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The Timber Harvest Plan Exemption from the California Environmental Quality Act: Due Process and Statutory Intent

by
Ruth McLay*

We know, above all, that to use the term "old-growth forest" does not really convey the depth and power of our feelings or our love. It does not convey what it is like to walk through a great aisle of forest giants early on a summer morning, the ground still damp, dew still on the ferns, golden bars of sunlight slanting and streaming through the arms of each tree, touching the park-like ground, like the fingers of God. This is a spiritual experience and a spiritual resource, as well as an economic and wildlife resource.¹

The Pacific Lumber Company was long commended for its environmentally sound approach to harvesting timber.² Yet, shortly after Maxxam Corporation took the helm of the company after a hostile corporate takeover in 1985,³ the company's environmentally sensitive approach was traded for one that doubled the rate at which company trees are cut and which began to include clear-cutting of old-growth forest.⁴ Maxxam's method of timber harvesting will have a drastic cumulative effect on the environment, causing irreparable harm to dependent species such as the spotted owl,⁵ and destroying watershed resources.⁶

* B.A. 1984, Antioch University West; Member, Third Year Class.
2. Tall Timber Tension: The Redwoods Meet the Law, Nat'l L. J., Feb. 1, 1988, at 1, col. 1, and at 24, col. 3 ("Other lumber companies stripped and sold their redwood and fir in cycles of boom and bust. In contrast, Pacific Lumber operated as if the Sierra Club were in charge.").
3. Id. at 24, col. 1.
4. Id.
5. See Declaration of Paul R. Ehrlich, Bing Professor of Population Studies in the Department of Biological Sciences at Stanford University, filed in case No. 81790, Superior Court of California, County of Humboldt, on November 14, 1988. Professor Ehrlich states "[t]he single human activity that most threatens species the world around is the cutting down of forests." Id. at 2. "[P]ast logging of old forest that provides habitat for the northern spotted owl has jeopardized the continued existence of this bird. Further harvesting of old forest increases the risk of extinction and reduces the management options available for protect[ion]."
Citizens who wish to stop the loss of nonrenewable resources have found that the most successful avenue of attack is environmental litigation. Interested citizens and citizen action groups have brought many cases against corporations such as Maxxam. When the threatened species or resources are located in California, these groups frequently use the California Environmental Quality Act as their vehicle for relief.\(^7\)

The California Environmental Quality Act (CEQA) was enacted by the California Legislature in 1970.\(^8\) The overriding legislative intent of CEQA is to maintain a "quality environment for the people of this state now and in the future."\(^9\) The preservation of such an environment is "a matter of statewide concern."\(^10\) To meet this public policy, CEQA requires that the "long-term protection of the environment ... be the guiding criterion in public decisions."\(^11\)

An environmental impact report (EIR) is the major method employed by CEQA to determine the impact a proposed project will have on the environment, and whether or not there are available methods to mitigate its adverse effects.\(^12\) An EIR is considered to be the "heart of the environmental control process."\(^13\) Timber harvesting operations on private lands in California, however, are exempt from CEQA's environmental impact report requirement.\(^14\) Instead, these operations must file

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\(^7\) Id. at 3. See also Declaration of Russell Lande, Associate Professor in the Department of Ecology and Evolution at the University of Chicago, filed in case No. 81790, Superior Court of California, County of Humboldt, on November 14, 1988:

[M]y own work as well as the work of other reputable scientists who have studied the spotted owl, indicates that the most responsible scientific opinion based on available data is that the Northern Spotted Owl is threatened with extinction by ongoing logging of its habitat, the old forests of the Pacific Northwest.

\(^8\) Id. at 3. ( Copies of these documents are on file at The Hastings Law Journal).

\(^9\) Id. at 3. This information was provided during a telephone conversation with Thomas Lippe (Jan. 23, 1989). Mr. Lippe, a San Francisco attorney who represents California litigants in efforts to save lands from clear cutting, states that clear cutting along the northern California coast will cause irreparable harm to the Big River drainage and estuary.

\(^10\) Tall Timber, supra note 2, at 27, col. 1 & 2.


\(^12\) CAL. ADMIN. CODE tit. 14, §§ 15000-15387 (1983).

\(^13\) County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 192, 139 Cal. Rptr. 396, 401 (1977); CAL. ADMIN. CODE tit. 14, § 15003(a) (1983).

timber harvest plans that should address both the broad environmental concerns\textsuperscript{15} and the substantive standards\textsuperscript{16} of CEQA.

Traditionally, timber harvest plans have been required to harmonize with the overall intent of CEQA. This means that participants in the timber harvest plan process must meet the substantive requirements of CEQA. Because CEQA’s substantive requirements are to protect the environment and involve the public in governmental decisionmaking in this regard,\textsuperscript{17} procedural deviations are exempt only if they continue to meet the overall intent of CEQA. Timber harvest plans, thus, should be exempt only to the extent their implementation meets the purpose of CEQA.\textsuperscript{18}

There is an alarming discrepancy, however, between CEQA and the procedures under which timber harvest plans operate. CEQA requires that members of the public receive notice and have an opportunity to be heard regarding all comments prior to the commencement of an approved project. Yet, the rules governing the procedural approach to timber harvest plans\textsuperscript{19} permit logging to commence immediately after a timber harvest plan has been approved. These rules allow logging to begin \textit{before} the public either is notified of such approval or given the opportunity to appeal such approval. This procedure has been challenged as violating the United States and California constitutional requirements of due process of law,\textsuperscript{20} as well as the overall intent of CEQA.\textsuperscript{21}

A recent Sixth District of California appellate opinion, \textit{Laupheimer v. State},\textsuperscript{22} concluded that the California Administrative Code’s procedural rules (under which the timber harvest plan operates) “are adequate as a matter of procedural due process.”\textsuperscript{23} The spirit of this decision is contrary to the First Appellate District’s reasoning in \textit{Environmental Protection Information Center v. Johnson}, 170 Cal. App. 3d 604, 216 Cal. Rptr. 502, 512 (1985).

\textsuperscript{17} \textit{Cal. Pub. Res. Code} § 21000(a), (b) (West 1986).
\textsuperscript{18} \textit{Id.} § 21080.5(d)(3).
\textsuperscript{20} U.S. Const. amend. XIV, § 1; \textit{Cal. Const.} art. I, § 7, subd. (a); \textit{See Laupheimer}, 200 Cal. App. 3d at 456, 246 Cal. Rptr. at 89; \textit{Environmental Protection Information Center}, 170 Cal. App. 3d at 608, 218 Cal. Rptr. at 504.
\textsuperscript{22} 200 Cal. App. 3d 440, 246 Cal. Rptr. 82 (1988).
\textsuperscript{23} \textit{Id.} at 457, 246 Cal. Rptr. at 89.
Protection Information Center v. Johnson,24 which held that the Forest Practice Rules are not a blanket exemption to CEQA25 and must comply with the overriding intent of CEQA. EPIC further held that the "public's interest in the forest resources and timberlands [in California] has been described as fundamental."26 The public's fundamental interest in forest resources together with the statutory right to a hearing provided by CEQA makes denial of that hearing a deprivation of due process of law.

The Laupheimer decision appears to meet with the constitutional due process standards set by the United States Supreme Court in Matthews v. Eldridge.27 It does not, however, meet the stricter scrutiny required by the California Constitution, as set forth in People v. Ramirez.28 This Note argues that Laupheimer does not meet California constitutional standards and is limited to its facts.

