

CERTIFIED FOR PARTIAL 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)

**ORDER MODIFYING OPINION AND
DENYING REHEARING;
SUPPLEMENTAL OPINION UPON
DENIAL OF REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

IT IS ORDERED that the published opinion filed herein on April 14, 2006, and reported in the Official Reports [138 Cal.App.4th 779] be modified in the following particulars:

1. At the top of page 1, replace the notation CERTIFIED FOR PUBLICATION with CERTIFIED FOR PARTIAL PUBLICATION* and add the following footnote:

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV.C.7 of Discussion.

2. On page 38, delete the text of the heading for part IV.B.6 and insert the following text in its place: ***Violations are presumptively prejudicial***

3. On page 38, before the second full paragraph beginning “Alternatively, even if the presumption of prejudice did not apply in this case,” insert the following heading and editorial footnote: ***7. Regardless of the presumption, the violations are prejudicial****

That editorial footnote shall read: See footnote, *ante*, page 1.

4. On page 38, immediately following the new heading 7 and its editorial footnote, add as footnote 31 the following footnote, which is not to be published and will require renumbering of all subsequent footnotes:

³¹This part is not published because, as an alternative to our ruling on the presumption of prejudice, it is dicta and might be misinterpreted if taken out of context. Should a reviewing court decide the presumption of prejudice does not apply, the inclusion of this part may avoid a remand.

5. In the paragraph commencing at the bottom of page 70 and continuing onto page 71, the last sentence of the paragraph, beginning “Second, DPR’s program” is modified to read as follows:

Second, DPR’s program does not expressly 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 and no evidence was introduced to show they do in fact undertake such an evaluation.

6. The following supplemental opinion upon denial of rehearing is certified for publication in its entirety.

SUPPLEMENTAL OPINION UPON DENIAL OF REHEARING

I. Geographic Area Used to Assess Cumulative Impacts

Our decision on SPI’s and CDF’s use of geographic areas as part of the analysis of cumulative impacts is quite narrow. It only concerns compliance with the procedures that must be followed to evaluate cumulative impacts. We do not reach broader issues regarding the quality of CDF’s factual analysis or the conclusions it reached. In short, we do not consider the destination CDF reached on its journey, we only decide that CDF set foot off the required path. As a result of the missteps, SPI and

CDF must undertake the journey again and, next time, must not stray from the path laid out in the regulations.

A. Contentions in Petitions for Rehearing

SPI and CDF both filed petitions for rehearing that asserted the assessment areas in each of the THP's were in fact varied by species. CDF stated "that the cumulative impact analysis undertaken by [CDF] ... varied the area of analysis depending upon the species being considered." SPI asserts this court erroneously assumed that the same assessment area was used for all species and the record "unequivocally demonstrates that assessment areas were tailored for different species to the extent appropriate" and in full compliance with this court's interpretation of Technical Rule Addendum No. 2.

Restated in terms of our six-step approach, SPI and CDF contend this court committed error in completing the fourth step of the approach. The fourth step involved determining what CDF did and did not do in applying the regulatory provision that stated biological assessment areas will vary with the species being evaluated and its habitat. (See part IV.B.4.) We now expand our discussion of steps three and four to further demonstrate that SPI's and CDF's use of geographic areas failed to comply with the methodology for assessing *cumulative impacts* set forth in the Forest Practice Rules. (See Cal. Code Regs., tit. 14, § 898 [methodology for assessing cumulative impacts is in Technical Rules Addendum No. 2].)

B. Assessment Areas: Project Impacts Versus Cumulative Impacts

When completing steps three and four of our six-step approach, it is important to distinguish between the THP's use of a geographic area in connection with an evaluation of *project impacts* and the use of a geographic area when completing the required methodology for assessing *cumulative impacts*. This distinction can help one avoid two errors. The first error is treating all references to an assessment area as though they refer to a geographic area used in the analysis of cumulative impacts to a species or other resource. Sometimes, a THP may use the term "assessment area" to refer to the area considered in connection with the evaluation of project, not cumulative, impacts. The second error is being distracted, by a voluminous discussion, from an ordered application of the methodology imposed on the assessment of cumulative impacts to a particular species or resource.

