure. When the commissioner determines that there is a likelihood that permit conditions have been or will be violated he shall take appropriate action to assure compliance." (Cal. Code Regs., tit. 3, § 6432.)

Under this provision, a county agricultural commissioner is not required to deny a permit where he or she determines that there are no feasible alternatives or feasible mitigation measures. Accordingly, a permit could be issued in circumstances that would result in a significant adverse environmental effect.[54]

Similarly, pest control advisers are not prohibited from recommending restricted pesticide use that may cause a significant adverse environmental effect when they determine feasible alternatives and feasible mitigation measures are not available:

> "(a) Each licensed agricultural pest control adviser and grower, when determining if and when to use a pesticide that requires a permit, shall consider, and if feasible, adopt any reasonable, effective and practical mitigation measure or use any feasible alternative which would substantially lessen any significant adverse impact on the environment." (Cal. Code Regs., tit. 3, § 6426.)

The regulation that sets forth some of the mandatory contents for a pest control adviser's written recommendation states that each recommendation shall include:

> "(e) Certification that alternatives and mitigation measures that would substantially lessen any significant adverse impact on the environment have been considered and, if feasible, adopted." (Cal. Code Regs., tit. 3, § 6556; see Food & Agr. Code, § 12003 [written recommendation required].)

Thus, this provision allows for the possibility that (1) herbicides that are not restricted may cause a significant adverse environmental effect, and (2) alternatives and mitigation

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[54]We note, for historical purposes, that under a prior regulatory system, the Attorney General reached the conclusion "that the issuance of permits to use … restricted herbicides by the county agricultural commissioner are projects which, in many cases, may have a significant effect on the environment thereby requiring an EIR." (59 Ops.Cal.Atty.Gen., *supra*, 306.)

measures that would lessen or eliminate those effects are not adopted because they are not feasible.

Finally, the description of DPR's regulatory program in CDF's official response did not disclose that the program lacks an express requirement that county agricultural commissioners or licensed pest control advisers consider the cumulative impacts that may occur as a result of their authorization of a particular herbicide application.

In summary, the DPR regulatory program imposes a variety of requirements that include (1) prohibiting the use of herbicides that are not registered by DPR, (2) requiring the issuance of a written recommendation and a permit before a restricted herbicide may be used, and (3) requiring the issuance of a written recommendation before a herbicide that is not restricted may be used. Despite these requirements, a particular herbicide use may be authorized even though it may cause significant adverse environmental effects.

Consequently, CDF's description of DPR's regulatory program is inaccurate and incomplete. CDF's statement that the use of herbicides in accordance with label directions and DPR restrictions "would not have a significant effect on the environment" does not accurately describe the program.

CDF's discussion of DPR's regulatory program should have demonstrated to the public, as well as any reviewing court, that CDF based its decision on a correct understanding of the legal requirements of DPR's regulatory program and the implications of those requirements. Specifically, CDF's discussion of the program and the program's reliance on permits from county agricultural commissioners and written recommendations from licensed pest control advisers should have made the following disclosures. First, DPR's program does not eliminate the possibility that a registered herbicide used in accordance with (1) label instructions, (2) DPR restrictions, (3) requirements in a permit issued by a county agricultural commissioner (if applicable), and (4) requirements in the written recommendation of a licensed pest control adviser could result in a significant adverse environmental effect. Second, DPR's program does not require county agricultural commissioners or licensed pest control advisers to

evaluate the cumulative impacts that may occur as a result of the herbicide use that they authorize.

2. Disclosure of information used by CDF

Next, we consider whether CDF abused its discretion by relying on information that was not in the administrative record. In *Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at page 1220, the California Supreme Court referred to "a record which lacked information" and "[t]he evidentiary gap in the record." These phrases indicate the need for information to be *in the record*.

In this case, a review of the information in the record and what CDF stated it used to make its decision shows that CDF used information that was not disclosed in the administrative record. CDF expressly stated that it considered "the typical pattern of use of these [herbicides], past use data as shown by the California Department of Pesticide Regulation and label restrictions and regulations on the use of these chemicals." CDF also stated that "SPI Pest Control Advisors have generally reported that the restrictions for use of the products include buffers around watercourses, but that the buffer restrictions in pesticide labeling are less than the W[atercourse and Lake Protection Zone] widths that already are in place in the Forest Practice R[ules]." This statement implies that CDF assessed documents created by the pest control advisers employed by SPI.