Section I of this Note sets forth the procedural requirements of CEQA and the Forest Practices Act, and examines their similarities and differences. Section II shows that the timber harvest plan is required to operate within the substantive scope of CEQA and examines the interplay between the two operative acts. Section III demonstrates that traditional judicial interpretation of comparable statutory schemes emphasizes that Laupheimer was decided incorrectly and that the timber harvest plan must fully comply with California due process requirements, as set forth by the California Constitution, the judiciary, and the legislature. Finally, section IV sets forth a proposal that the California Legislature amend the timber harvest plan to require that an official environmental response stating all grounds for timber harvest plan approval be issued to the public before logging is allowed to commence.

I. The California Environmental Quality Act and the Timber Harvest Plan Exemption

It is well-established California policy to provide long-term protection for the environment.29 The California Legislature enacted CEQA to monitor government activities that would have any significant effect on

24. Environmental Protection Information Center, 170 Cal. App. 3d at 621-24, 216 Cal. Rptr. at 513-15; see infra notes 133-36 and accompanying text.
25. Id. at 616-18, 216 Cal. Rptr. at 509-11.
26. Id. at 623, 216 Cal. Rptr. at 514.
27. 424 U.S. 319 (1976) (government benefits may be terminated without a prior evidentiary hearing if a three-part balancing test is met).
28. 25 Cal. 3d 260, 286, 599 P.2d 622, 627, 158 Cal. Rptr. 316, 320 (1979) ("freedom from arbitrary adjudicative procedures is a substantive element of one's liberty").
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the environment. CEQA is a complex statutory system setting forth detailed procedural requirements that must be followed to meet its substantive purposes. A brief description of how CEQA works is necessary to understand how the timber harvest plan exemption fits within the statutory scheme.

A. How CEQA Works

The California Environmental Quality Act applies to all governmental actions that will have a "significant effect" on the environment. Its purpose is not only to protect the environment, but also to inform the public, so that the public may respond to any governmental action with which it disagrees. As a result, CEQA is a powerful tool for citizen action and governmental accountability.

To meet these substantive goals, the act sets forth procedures to be followed by state and local agencies in their efforts to ensure that any project having a potentially significant adverse effect on the environment will be ameliorated. To achieve these objectives, the legislature requires that the "lead agency" determine whether a project will have a significant environmental impact.

30. See supra notes 8-11 and accompanying text.
31. CAL. ADMIN. CODE tit. 14, §§ 15002(b)-(c) (1983) distinguish between governmental action and private actions. "A private action is not subject to CEQA unless the action involves governmental participation, financing, or approval." See also Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). Mammoth was the first California Supreme Court decision to interpret CEQA and held that environmental analysis is required for agency actions such as permits, leases, and other entitlements, taken in response to private initiatives. Id. at 262, 502 P.2d 1059, 104 Cal. Rptr. 771; S. DUGGAN, J.G. MOOSE & T. THOMAS, GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) 6 (2nd ed. 1988) (GUIDE TO CEQA).
32. "Significant effect" is a "substantial or potentially substantial, adverse change in the environment." CAL. PUB. RES. CODE § 21068 (West 1986); CAL. ADMIN. CODE tit. 14, § 15064 (1983).
35. CAL. ADMIN. CODE tit. 14, § 15368 (1983) defines local agency as "any public agency other than a state agency, board, or commission."
36. "Environment" is defined by CEQA to mean "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." CAL. PUB. RES. CODE § 21060.5 (West 1986).
37. A "lead agency" is the agency that has principal responsibility for approving or carrying out a project. Id. § 21067; CAL. ADMIN. CODE tit. 14, § 15367 (1983).
If the project will not have a significant effect on the environment, the lead agency must prepare and issue a negative declaration. If the lead agency determines the project will have a significant effect on the environment, it must file an environmental impact report. The lead agency's determination regarding the negative declaration or EIR is conclusive on all persons and responsible agencies unless challenged within a short statute of limitations.

38. Cal. Pub. Res. Code § 21080(c) (West 1986). A negative declaration is a written statement setting forth the reasons a proposed project will not have a significant effect on the environment and therefore does not require the preparation of an EIR. Id. § 21064; Cal. Admin. Code tit. 14, § 15371. The negative declaration process is set forth in sections 15070-15075 of title 14 of the California Administrative Code. While the time period for public review of final EIRs is limited to 30 days, see infra note 65, the time period for negative declarations "shall be a reasonable period of time sufficient to allow members of the public to respond to the proposed finding before the negative declaration is approved." Cal. Admin. Code tit. 14, § 15105(b) (1982).

39. The CEQA Guidelines state:
(a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
(b) The possible effects of a project are individually limited but cumulatively considerable. As used in this subdivision, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
(c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

40. Cal. Pub. Res. Code § 21165 (West 1986). An environmental impact report is a detailed statement prepared (or caused to be prepared) by the lead agency. Id. § 21061; Cal. Admin. Code tit. 14, § 15362 (1982). The EIR discusses the significant environmental effects of the proposed project, including proposed mitigation measures, as well as any significant effects on the environment that cannot be avoided if the project is implemented. The EIR also sets forth alternatives to the proposed project, the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, any irreversible significant environmental changes that would occur if the project is implemented, and the growth-inducing impact of the proposed project. The EIR must also include a brief statement indicating the reasons for determining that various effects of a project are not substantial and consequently have not been discussed in detail. Cal. Pub. Res. Code § 21100 (West 1986). Section 21100.1 of the California Public Resources Code sets forth limits to the EIR requirement. The EIR process is set forth in sections 15080-15096 of title 14 of the California Administrative Code.

An EIR is not required for projects that are categorically or statutorily exempt. See infra notes 68-71 and accompanying text; see also Cal. Admin. Code tit. 14, §§ 15300-15329 for categorical exemptions.

Environmental Impact Report

An EIR is a document informing public agency decisionmakers and the general public of a project's significant environmental effects.42 The EIR identifies possible ways to minimize significant effects, and describes reasonable alternatives to the project,43 including the alternative of not moving forward, with it.44 The information contained in the EIR does not control the agency's ultimate discretion on the project; however, the agency must respond in writing to all comments on environmental issues received,45 as well as respond to each significant effect identified in the EIR,46 by making written findings and including the rationale for each finding.47 An EIR has been described as an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."48

In preparing the EIR, the lead agency consults with and obtains comments from each responsible agency.49 The EIR may include comments elicited from "any person who has special expertise with respect to the environmental impact involved."50

The public is encouraged to be involved throughout the process of determining the significance of a proposed project's effect on the environment.51 The legislature expressly stated that "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the

42. CAL. PUB. RES. CODE § 21061 (West 1986).
43. Id. § 21002.1(a); CAL. ADMIN. CODE tit. 14, § 15121(a) (1983). The procedures establishing the content requirements of EIRs generally are set forth at §§ 15120-15132.
44. Referred to as the "no project alternative." CAL. ADMIN. CODE tit. 14, § 15126(d)(2) (1983) ("The specific alternative of 'no project' shall also be evaluated along with the impact.").
45. Id. § 15088(a) (1982).
46. CAL. ADMIN. CODE tit. 14, § 15121(b).
47. Id. § 15091.
49. A "responsible agency" is an agency that will undertake or approve a specific project, but is not the lead agency for the project. The term includes all public agencies other than the lead agency that has approval power over the project. CAL. PUB. RES. CODE § 21069 (West 1986); CAL. ADMIN. CODE tit. 14, § 15381 (1986). While a lead agency must consider both the individual and collective effects of all activities involved in a project, a "responsible agency" need only consider the effects of those activities involved in the project that it must carry out or approve. CAL. PUB. RES. CODE § 21002.1(d) (West 1986). A responsible agency's role in the EIR process is set forth in CAL. ADMIN. CODE tit. 14, § 15096 (1986).
50. CAL. PUB. RES. CODE § 21153 (West 1986).
51. Id. §§ 21000(e), 21003.1(a); CAL. ADMIN. CODE tit. 14, § 15044 (1986).
environment." One way of contributing to this goal is to take an active role in the EIR process. Public agencies and members of the public may comment on the environmental effects of a proposed project at any time during the EIR process. Such comments assist the lead agency in assessing the environmental effects of a project, potential significant effects, alternatives, and mitigation measures that may substantially reduce the effects.