In this case, an ordered review of the methodology imposed on the assessment of cumulative impacts clearly shows that SPI and CDF failed to

comply with the requirement that biological assessment areas will vary with the species being evaluated or, alternatively, failed to comply with the required methodology. In either event, CDF “has not proceeded in the manner required by law” for purposes of Code of Civil Procedure section 1094.5, subdivision (b). As a result, CDF abused its discretion.

C. Step Three Revisited and Expanded

We start with step three and describe, point by point, the procedural requirements that apply to the selection and use of geographical areas in the analysis of potential cumulative impacts on a wildlife species. The purpose of this description is to show what SPI and CDF would have done if they actually had complied with the rules governing how a geographic area is used in the analysis of cumulative impacts on a species of wildlife.

Procedural Requirement One: “The R[egistered Professional Forester] shall establish ... the geographic assessment area within or surrounding the [THP] for each [species] to be assessed ...”¹ As previously discussed, because the rules state that biological assessment areas will vary with the species being evaluated, it necessarily follows that a geographic area must be separately selected for each species.

Procedural Requirement Two: The registered professional forester shall briefly describe, in narrative form, the geographic area for each species subject to a cumulative impacts assessment.²

Procedural Requirement Three: “[T]he geographic assessment area ... for each [species] to be assessed ... shall be shown on a map where a map adds clarity to the assessment.”³

Procedural Requirement Four: The registered professional forester shall briefly explain the rationale for establishing the geographic area for each species.⁴

¹This requirement from Technical Rule Addendum No. 2 is set forth in the paragraph following the heading “Identification of Resource Areas.” A quote of that paragraph accompanies footnote 28 of our April 14, 2006, opinion.

²This requirement comes from the same sentence that sets forth the first procedural point.

³This requirement comes from the second sentence of the paragraph referenced in footnote 1, *ante*.

⁴This requirement comes from the first sentence of the paragraph referenced in footnote 1, *ante*.

Procedural Requirement Five: Pursuant to item (1) of the checklist contained in section 952.9 of title 14 of the California Code of Regulations, the geographical area established for each species is examined to determine whether it contains any past, present, or reasonably foreseeable probable future projects. If any such projects are contained in the geographic area, those projects are identified in the THP.

Procedural Requirement Six: Pursuant to item (2) of the checklist, continuing, significant adverse impacts from past land use activities that may add to the impacts of the proposed project are identified and their locations and impacts are described.

Procedural Requirement Seven: A determination is made whether the projects and activities identified in items (1) and (2) of the checklist, when combined with the proposed THP, would have a reasonable potential to cause or add to significant cumulative impacts to any species of wildlife being assessed.

The determination made under procedural requirement seven may trigger a requirement for the inclusion of further descriptions in the THP. We need not discuss those further descriptions to illustrate that SPI and CDF did not comply with the procedural requirements that govern the use of geographic areas in the analysis of cumulative impacts to a species of wildlife.

D. Step Four

Next, we compare the procedural requirements to what SPI and CDF actually did. The result of this comparison establishes that they did not proceed in the manner required by law because they did not follow the procedural requirements. As a result, CDF abused its discretion in approving the THP's.

Procedural Requirement One (Establish Area): If the registered professional forester complied with this requirement and separately established a geographic area for each species to be assessed, the evidence of compliance will be apparent in our review of the subsequent procedural requirements.

Procedural Requirement Two (Describe Area): Compliance with this procedural requirement allows a reviewing court to look at the THP's narrative descriptions of the geographic areas established for each species and compare those descriptions to identify how the geographic areas varied from one another. If SPI really had (1) varied the geographic area actually used in the cumulative impacts analysis for each species and (2) complied

with procedural requirement two, then the variance in those geographic areas (which SPI now claims exists) would be easy to identify by reviewing the narrative description of the geographic areas established for the wildlife species being evaluated.

Instead of containing narrative descriptions of geographic areas separately established for each species, the Cedar Flat THP provides the following narrative under the heading “BIOLOGICAL RESOURCE ASSESSMENT AREA”:

“The ***Biological CIAA*** selected is the same as the Watershed Assessment Area, which is defined as the state planning watershed Upper Griswold Creek. 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.” (Cedar Flat THP, p. 77.)