The administrative record does not contain information that reveals SPI's typical pattern of herbicide use, past use data maintained by DPR, or documents created by pest control advisers that SPI has hired in the past. This evidentiary gap in the record is central to the dispute between plaintiffs and CDF. The official response of CDF presented an analysis that relied heavily on licensed pest control advisers to determine whether their recommendations for herbicide use would have a significant adverse environmental impact and to lessen that impact by adopting feasible alternatives and feasible mitigation measures. Although CDF relied on information that showed how pest control advisers hired by SPI actually did their jobs, this information did not become part

of the administrative record. As a result, we are unable to determine if that information supported CDF's findings.[55]

This evidentiary gap in the record also undermines our review of whether other details of SPI's potential herbicide use were reasonably foreseeable and, as a result, should have been included in the description of the activity covered by the THP's. Had CDF disclosed the information upon which it determined "the typical pattern of use" of herbicides by SPI, those patterns may have established that other details were reasonably foreseeable. In *No Oil, Inc. v. City of Los Angeles, supra,* 196 Cal.App.3d at page 234, sufficient information existed about the potential pipeline construction for the EIR to include a description of its construction noise, risk of upset, mitigation measures, effect on traffic, the risk of polluting the City of Santa Monica's water supply, and the risk of spills, fires, and explosions. Similarly, when the record discloses the information about the typical pattern of use of herbicides by SPI and other information about actions actually taken pursuant to the written recommendations of pest control advisers, additional discussion about SPI's herbicide use, along with mitigation measures, may be warranted.

For example, the record does not show whether, when pest control advisers make the certification required by rule, the form of certification is uniform or varies by adviser. Neither does the record show whether the certification is made as a single sentence or whether each fact is certified separately. If the form of certification simply states "that alternatives and mitigation measures that would substantially lessen any significant adverse impact on the environment have been considered and, if feasible, adopted" (Cal. Code Regs., tit. 3, § 6556, subd. (e)), then someone reviewing it cannot tell if the adviser determined (1) there would be no adverse impact on the environment, (2) the adverse impact would not be significant, (3) the possibility of a significant impact was lessened to

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[55]In other words, even if we assume that CDF used its best efforts to investigate and find out all it could about SPI's typical pattern of herbicide use, the administrative record shows that CDF did not "disclose all that it reasonably c[ould]." (Guidelines, § 15144.)

insignificance by mitigation measures included in the written recommendation, or (4) significant environmental impact would occur and any alternatives and mitigation measures were not feasible. In contrast, more information will be available if the form of certification addresses each determination separately.

As another example, disclosure of the information upon which CDF relied may show that pest control advisers routinely impose restrictions on aerial applications of herbicides. Such restrictions may address the concern raised in a 1996 report that monitored water quality when hexazinone was applied aerially to parts of the Stanislaus National Forest. The report stated that hexazinone was detected in surface water samples taken *during* aerial applications, and explained the contamination by stating that "[t]he helicopter's application bucket was shut off during any water flyover but residual pellets may have been dislodged."

The uncertainty about what in fact occurs, which was created by the lack of disclosure of the information upon which CDF relied in reaching its conclusions, demonstrates the inadequacies of the THP's and the official responses as informative documents. (See *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189 [courts pass on the sufficiency of the informative document, not the correctness of its conclusions]; *Laurel Heights I*, *supra*, 47 Cal.3d at p. 392.)

3. Prejudice

We conclude CDF prejudicially abused its discretion when it (1) failed to describe the DPR regulatory program accurately and (2) failed to include information upon which it relied in the administrative record.

This court has stated that "[a] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation …." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712 [omissions from EIR were prejudicial].) Here, CDF's failure to accurately describe the DPR regulatory program reveals that CDF was misinformed, rather than informed, when it made decisions based on that program. One such decision

was that it "is not required to analyze the use in the THP." Another appears to be its conclusion "that adherence to State and Federal laws pertaining to certifications and operations should prevent significant effects," when it addressed the cumulative impacts of chemical usage on watershed or biological resources. Further, the erroneous view of the DPR program may have been the reason why the program was discussed in the abstract and information about its actual application, particularly information about what restrictions, if any, result from the written recommendations of licensed pest control advisers, was not included in the administrative record.