As soon as a draft EIR is complete, a notice of completion must be filed with the Office of Planning and Research. Notice must also be given to all organizations and individuals who have previously requested notice, as well as to contiguous land owners. The public agency must publish the notice in a paper of general circulation in the area of the proposed project, and post the notice on and off site. The EIR is then available for public review and comments for a period of thirty to ninety days. Public hearings on the environmental documents are encouraged.

The lead agency is required to respond in writing to all comments received during the noticed comment period. The written response must describe the disposition of any significant environmental issues in detail, with a "good faith, reasoned analysis" as to why the lead agency's recommendation is at variance with the comments. The CEQA requirement that lead agencies respond in writing to all public comments is significant. This process gives the public and agencies notice of grounds for opposition to the proposed project. The agency, in turn, will have the opportunity to respond to objections raised during the comment period, and the lead agency's written response will serve to inform the public that it has considered the objections.

52. CAL. PUB. RES. CODE § 21000(e) (West 1986) (emphasis added). See also County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 198, 139 Cal. Rptr. 396, 405 (1977) (one purpose of CEQA is to assure general public input both in the formulation of the EIR and in the ultimate governmental decision).

53. CAL. PUB. RES. CODE § 21003.1(a) (West 1986).

54. Id.

55. CAL. ADMIN. CODE tit. 14, § 15023(g) (1986) (the Office of Planning and Research makes recommendations to the Secretary of Resources regarding adoption, amendment, or repeal of categorical exemptions); id. § 15085(a)-(b).

56. CAL. PUB. RES. CODE §§ 21092, 21161 (West 1986).

57. CAL. ADMIN. CODE tit. 14, § 15087(a) (1986).

58. Referred to as the "noticed comment period." CAL. ADMIN. CODE tit. 14, §§ 15087(c), 15105(a) (1986).

59. Id. § 15087(g). An agency must provide the public with a review period that will adequately permit public response to the proposed finding that the project will produce no significant adverse environmental impacts before a negative declaration is adopted. Id. § 15073(a).

60. CAL. PUB. RES CODE §§ 21104, 21153 (West 1986); CAL. ADMIN. CODE tit. 14, § 15088(a)-(b) (1986).

61. CAL. PUB. RES CODE §§ 21104, 21153 (West 1986); CAL. ADMIN. CODE tit. 14, § 15088(b) (1986).
for project approval and provides grounds that create a basis upon which judicial review of the action may be obtained.

Finally, after public comments have been responded to, an EIR goes into final form and is ready to be certified by the lead agency.62 Before a project can be approved, the EIR must be considered and certified by the decisionmaking body of the lead agency,63 which considers the EIR in conjunction with the required findings.64 The lead agency must file a notice of determination for all approved projects for which an EIR was considered,65 at which point a thirty-day statute of limitations on court challenges to the approved project begins to run.66 The public not only is encouraged to participate throughout the EIR process, but the statutes expressly provide the public with an opportunity to challenge a lead agency's finding.67

B. The Timber Harvest Plan is Exempt From Filing Environmental Impact Reports

The lead agency overseeing an EIR is required to complete and certify the final EIR68 within one year from the date the lead agency accepted the application as complete.69 Public policy, however, demands that some projects be expedited through this time-consuming process. The California Legislature has provided for the Secretary of Resources to certify certain regulatory programs of a state agency as exempt from the EIR requirement.70 For a program to be certified, it must be governed

63. Id. § 15090.
64. Id. §§ 15090-15092.
65. Id. § 15094(a).
66. Id. § 15094(d); CAL. PUB. RES. CODE § 21167(b) (West 1986); cf. Citizens of Lake Murray Area Ass'n v. City Council, 129 Cal. App. 3d 436, 440-41, 181 Cal. Rptr. 123, 126 (1982) (the thirty-day statute of limitations on court challenges does not begin to run, "until the day the notice is posted in the office of the county clerk").
67. CAL. ADMIN. CODE tit. 14, § 15112(c), sets forth CEQA's "unusually short" statute of limitations. Id. at § 15112(a).
68. Id. § 15090.
69. Id. § 15108. See also Bendix, A Short Introduction to the California Environmental Quality Act, 19 SANTA CLARA L. REV. 521, 539 (1979); CAL. ADMIN. CODE tit. 14, §§ 15100-15108 (1983) (setting forth the permissible time periods plus length and availability of extensions). It should be noted that certain projects are not deemed received for filing until sufficient environmental documentation has been completed to permit the CEQA process to be completed during this short time period. Id. § 15111. The timber harvest plan is not one of these projects.
by rules and regulations that conform to the exemption standards set out in CEQA.\textsuperscript{71}

The regulatory program for the approval of timber harvest operations on private lands in California has been certified by the Secretary of Resources and is exempt from the EIR requirement.\textsuperscript{72} Timber harvest plan operations may be approved by applying to the California Department of Forestry for a timber harvest plan.\textsuperscript{73}

A timber harvest plan is provided for by the legislature and is implemented and controlled under the auspices of a related act,\textsuperscript{74} the Z'berg-Nejedly Forest Practice Act of 1973 (FPA),\textsuperscript{75} which was established to regulate California timberlands. The express intent of the FPA is to "create and maintain an effective and comprehensive system of regulation and use of all timberlands"\textsuperscript{76} assuring that timberland productivity is "restored, enhanced, and maintained."\textsuperscript{77} At the same time, consideration is given to "recreation, watershed, wildlife, range and forage, fisheries, and aesthetic enjoyment."\textsuperscript{78} The California Department of Forestry implements the FPA\textsuperscript{79} under procedures set forth in the Forest Practice Rules.\textsuperscript{80}

\textsuperscript{71} A certifiable agency's rules and regulations are exempt from the EIR requirement if they: (1) require that no project shall be approved if there are feasible alternatives or mitigation measures available that would substantially lessen any adverse impact on the environment, Cal. Pub. Res. Code § 21080.5(d)(2)(i); (2) include guidelines for the preparation of the project plan and for its evaluation "consistent with the environmental protection purposes of the regulatory program," id. § 21080.5(d)(2)(ii); (3) require the agency to "consult with all public agencies which have jurisdiction, by law, with respect to the proposed activity," id. § 21080.5(d)(2)(ii); (4) "require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process," id. § 21080.5(d)(2)(iv); (5) require notice of the administering agency's decision be filed with the Secretary of Resources, who is to make it available for public inspection and post it for 30 days, id. § 21080.5(d)(2)(v); and, (6) "require the notice of the filing of the plan or other written documentation to be made to the public and to any person who requests, in writing, notification. The notification shall be made in a manner that will provide the public or any person requesting notification with sufficient time to review and comment on the filing." Id. § 21080.5(d)(2)(vi).


\textsuperscript{73} Id. § 15121(a) (1983).

\textsuperscript{74} See supra note 8 and accompanying text.