This quoted language from the Cedar Flat THP uses the definitive article “the” in the phrases “[t]he ***Biological CIAA***” and “[t]he area.” These phrases also use the singular “CIAA” and “area.” The text used in the Cedar Flat THP only describes a single biological cumulative impacts assessment area and, thus, creates the strong inference that SPI established only one biological cumulative impacts assessment area. Alternatively, if SPI did vary the geographic area used in the assessment of cumulative impacts to wildlife species, then (1) the narrative under the heading “BIOLOGICAL RESOURCE ASSESSMENT AREA” inaccurately described what SPI was doing and (2) SPI did not provide a narrative description of each geographic area used. Under this alternative, SPI violated procedural requirement two.⁵

Procedural Requirement Three (Map Area): SPI mentioned a “Cumulative Impacts Assessment Area Map” in its discussion of the “***Biological CIAA***” contained on page 77 of the Cedar Flat THP. The map,

⁵We recognize that SPI claims its “assessment evaluated the Watercourse and Lake Protection Zone surrounding Class I and II streams and associated wetlands” as the geographic areas for three species of frogs and the western pond turtle. While SPI may have considered those areas in connection with some type of evaluation, it does not follow that simply mentioning those areas means they actually were selected and plugged into the required methodology for assessing *cumulative* impacts. Rather, the record shows SPI did not plug its choice of geographic area into the methodology and work its way through the mandatory procedures.

which is set forth at page 95 of the Cedar Flat THP, outlines only one cumulative impacts assessment area. The Cedar Flat THP does not contain any other map that shows a geographic area used to assess cumulative impacts to one or more species.

Based on these contents of the Cedar Flats THP, we consider two scenarios regarding compliance with the provision that the geographic area used to assess cumulative impacts for each species of wildlife “shall be shown on a map where a map adds clarity to the assessment.” (Technical Rule Addendum No. 2)

Under the first scenario, the map included in the Cedar Flat THP accurately reflects what SPI did—that is, SPI only used the single, one-size-fits-all-species geographic area shown in the map to assess cumulative impacts on wildlife species. In that situation, SPI violated the requirement that geographic areas will vary with the species being evaluated, and ancillary errors inevitably followed in its evaluation of cumulative impacts.

Under the second scenario, SPI actually varied the geographic assessment areas used to analyze cumulative impacts on different species of wildlife. The problem created by this scenario is that the map included in the Cedar Flat THP does not accurately reflect what SPI did because it does not show any variation in geographic areas. This scenario seems implausible because it would mean that SPI also decided (1) that separately mapping each species’ geographic area would not add clarity to the assessment and (2) including a map that showed a single “Biological CIAA” added clarity to the assessment. In effect, SPI has taken the strange position that it decided to clarify its cumulative impacts assessment by including a map that actually contradicts what it claims to have done.

Based on these two possible scenarios, we reach the following conclusions. The cumulative impacts assessment area map in the Cedar Flat THP (1) does not demonstrate compliance with the requirement that biological assessment areas will vary with the species being evaluated, (2) shows, at a minimum, that SPI confused rather than clarified its cumulative impacts assessment by using the map, and (3) strongly supports the inference that SPI did not vary the biological assessment areas.

Procedural Point Four (Explain Area’s Rationale): Compliance with the requirement for a brief explanation of the rationale for establishing a species’ geographic area, like compliance with procedural point two, would provide evidence that the biological assessment areas selected in a THP varied with the species being evaluated. Thus, if SPI correctly asserted that “the biological assessment areas used by SPI and accepted by CDF varied with respect to the species being evaluated” and if SPI complied with the

mandatory requirement for a brief explanation of the rationale for use of the particular geographic area chosen for a species, then a reviewing court could look at the contents of the THP, compare the rationales for each geographic area selected, and understand the source of the variation among the geographical areas selected for the species being evaluated.

The Cedar Flat THP included an explanation of why the watershed assessment area also was selected as the biological cumulative impacts assessment area. It did not include any explanation of why a particular geographic area was selected for use in the analysis of cumulative impacts to a particular species. If SPI really had (1) varied the geographic area actually used in the cumulative impact analysis for each species and (2) complied with procedural requirement four, then the variance in those geographic areas would be explained by reviewing the rationale provided in the THP. The failure of the Cedar Flat THP to include a rationale for each separately chosen geographic area means that SPI either violated the requirement to separately choose the geographic area used to evaluate the cumulative impacts on each species or violated the requirement to provide a brief explanation of the rationale for each separately chosen geographic area.