Therefore, we conclude that CDF's inaccurate view of the DPR regulatory program resulted in a prejudicial abuse of discretion.[56]

As to CDF's failure to include information upon which it relied in the administrative record, it does not automatically follow that CDF's decisionmaking was uninformed. Nevertheless, the evidentiary gap that occurred was prejudicial because it (1) precluded informed public participation during the decisionmaking process and (2) undercut postdecision accountability. (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1229.)

H. Allegations and Denials of Past Misuse of Herbicides

The THP's assert that SPI's past use of herbicides has been "in full compliance with label requirements." Plaintiffs' opening appellate brief challenges this assertion by claiming that "SPI has been prosecuted by local law enforcement for hexazinone contamination" and "has previously contaminated surface waters in the Mokelumne watershed with hexazinone, without any enforcement action from pesticide officials." In

[56]Because of the importance the California Supreme Court placed on CDF's obligation to consider mitigation measures in *Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at page 1220, we note the following example of a mitigation measure that CDF's inaccurate view of the DPR regulatory program may have precluded it from considering: If a pest control adviser concludes that a recommended herbicide application may have a significant adverse impact on the environment, SPI must obtain CDF's prior approval before going forward with the application.

its respondent's brief, SPI contends plaintiffs "falsely accuse SPI" and the "allegations are totally unfounded and inflammatory."

Plaintiffs support their claim that "SPI has been prosecuted by local law enforcement for hexazinone contamination" by citing to a document titled "Profile of Sierra Pacific Industries" that was taken from an Internet Web site.[57] Plaintiffs rely on the following paragraph from that document:

> "And as C[itizens for Better Forestry] notes, SPI has also earned lawsuits: 'Trinity County's District Attorney, David Cross, recently filed a civil suit against SPI for polluting water with hexazinone, the active ingredient in the herbicide Pronone. SPI face potential fines up to $1 million.' (*See Appendix 2: Legal Actions Involving SPI*)."

The appendix reference simply identifies the lawsuit by the name "*Trinity County District Attorney David Cross v. SPI*" and does not provide a case number or a source where information about the case is available. Also, as observed by SPI in its respondent's brief, "the website does not discuss the merits or the outcome of that litigation."

Plaintiffs also refer to reports in the administrative record regarding the detection of hexazinone in the El Dorado and Stanislaus National Forests. One such report monitored water quality after hexazinone was applied aerially to parts of the Stanislaus National Forest and stated:

> "By June of 1996, 10 weeks after application, baseflow monitoring showed decline in hexazinone levels. Results ranged from non-detectable to less than 1 ppb at all stations except the station monitoring residual hexazinone from a fall 1994 application on private land. Hexazinone residual from private land was still contributing to hexazinone detected at stations HU-10 and HU-20 on Hunter Creek below project treatment units."

None of the reports referenced by plaintiffs state that SPI was responsible for the fall 1994 application of hexazinone to private land mentioned. Perhaps plaintiffs are

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[57]The document is contained in the administrative record and available at <http://www.endgame.org/spi.html> (as of Apr. 12, 2005).

arguing that CDF should have found that SPI was the private landowner involved based on inferences drawn from other evidence, such as the high percentage of private timberland that is held by SPI. The propriety of such an inference is a matter for CDF to determine in its role as the finder of fact after adequate investigation.

Because the discussion of herbicide use must be redone to address other inadequacies, and to reduce the prospect of a future error,[58] we observe that CDF stated that it "must assume" SPI will follow the law. CDF has not cited, and we are not aware of, any statute, rule or case law that makes such an assumption mandatory. (See Cal. Code Regs., tit. 3, § 6432, subd. (a) [compliance with permit conditions is not assumed].) Consequently, in the future, CDF should use language that clearly shows it performed its responsibilities as a finder of fact, rather than language that creates the impression it believed its conclusion was compelled by law. Also, "'"to demonstrate to an apprehensive citizenry that [it] has, in fact, analyzed and considered"'" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1229) SPI's record for regulatory compliance when using herbicide, CDF may choose to make any finding of fact that forecasts future compliance by SPI only after it has "use[d] its best efforts to find out and disclose all that it reasonably can" (Guidelines, § 15144) concerning the allegations of past misuse by SPI.