\textsuperscript{76} Id. § 4513 (West 1986).

\textsuperscript{77} Id. § 4513(a).

\textsuperscript{78} Id. §§ 4513(b), 4512(c).

\textsuperscript{79} Id. § 4511; Cal. Admin. Code tit. 14, § 15250(a) (1989).

\textsuperscript{80} The rules under which the California Department of Forestry implements the FPA are set forth at sections 895-1112 of title 14 of the California Administrative Code. The Forest Practice Rules regulate timber harvest plans. Id. § 15251(e) (1989).
To obtain a license to harvest timber, a timber harvest plan prepared by a Registered Professional Forester must be filed with the California Department of Forestry. The State Board of Forestry is the section within the California Department of Forestry that makes recommendations regarding implementation of timber harvest plans to the Director of Forestry. The Director controls the notice to the public of the plan, responds to comments on the plan, and has the last word on licensing. Because the timber harvest licensing process has been certified by the Secretary of Resources as exempt from the EIR requirement, an EIR need not be prepared; rather, a timber harvest plan analogous to an EIR must be prepared.

Though narrower in scope than an EIR, the purpose of a timber harvest plan 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 the significant effects, and point out any less environmentally destructive alternatives to or mitigation measures for the project. Thus, one might view a timber harvest plan as at the "heart of the environmental review process" in determining the significant environmental impact of harvesting timber. Because of the interplay between CEQA and the FPA, an adequate project description necessarily includes identification of all significant impacts of a project, possible mitigation measures, and responses to any comments that the Board of the Department of Forestry does not deem significant enough to block the project.

C. Similarities and Differences Between EIRs and Timber Harvest Plans

Both an EIR and a timber harvest plan share the elementary requirement that the lead agency determine whether a project will have a

81. Section 4571 of the California Public Resources Code requires that a license be issued prior to commencement of timber harvesting.
82. Id. § 4581 (West 1986). The Registered Professional Forester who prepares the timber harvest plan must personally inspect the plan area before submitting the timber harvest plan. Id. § 4582(h) (West Supp. 1989).
83. Id. § 4581.
87. See supra notes 13 & 48 and accompanying text.
significant adverse effect on the environment. In addition, both the EIR and the timber harvest plan require implementation of all feasible mitigation measures and alternatives to reduce substantially significant adverse effects.

Courts have held that, as with EIRs, public participation should be encouraged throughout the timber harvest plan process. There is a vast difference, however, between how an EIR is made known to the public and the way in which a timber harvest plan becomes available for public review. For example, while all contiguous landowners must receive notice that an EIR has been filed, a notice of intent, the document that alerts the public that a timber harvest plan has been proposed, must be filed with the plan only if (1) the proposed plan boundary lies within 300 feet of any property owned by any person other than the plan submitter; (2) the plan changes a boundary so that it fits within (1); or (3) if a plan amendment changes the harvesting method and a notice of intent was required under (1) or (2).

Only if a plan fits within this tight framework must a notice of intent be filed. Distribution requirements of the notice are also far less rigorous than those applicable to EIRs. The Director need only distribute to those persons holding title to property within 300 feet of the proposed plan’s boundary, to the County Clerk and local ranger unit headquarters for posting, and to “such other locations as the Director may deem desirable and feasible to provide adequate public notice.” A notice of an EIR, however, must not only be directly distributed to interested indi-

89. CAL. PUB. RES. CODE § 21002 (West 1986) (“The Legislature finds and declares that it is the policy of the State that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects. . . .”); CAL. ADMIN. CODE tit. 14, § 898 (1986).
90. CAL. ADMIN. CODE tit. 14, § 15201 (1986) (“Public participation is an essential part of the CEQA process.”). See also supra notes 51-59 and accompanying text.
92. See supra notes 56-60 and accompanying text
94. CAL. ADMIN. CODE tit. 14, § 1032.7(c) (1982).
95. Id. § 1032.7(f). Note that the addresses of the property owners are to be supplied by the plan submitter. Id. § 1032.7(e).
96. Id. § 1032.8(a), (b).
97. Id. § 1032.8(c).
viduals and organizations, but it also must be published in a newspaper of general circulation. 98

Further, if the Director does not deem other locations—such as a public paper of general distribution 99—"desirable and feasible to provide adequate public notice," 100 only landowners within 300 feet of the proposed plan's boundary and those members of the public who know to check the County Clerk's or Ranger Unit's regular place of posting will have adequate notice of the intent to harvest timber. The tremendous discrepancy between requiring public participation and making it difficult to receive notice of an event that the public might want to participate in should be addressed by the legislature.

The EIR Guidelines require that the lead agency respond to any comments made by the public by including in the final EIR, "a statement briefly indicating the reasons for determining that various effects of a project are not significant and consequently have not been discussed in detail." 101 As one court observed, "the written response is a keystone to the public's participation in the approval process, and an important element in the public's right to prepare and file a challenge within the maximum time allowed under the rules." 102

The major distinctions in the process by which responses are made to the EIR and timber harvest plans result in far different implementation of the two acts. CEQA and its related rules require that written responses be made to "each significant effect identified in the EIR," 103 including a rationale for permitting a project that is "supported by substantial evidence in the record." 104 The lead agency must consider the EIR in conjunction with any rationale for continuing with the project in spite of the significant effect on the environment and include these reasons in the record of project approval and the notice of determination. 105

Further, "[a]n EIR shall contain a statement briefly indicating the reasons that various possible significant effects of a project were determined

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98. See supra notes 56-58 and accompanying text.
100. CAL. ADMIN. CODE tit. 14, § 1032.8(c) (1982).
101. CAL. PUB. RES. CODE § 21100 (West 1986); CAL. ADMIN. CODE tit. 14, § 15126(a) ("Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and the long-term effects.").
102. Environmental Protection Information Center, 170 Cal. App. 3d at 622, n.10, 216 Cal. Rptr. at 513, n.10.
104. Id. § 15091(a)(1), (2), (3) & (b) (1986).
105. Id. §§ 15092-15094.
not to be significant and were therefore not discussed in detail in the EIR." 106

The Forest Practice Rules, on the other hand, provide that the notice of conformance filed with the plan need only "include a written response of the Director to the significant environmental points raised during the evaluation process." 107 Although the lead agency processing an EIR must respond to each public comment made, in addition to supporting its rationale for why it did or did not find the effects significant, 108 the Director is not statutorily required to respond to the public comments alleging significant environmental impact unless she determines that the environmental impact will be in fact significant. Nor is she required to set forth the reasoning for her determination. Yet, unless the Director responds to all alleged significant impacts on the environment, the Director fails to comply with the purpose of requiring the timber harvest plan and environmental impact reports—to provide the public with sufficient information to ensure governmental accountability. 109 This discrepancy gives the Director far greater discretion regarding which public comments she wants to respond to and weakens the ability of the public to hold government accountable.