Procedural Points Five through Seven (Checklist): The critical function of the geographic area in a cumulative impacts analysis is its use in identifying the other projects and activities that are combined with the proposed project to produce cumulative impacts. Thus, varying the geographic area used to assess the cumulative impacts to the species being evaluated would result in a different group of projects and activities being identified and combined with the proposed project.

Pages 62 through 65.5 of the Cedar Flat THP contain SPI's responses to the items in the cumulative impacts assessment checklist set forth in section 952.9 of title 14 of the California Code of Regulations. Nowhere in the Cedar Flat THP's responses to the items in the checklist is it evident that the geographic area used to identify other projects and activities varied with the species being evaluated. Rather, those pages show that only a single geographic area was used to identify other projects and activities that might have incremental impacts that would combine with the impacts of the proposed project.

In summary, the administrative record clearly establishes that the THP's did not conform to applicable legal requirements. The THP's do not show that SPI varied the geographic areas used to assess cumulative impacts on the species being evaluated as required by Technical Rule Addendum No. 2. Even if one assumes that (1) SPI separately selected

geographic areas, (2) the geographic areas were used for cumulative impacts assessment, not project impacts assessment, and (3) the areas actually varied as SPI now claims in its petition for rehearing, the THP's do not contain the information required by the methodology described in section 952.9 of title 14 of the California Code of Regulations.

II. CDF's Discussion of Wildlife Species

CDF's petition for rehearing asserts that it proceeded in the manner required by law and argues that its cumulative impacts analysis "considered evidence beyond the planning watershed level and varied the area of analysis depending on the species being considered." In effect, CDF argues that its failure to require that SPI follow each of the steps set forth in the cumulative impacts methodology was excusable because of its own extensive discussions of cumulative impacts.

We reject this argument for three reasons. First, CDF's discussion did not occur until the end of the process and, therefore, the public's ability to review and comment on the information and analysis was curtailed compared to situations where the required discussion is included in the THP.

Second, CDF's argument is the equivalent of saying that its failure to enforce the mandatory steps of the cumulative impacts methodology described in section 952.9 of title 14 of the California Code of Regulations was not prejudicial. This implicit position directly conflicts with the established rule that prejudice is presumed when CDF fails to follow mandatory procedures. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) We reject this aspect of CDF's argument and follow the rule established by our Supreme Court.

Third, the argument would carry more weight if it were clear that CDF actually had addressed the shortcomings of the THP. CDF's discussion, however, does not address (sequentially or otherwise) each procedural requirement in the methodology for assessing cumulative impacts. For example, one cannot review CDF's discussion and determine that geographic area K was selected for wildlife species 1 and used to identify projects and activities I, II, III, IV and V, the incremental impacts of which were combined with the potential impacts of the THP to determine if the cumulative impacts on wildlife species 1 were significant. As an example, CDF claims cumulative impacts on the California mule deer were assessed based on information within the watershed assessment area and the migration route outside the watershed assessment area. Yet, CDF's discussion does not (1) identify any other project or activities in the migration route's area outside the watershed assessment area or (2) purport

to combine the potential impact of the THP with the incremental impacts of *any* other projects or activities. CDF appears to have discussed only the proposed project's impact on the deer herd's migration route, and did not actually combine that impact with the incremental impacts of other projects to produce a *cumulative* impacts analysis.⁶

In sum, this court is not substituting its judgment of cumulative impacts for the judgment of CDF. Our conclusion is much narrower and concerns only the failure to follow mandatory procedural requirements.

The petitions for rehearing are denied. Except for the modifications set forth, the opinion previously filed remains unchanged.

These modifications do not effect a change in the judgment.

DAWSON, J.

WE CONCUR:

HARRIS, Acting P.J.

CORNELL, J.

⁶This error (passing off an assessment of a project's impact for an assessment of the cumulative impacts of many projects) is discussed in part I.B, *ante*, of this Supplemental Opinion.