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[58]We note that plaintiffs have not argued that, to adequately assess the likelihood that SPI would comply with label requirements in the future, CDF was obligated to obtain and disclose further information about (1) all lawsuits filed or pending against SPI that involved allegations of chemical misuse or (2) whether SPI was responsible for the application of chemicals on private land that are referenced in any reports. Nor have plaintiffs argued that CDF committed legal error in too narrowly restricting its inquiry into possible misuse of chemicals. This latter argument could arise because of the many qualifications and restrictions in CDF's statement that it "is not aware of any reported instances in the county associated with this THP where a Licensed Pest Control Advisor or Applicator working on SPI lands has been shown to be using materials in a way that is substantially inconsistent with label requirements in a manner that would result in significant environmental damage."

VI. Res Judicata

In its supplemental brief, SPI claims the final decisions in lawsuits between plaintiffs and SPI involving THP's located in El Dorado and Calaveras Counties are now res judicata and "preclude further litigation on the questions now before this court …." The lawsuits to which SPI refers were the subject of the appeal in *Ebbetts Pass I*, *supra*, 123 Cal.App.4th 1331.

SPI's contention misapplies the doctrine of res judicata. This error is explained in part by SPI's failure to undertake the basic step of using California's primary right theory to analyze whether the same cause of action is being litigated in more than one lawsuit. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 [primary right theory].) Under the primary right theory, a "cause of action" involves a plaintiff's primary right to be free of a particular injury; a primary right is indivisible and is distinguishable from the legal theory and remedy sought to vindicate the right. (*Ibid*.; see generally Heiser, *California's Unpredictable Res Judicata* (*Claim Preclusion*) *Doctrine* (1998) 35 San Diego L.Rev. 559.) Thus, res judicata precludes splitting a cause of action or attempting to recover for the same injury in a second lawsuit that advances a different legal theory. (*Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1043.)

In applying the primary right theory to a case involving CEQA claims, the Second Appellate District held that res judicata applied where the CEQA causes of action raised in the two proceedings concerned "the same project, the same EIR, and substantially the same findings." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1203.) Thus, where the same project, same environmental review document and same agency findings are involved, it is clear the causes of action address the same injury and, thus, the same primary right.

The lawsuit underlying this appeal was not split from the cause of action pursued in the lawsuits filed in El Dorado and Calaveras Counties and is not a second attempt to recover for the same injury using different legal theories. Those lawsuits concerned projects, plans, and locations that are different from the projects, plans, and locations

involved in the instant appeal and, consequently, sought the redress of different injuries. Contrary to SPI's contentions, the similarities in the statutory and regulatory violations raised in this lawsuit and those raised in the lawsuits filed in El Dorado and Calaveras Counties does not mean the lawsuits involve the same injuries and same primary rights. Rather, it is clear that plaintiffs have not divided a primary right and attempted to enforce that right in two different suits. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 682.)

Furthermore, the doctrine of stare decisis does not control our decision in this case. The opinion in *Ebbetts Pass I*, *supra*, 123 Cal.App.4th 1331 did not explicitly discuss or analyze the questions (1) whether use of a one-size-fits-all-species assessment area complies with the provision of Technical Rule Addendum No. 2 that states biological assessment areas will vary by species, (2) whether CDF's description of DPR's regulatory program was prejudicially inaccurate, or (3) whether CDF erroneously relied upon information not disclosed in the administrative record. "[A] case does not stand for a proposition neither discussed nor analyzed." (*DCM Partners v. Smith* (1991) 228 Cal.App.3d 729, 739.)[59]

DISPOSITION

The judgment denying plaintiffs' petition for writ of mandate is reversed and the matter is remanded to the superior court with directions to grant plaintiffs' petition for a peremptory writ of mandate compelling defendant California Department of Forestry and Fire Protection to rescind its approval of the three timber harvesting plans. Costs on appeal are awarded to plaintiffs.

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[59]To illustrate the limits of the precedent established by this opinion, it does not stand for the proposition that the provisions of the Forest Practice Rules that address the analysis of cumulative impacts are "consistent and not in conflict with" the Forest Practice Act or CEQA (Gov. Code, § 11342.2), which is an issue plaintiffs did not raise in this appeal. (See fn. 26, *ante*.)

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DAWSON, J.

WE CONCUR:

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HARRIS, Acting P.J.

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CORNELL, J.