II. CEQA Governs the Timber Harvest Plan

The Forest Practice Rules do not require that each significant environmental point raised during the evaluation process be addressed in the notice of conformance. 110 This limited requirement, as well as the inadequate notice and distribution of timber harvest plans, is inconsistent with the clearly delineated requirements of CEQA 111 and undermines the purpose behind encouraging public involvement in the timber harvest plan review process. 112

106. Id. § 15128 (1983).
107. Id. § 1037.8 (1986) ("The notice of conformance shall include a written response of the Director to significant environmental points raised during the evaluation process.").
108. See supra notes 60-61 and accompanying text.
109. See infra note 112 and accompanying text.
110. CAL. ADMIN. CODE tit 14, § 1037.8 (1986).
111. CAL. PUB. RES. CODE § 21100 (West 1986).
112. "The EIR process protects not only the environment but also informed self-government." Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 392, 764 P.2d 278, 283, 253 Cal. Rptr. 426, 431 (1988). The EIR also is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 86, 529 P.2d 66, 78, 118 Cal. Rptr. 34, 46 (1974) ("One major purpose of an EIR is to inform other government agencies and the public generally, of the environmental impact of a proposed project.") (citations omitted)). Because the EIR must be certified or rejected by public
Unless the Director includes the reasons and the underlying rationale for her failure to acknowledge public comments regarding the significance of the environmental impact along with grounds for approval and makes this information available with approval of the timber harvest plan, the public may have only limited grounds upon which to base its challenge.

A. The Statutory Interplay Between CEQA and the Act

Despite the exemption of licenses to harvest timber on private lands in California from the EIR requirement and the existence of the separate statutory authority and regulations applicable to the California Department of Forestry and timber harvest plans, the Department still must proceed within the statutory requirements of CEQA.\textsuperscript{113}

The California Appellate Court's holding in \textit{Natural Resources Defense Council, Inc. v. Arcata National Corp.}\textsuperscript{114} that implementation of the FPA and CEQA be harmonized in order to achieve the goals of both\textsuperscript{115} was also required by the EIR Guidelines authorizing the timber harvest plan.\textsuperscript{116} The judiciary also has required the Board of the California Department of Forestry to harmonize CEQA with the FPA.\textsuperscript{117} The EIR exemptions are permitted \textit{only} if a project meets specific conditions that ensure the project will meet the substantive goals of CEQA. Thus, while timber harvest plan review is designed to be less time consuming than the

\begin{itemize}
  \item officials, it is a document of accountability. If CEQA is followed scrupulously, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. People v. County of Kern, 39 Cal. App. 3d 830, 842, 115 Cal. Rptr. 67, 75 (1974); \textit{CAL. ADMIN. CODE} tit. 14, § 15003(e) (1983). "The EIR is to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." \textit{CAL. ADMIN. CODE} tit. 14, § 15003(d) (1983).
  \item The section 21080.5 exemption is not all-encompassing; rather, agencies are only exempt from chapters 3 and 4 of CEQA relating to the EIR process. The rest of CEQA still governs these exemptions. \textit{CAL. PUB. RES. CODE} § 21080.5(c) (West Supp. 1989); Environmental Protection Information Center v. Johnson, 170 Cal. App. 3d 604, 616-18, 216 Cal. Rptr. 502, 509-11 (1985).
  \item \textit{Id.}
  \item \textit{CAL. ADMIN. CODE} tit. 14, § 15111(a)(1), (2), (3) & (b)(2) (1986) (setting forth procedures that "enable the lead agency to comply with both the permit statute and CEQA") (emphasis added).
  \item \textit{CAL. ADMIN. CODE} tit. 14, § 15111 (1982); \textit{Environmental Protection Information Center, 170 Cal. App. 3d at 620, 216 Cal. Rptr. at 512 ("While section 21080.5 may allow . . . abbreviated project plans instead of full-blown EIRs, it does not except the industry from adhering to the broad policy goals of CEQA . . . and to CEQA's substantive standards designed to fulfill the act's goal of long-term preservation of a high-quality environment for the citizens of California.")}; Gallegos v. Board of Forestry, 76 Cal. App. 3d 945, 952-54, 142 Cal. Rptr. 86, 90-91 (1978).
\end{itemize}
EIR process, the Department of Forestry and applicants to harvest timber on private lands in California have been required to comply with the overall intent of CEQA.

The failure of the Forest Practice Rules to provide either for adequate notice and distribution or for responses to all comments prevents the Rules from meeting the conditions set forth in CEQA Guideline section 15111. This provision was promulgated to address specifically how projects requiring short time periods for approval can achieve simultaneously the goals of CEQA and subsidiary permit statutes such as a timber harvest plan. Although statutory interpretation traditionally holds that an administrative agency is "entitled to deference when interpreting policy in its field of expertise," and the Department of Forestry is accorded deference in its interpretation of timber harvest plan implementation, the judiciary must ensure that the plans comply with the intent of CEQA. "Moreover, [courts] should construe every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." The Forest Practice Rules should be construed with reference to each of the conditions set forth in the CEQA Guidelines to fulfill the exemption requirements as well as the overall substantive intent of CEQA.

The California Supreme Court has not determined whether the Guidelines are binding interpretations of CEQA. Lower courts have held, however, that at a minimum, the judiciary should afford great weight to the Guidelines except when a provision is clearly "erroneous or unauthorized" under CEQA. When administrative rules or regul-

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118. CAL. ADMIN. CODE tit. 14, § 15111 (1986), implements the statutory requirement of CEQA that "[t]he guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a 'significant effect on the environment.' " CAL. PUB. RES. CODE § 21083 (West 1986). A subsidiary permit statute is a statutory exemption to CEQA that has been approved by the Secretary of Resources as required in CAL. PUB. RES. CODE § 21080.5 (West Supp. 1989).

119. Norton v. Agricultural Labor Relations Bd., 26 Cal. 3d 1, 29, 603 P.2d 1306, 1322, 160 Cal. Rptr. 710, 726 (1979); see also Phelps Dodge Corp. v. Labor Bd., 313 U.S. 177, 194 (1941) (an administrative agency is entitled to deference when interpreting policy in its field of expertise).

120. "It is fundamental in statutory construction that courts should ascertain the intent of the Legislature so as to effectuate the purpose of the law." Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 3d 801, 813-14, 523 P.2d 617, 624, 114 Cal. Rptr. 577, 584 (1974) (citing California Toll Bridge Auth. v. Kuchel, 40 Cal. 2d 43, 53, 251 P.2d 4, 9 (1952); Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 802, 151 P.2d 505, 508 (1944)).

121. Clean Air Constituency, 11 Cal. 3d at 814, 523 P.2d at 624-25, 114 Cal. Rptr. at 584-85.

122. See Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 391 n.2, 764 P.2d 278, 282 n.2, 253 Cal. Rptr. 426, 430 n.2 (1988).

123. Rural Landowners Ass'n v. City Council, 143 Cal. App. 3d 1013, 1022, 192 Cal.
tions "alter or amend the statute or enlarge or impair its scope" they "are void and courts not only may, but it is their obligation to strike down such regulations."124

Because the administrative rules125 established by the Board of the California Department of Forestry do not provide for sufficient notice to allow adequate public participation the Forest Practice Rules alter CEQA and impair its scope. The judiciary must therefore strike down the conflicting requirements and look to CEQA for the proper notice and response requirements in processing the timber harvest plan.126 It is clear from the statutes as well as judicial interpretation that if traditional statutory construction and analysis is applied to CEQA, the same analysis should control timber harvest plan review. Current judicial interpretation, however, is far from settled.

B. Judicial Interpretations Hold that the Timber Harvest Plan Exemption is Governed by the Overall Intent of CEQA

The California Legislature enacted the FPA, the EIR exemption, and Forest Practice Rules in response to various decisions by the judiciary. The trial court decision in Natural Resources Defense Council, Inc. v. Arcata National Corp.127 held that the timber harvest plan review process is subject to CEQA.128 The Arcata129 opinion did not consider fully

Rptr. 325, 330 (1983) (citing City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 530, 160 Cal. Rptr. 907, 911 (1979)).


Under the maxim expressio unius est exclusio alterius, exemptions specified in the statute prevent additional exemptions from being implied or presumed, absent a clear legislative intent to the contrary. [Citations omitted.] An examination of the specific exemptions in the statutory scheme of CEQA reveals no legislative intent contradicting that maxim, and if anything strengthens the maxim's applicability and the conclusion that save for the exempted provisions, CEQA applies to the FPA and Forestry Rules.

125. CAL. ADMIN. CODE tit. 14, §§ 1037.7, 1037.8 (1986).

126. See supra notes 55-61 and accompanying text for the EIR notice and response requirements.


128. The Arcata plaintiffs successfully brought a writ of mandate to compel the state forester to set aside three timber harvest plans submitted without accompanying EIRs and to obtain a judicial declaration that CEQA's EIR requirements apply to timber harvest plans. Arcata, 59 Cal. App. 3d at 964, 134 Cal. Rptr. at 175.

129. Id. at 973-77, 134 Cal. Rptr. at 180-83.
the scope of CEQA's impact on the processing of timber harvest plans. It did state, however, "we entertain no doubt that the two acts in question are not in conflict, but rather supplement each other and, therefore, must be harmonized."\textsuperscript{130}

The Secretary of Resources certified the timber harvest plan review process as one that meets EIR exemption requirements on January 6, 1976.\textsuperscript{131} Neither the statutes nor the numerous cases that continue to refer to the requirement that the two acts be implemented in concert\textsuperscript{132} have clearly delineated the actual scope of the exemption. Likewise, the exemption has never been fully considered in an appellate opinion. Rather, California appellate courts have addressed this matter on a fact-specific basis alone.

In *Environmental Protection Information Center, Inc. v. Johnson*\textsuperscript{133} (EPIC), the First District Court of Appeal held that the timber harvest plan exemption did not relieve the plan review process from demonstrating to the public a consideration of cumulative environmental effects that would be caused by the proposed logging.\textsuperscript{134} The EPIC court reiterated the *Arcata*\textsuperscript{135} holding that CEQA applies to the timber harvest plan review process to the extent it has not been exempted. With the exception

\textsuperscript{130} Id. at 965, 131 Cal. Rptr. at 176.

\textsuperscript{131} CAL. ADMIN. CODE tit. 14, § 15251(a), (f) (1976). Pursuant to section 21080.5 of the California Public Resources Code, timber operations subject to the FPA are provided a limited exemption as a "certified regulatory program" from Chapters 3 and 4 (sections 21100-21155) and section 21167 of CEQA. Chapters 3 and 4 specify the contents of an EIR, while section 21167 specifies the procedure for challenging environmental impact reports. Except for these sections, all other provisions of CEQA and the CEQA Guidelines apply to certified programs under section 21080.5, including timber harvest plan review. Environmental Protection Information Center v. Johnson, 170 Cal. App. 3d 604, 616, 216 Cal. Rptr. 502, 510-11 (1985).


\textsuperscript{133} 170 Cal. App. 3d at 604, 216 Cal. Rptr. at 502.

\textsuperscript{134} Id. at 625, 216 Cal. Rptr. at 516. The EPIC plaintiffs filed a writ of mandate to set aside an approved timber harvest plan that had failed to consider the cumulative impact of foresting a 75-acre grove of old-growth redwoods containing a Native American archaeological site. The EPIC court held that the timber harvest plan exemption is not a "blanket exemption" from CEQA, *id.* at 616, 216 Cal. Rptr. at 509, and that it is a prejudicial abuse of discretion to fail to have a window of 10 days from the date of approval before a notice of approval that includes a response to significant environmental points is made available to the public, CAL. ADMIN. CODE tit. 14, § 1037.8 (1983). *Environmental Protection Information Center*, 170 Cal. App. 3d at 624, 216 Cal. Rptr. at 515.

of asserting that the CEQA Guidelines govern consideration of cumulative impact, the court did not further clarify this issue.

The Sixth District Court of Appeal, in *Laupheimer v. State*, rejected *EPIC*'s holding that the CEQA Guidelines governing cumulative impact apply to the timber harvest plan and held that the CEQA Guidelines have limited application to the timber harvest plan review process. The *Laupheimer* court held that timber harvest plan review is governed by the rules of the Board of Forestry, and while "cumulative impact" issues raised during the review process must be considered, the consideration does not need to be of the detailed nature suggested by the *EPIC* court. The *Laupheimer* court did not go so far, however, as to say that the logging industry is exempt from the broad environmental concerns expressed in CEQA.

With respect to the requirements of an adequate timber harvest plan, the First District's decision in *EPIC* and the Sixth District's decision in *Laupheimer* arrive at completely different results. Given that the California Supreme Court has declined to consider the issue, litigants attempting to protect the environment through similar litigation should carefully hone their arguments to avoid the *Laupheimer* result.

III. Timber Harvest Plan Review Procedures and the Due Process Right To Be Free from Arbitrary Adjudicative Procedures

When a person is deprived of a statutorily conferred benefit, such as the right to have public comments addressed before a timber harvest plan is certified or the requirement that the Director give detailed consideration to the cumulative impact of cutting old-growth forest, California

136. *Environmental Protection Information Center*, 170 Cal. App. 3d at 625, 216 Cal. Rptr. at 516 ("Since CEQA applies to the THP evaluation and approval process, it follows that CDF . . . [is] required by law . . . to consider the impact of cumulative effects . . . . The failure to consider cumulative impact was a prejudicial abuse of discretion.").


139. *Laupheimer*, 200 Cal. App. 3d at 466, 246 Cal. Rptr. at 95 (the Department of Forestry need only "have looked for and . . . assessed potential cumulative environmental effects").

140. *Id.* at 462, 246 Cal. Rptr. at 93 (The Department of Forestry "must consider each timber harvesting plan in its full environmental context and not in a vacuum . . . the importance of seeing the entire environmental picture is unaffected by labels developed under CEQA. The relevant question will be whether, in a given case, Forestry has adequately considered the entire relevant environmental picture.").

141. *Id.* at 440, 246 Cal. Rptr. at 82 (review denied Jun. 29, 1988).
constitutional due process analysis must start with an assessment of what procedural protections are mandated in light of the governmental and private interests at stake. The due process safeguards required for protection of an individual’s statutory interests must be analyzed in the context of the principle established in *People v. Ramirez* that “freedom from arbitrary adjudicative procedures is a substantive element of one’s liberty.”

The procedures followed by the Board of Forestry in the timber harvest plan review process fail to satisfy this basic requirement of due process. These rules do not provide the public with an opportunity to respond to the grounds for the timber harvest plan approval before a final decision. The *Ramirez* court requires that before a final decision is made the person(s) whose liberty interest in freedom from arbitrary adjudicative procedures is at stake must be given a statement of the grounds for the decision, access to the information considered in reaching the decision, notice of the right to respond, and an opportunity to respond if he or she elects to do so. A judicial hearing that may be ob-

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142. *People v. Ramirez*, 25 Cal. 3d 260, 264, 599 P.2d 622, 624, 158 Cal. Rptr. 316, 318 (1979). Ramirez was convicted of a drug offense and committed as an outpatient for treatment. Two years after his drug conviction he was arrested for disturbing the peace and resisting arrest. Ramirez pleaded guilty to the first charge and the second was dropped. Because the Director of Corrections found Ramirez was “not a fit subject for confinement or treatment” in the center, the defendant’s commitment for treatment was terminated and criminal proceedings on the drug offense were resumed. The California Supreme Court held that due process entitles a patient-inmate of a California Rehabilitation Center an opportunity to respond to an exclusion prior to a final exclusion decision. The court based its analysis on the due process clause of the California Constitution (article I, sections 7(a) and 15) and held that application of the clauses must be determined “in a context of the individual’s due process liberty interest in freedom from arbitrary adjudicative procedures.” Thus, when a person is deprived of a statutorily conferred benefit, due process analysis must start “with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake.” *Id.* at 268, 599 P.2d at 626, 158 Cal. Rptr. at 320.


144. *Ramirez*, 25 Cal. 3d at 268, 599 P.2d at 627, 158 Cal. Rptr. at 320.


146. CAL. ADMIN. CODE tit. 14, § 1037.8 provides for the Director to delay notifying the public of timber harvest plan approval for ten days from the date of approval.

tained only after timber harvest plan approval\(^{148}\) is too late to prevent the deprivation of the public's interest in protection of environmental values. Thus, current implementation of the Forest Practice Rules deprives the public of its procedural as well as substantive right to freedom from arbitrary adjudicative procedures.

The critical failure of due process in the current review procedure employed by the Department of Forestry is that logging may commence after a timber harvest plan is approved, but before the public is aware of the grounds for approval. This flawed process impedes the public's access to judicial review of the Department's decision. To satisfy the constitutional requirements of due process, the Department of Forestry must prohibit the commencement of logging under an approved timber harvest plan until a notice of conformance has been issued informing the public of the grounds for approval and allowing the public time to challenge the decision.\(^{149}\) This procedure will allow the public to seek a judicial hearing to preserve its rights and does not entail additional fiscal or administrative burdens. At a minimum, the grounds for approval must be made available at the time of approval and before timber harvesting may commence.

A. What Procedural Protections are Constitutionally Required?

The California Constitution requires that persons who have a fundamental right, significant interest, or expectancy interest in a statutorily created benefit be provided procedural due process before they are deprived of that right or interest.\(^{150}\) Although the procedural protections vary depending on the interest, each of the interests requires procedural due process.

**(1) Fundamental Right**

The California Constitution,\(^{151}\) coupled with CEQA's express legislative intent to encourage public involvement at every stage of the review process,\(^{152}\) may give California citizens a fundamental interest in\(^{153}\) pro-

\(^{148}\) CAL. PUB. RES. CODE § 4514.5 (West 1984) (alerts persons to their right to commence an action for writ of mandate).

\(^{149}\) Cf. CAL. ADMIN. CODE tit. 14, § 1037.8 (1986). The notice of conformance currently requires only that the Director include a written response to "significant environmental points raised during the evaluation process."

\(^{150}\) See infra notes 151-88 and accompanying text.

\(^{151}\) CAL. CONST. art. I, §§ 7(a), 15.

\(^{152}\) See supra notes 51-61 and accompanying text.

\(^{153}\) People v. Ramirez, 25 Cal. 3d 260, 268, 599 P.2d 622, 627, 158 Cal. Rptr. 316, 320 (1979) (granting the public a substantive right to freedom from arbitrary adjudicative proce-
tecting the environment from destructive timber harvesting. Legislative recognition of this fundamental interest is embodied in the legislative findings of CEQA. This interest is also recognized in the Z'berg-Nejedly Forest Practice Act of 1973. When there is a fundamental right, no allegation of "beneficial interest" is necessary in order to enforce a statutory duty or public right. Hence, a fundamental right is

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155. CAL. PUB. RES. CODE § 21000 (West 1986):

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.

(b) It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.

(c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.

156. Id. § 4512:

(b) The Legislature further finds and declares that the forest resources and timberlands of the state furnish high-quality timber, recreational opportunities, and aesthetic enjoyment while providing watershed protection and maintaining fisheries and wildlife.

(c) The Legislature thus declares that it is the policy of this state to encourage prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations.

See also Sierra Club v. California Coastal Conservation Comm'n, 58 Cal. App. 3d 149, 155, 129 Cal. Rptr. 743, 747 (1976) (policy statement of California Coastal Zone Conservation Act established fundamental right in public that the coastal zone will be preserved and maintained in its present state).


"Where the question is one of public right and the object . . . is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced" . . . . The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.
sufficient to require due process of law before the person who is holding such a right is deprived of his interest in it.

(2) Significant Interest

Even if the courts fail to recognize the "fundamental right" of the public, the fact that the public has a "significant interest" in being free from "arbitrary adjudicative procedures"158 accords it due process rights. California judicial interpretation of "significant interest" is varied.159 Adjudicatory decisions by state agencies that threaten to impair a significant interest are subject to the due process clauses and requirements of both the United States and California Constitutions.160 The government may not deprive its citizens of a significant interest without adequate notice and an opportunity to respond to the proposed decision before such deprivation takes place.161

(3) Laupheimer and Due Process

In a recent case, Laupheimer v. State,162 homeowners, joined by a county and water district, challenged two timber harvest plans that had been approved by the Department of Forestry. The plaintiffs argued that the plans were illegal because the Forest Practice Act and its Rules violate the Federal and California constitutions and CEQA.163 Although the Laupheimer decision takes a very restrictive view of the public's rights under the Forest Practices Act, it leaves open a slight possibility

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159. A significant interest has been found in the state's right to protect gravely ill children whose parents refuse treatment for them on religious grounds, Walker v. People, 47 Cal. 3d 112, 141, 763 P.2d 852, 873, 253 Cal. Rptr. 1, 20 (1988); a defendant's right to have faith in her court appointed counsel, People v. Crandell, 46 Cal. 3d 833, 860, 760 P.2d 423, 435, 251 Cal. Rptr. 227, 239 (1988); the public interest in promoting the efficient administration of justice by discouraging baseless lawsuits, City of Long Beach v. Bozek, 31 Cal. 3d 527, 531, 645 P.2d 137, 139, 183 Cal. Rptr. 86, 88 (1982); an employer's interest in protecting its unemployment insurance reserve account from erroneous charges, Interstate Brands v. Unemployment Ins. Appeals Bd., 26 Cal. 3d 770, 608 P.2d 707, 163 Cal. Rptr. 619 (1980); a person's opportunity to be heard prior to the removal of statutorily provided benefits, People v. Ramirez, 25 Cal. 3d 260, 265, 599 P.2d 622, 624-25, 158 Cal. Rptr. 316, 318-19 (1979); and the public's interest in seeing that legal strictures are properly enforced, Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles, 23 Cal. 3d 917, 935-36, 593 P.2d 200, 209-10, 154 Cal. Rptr. 503, 512-13 (1978).
161. Ramirez, 25 Cal. 3d at 268, 599 P.2d at 627-28, 158 Cal. Rptr. at 320 ("freedom from arbitrary adjudicative procedures is a substantive element of one's liberty").
163. Id. at 448, 246 Cal. Rptr. at 84.
that a petitioner may make a factual showing that her due process rights have been violated in the approval of a timber harvest plan. The Laupheimer court said, "[a] directly affected member of the public might well be able, in the circumstances of a given case, to demonstrate that he or she had been denied procedural due process notwithstanding full compliance with all applicable statutes and regulations."\textsuperscript{164} To the extent that Laupheimer may be read to suggest that members of the public have no interest requiring due process protection, it is inconsistent with California law.

The Laupheimer court's reliance upon Mathews v. Eldridge\textsuperscript{165} illustrates that the court, in ignoring California Supreme Court jurisprudence, placed too much emphasis on federal constitutional law. In Mathews, the United States Supreme Court established a three-part balancing test to determine whether a hearing is required before a person's interest may be deprived.\textsuperscript{166} The test involves weighing the importance of the "private interest that will be affected by the official action" and the value of specific procedural safeguards to protect that interest against the governmental interest in fiscal and administrative efficiency.\textsuperscript{167} The Laupheimer court held that because the Department of Forestry "has as a practical matter the power to convene a public hearing, on adequate notice to all apparently affected persons, whenever appropriate,"\textsuperscript{168} consideration of whether the Act and the Forest Practice Rules are defective in protecting the public's due process rights to predeprivation notice is abstract and need not be assessed. The court glossed over the procedural due process issue by terming it abstract and therefore unidentifiable. The court concluded that because a public hearing could be held, at the Director's discretion, sufficient due process protection is provided. The Laupheimer court failed, however, to mention the Ramirez due process test.\textsuperscript{169} In light of the fact that the Ramirez due process approach serves to further refine California constitutional guarantees and provides greater protections than those available under the United States Constitution, the Laupheimer court failed to apply the relevant approach in California.

\begin{footnotes}
\item[164.] Id. at 456, 246 Cal. Rptr. at 89. "We conclude only that the Act and Rules establish procedures which are adequate, as a matter of procedural due process in the abstract context in which appellants have chosen to attack them." Id. at 457, 246 Cal. Rptr. at 89.
\item[165.] 424 U.S. 319 (1976) (Social Security benefits are statutorily created property that may not be taken without an opportunity to be heard).
\item[166.] Id. at 334-35.
\item[167.] Id.
\item[168.] Laupheimer, 200 Cal. App. 3d at 457, 246 Cal. Rptr. at 89.
\item[169.] See supra note 142.
\end{footnotes}
The United States Constitution sets forth the minimal requirements a state must meet.\textsuperscript{170} California procedural due process jurisprudence differs from and expands upon federal due process analysis. The application of the due process clause of the California Constitution\textsuperscript{171} must be determined in the context of the individual's interest in freedom from arbitrary adjudicative procedures.\textsuperscript{172} The \textit{Ramirez} approach expands upon \textit{Mathews} and federal due process jurisprudence by requiring courts to "evaluate the extent to which procedural protections can be tailored to promote more accurate and reliable administrative decisions in light of the governmental and private interests at stake."\textsuperscript{173} The analytical approach set forth in \textit{Ramirez} guides state due process analysis and requires that the California Department of Forestry tailor its rules to provide adequate opportunity for public response to the Department of Forestry's proposed timber harvest plan decisions and the grounds for them prior to timber harvest plan approval.

The \textit{Laupheimer} court not only failed to apply the appropriate California constitutional analysis, but it also wrongly applied the United States analytical approach. Even if the \textit{Mathews} test were the proper analysis, because the procedures held constitutional in \textit{Mathews}\textsuperscript{174} allowed for welfare recipients to respond to a proposed termination of benefits prior to the termination decision, the \textit{Laupheimer} court should have required the Department to have provided the public with the grounds for its decision before commencement of timber harvesting. The Department's current procedures fail to meet even this minimal standard of due process.

\textbf{B. The State Must Provide Substantial Evidence of Grounds for Depriving the Public of Their Interest}

The current procedural approach to authorizing timber harvest plans permits logging to commence immediately upon approval and before the public has been informed of the grounds for approval. This approach violates state and federal due process. In order to satisfy the

\textsuperscript{170} Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1979) (citing Cooper v. California, 368 U.S. 58, 62 (1967)) (A state may "exercise its . . . sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.").

\textsuperscript{171} CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws"), § 15 ("Persons may not . . . be deprived of life, liberty, or property without due process of law.").


\textsuperscript{173} Id. at 267, 599 P.2d at 626, 158 Cal. Rptr. at 320.

constitutional requirements of due process of law, the Department of Forestry must issue a notice of conformance that informs the public of the grounds for approval before logging is permitted to commence. This procedure would allow the public time to seek a judicial hearing to preserve their rights and does not entail additional fiscal or administrative burdens.

As held in EPIC and reiterated in Laupheimer, the timber harvest plan is within the scope of CEQA. CEQA requires that a conclusion be supported by substantial evidence made explicit in the record. The requirement that state and local agencies provide substantial evidence to support their denial of benefits is common to statutory constructs. In Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board, an agricultural employer challenged as unconstitutional the statutorily prescribed "substantial evidence" standard of review of Agricultural Labor Relations Board decisions. The California Supreme Court held that the Agricultural Labor Relations Act and the substantial evidence standard were constitutional precisely because the provisions for adequate notice and evidentiary hearings before the Agricultural Labor Relations Board guaranteed procedural due process.

The California Department of Forestry is a statewide agency, whose procedural requirements are similar to those provided by the Agricultural Labor Relations Board including "notice, written pleadings, evidentiary hearings . . . and a requirement that orders be accompanied by findings based on the preponderance of the reported evidence." Hence, even if the timber harvest plan were beyond the scope of CEQA,

175. CAL. ADMIN. CODE tit. 14, § 15384(a) (1986) ("substantial evidence . . . means enough relevant information and reasonable information . . . that a fair argument can be made to support a conclusion, even though other conclusions might also be reached"). See also CAL. PUB. RES. CODE § 21083 (West 1986) (directing the Office of Planning and Research (OPR) to develop guidelines with objectives and criteria for orderly evaluation of projects), and § 21087 (OPR shall review these guidelines periodically and propose changes or amendments).


177. As the court stated: "[A] statute might pass constitutional muster if it were to: (1) provide for judicial review of fact findings only by the standard whether they are supported by substantial evidence in the light of the whole record, and (2) guarantee administrative due process." Id. at 344, 595 P.2d at 584, 156 Cal. Rptr. at 6.

178. "We therefore hold that the Legislature may accord finality to the findings of a statewide agency that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair labor practice proceedings . . . ." Id. at 346, 595 P.2d at 585, 156 Cal. Rptr. at 7.

179. Id. at 345, 595 P.2d at 584, 156 Cal. Rptr. at 6; CAL. ADMIN. CODE tit. 14, §§ 895-1112 (1989); for the ALRA requirement, see CAL. LAB. CODE §§ 1160.2, 1160.3 (West 1986); see also notes 81-109 and accompanying text.
the notice of conformance still would have to be supported by substantial evidence in the record under a typical statutorily created benefit analysis.

The timber harvest plan is within the scope of CEQA, however; and the CEQA Guidelines that require an agency's approval of an EIR to "be supported by substantial evidence in the record" also apply to timber harvest plans. The Guidelines define the standard for "substantial evidence" as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion . . . . Mere uncorroborated opinion or rumor does not constitute substantial evidence." Because the California Department of Forestry procedures do not meet this standard, the failure to use the substantial evidence test in judicial review of the Department of Forestry findings is unconstitutional. To make these procedures constitutional the substantial evidence test must be applied.

Even if the public's interest in a "quality environment" is deemed a mere expectancy (and not a significant interest as suggested above), California jurisprudence requires a response to all public comments before a timber harvest plan is granted. In Saleeby v. State Bar of California the California Supreme Court applied the Ramirez approach in a case brought by an aggrieved client who petitioned the State Bar Security Fund for reimbursement for monies paid to counsel who provided ineffective and inadequate assistance. The petitioner was denied reimbursement without a hearing. In the client's challenge to the State Bar Rules, the California Supreme Court found that under the Bar's rules "[a]n applicant is entitled to present information in support of his claim at the time he makes his request, but he is not entitled to any further information until the Bar makes its final decision." The court held that such procedures violated basic due process although it construed the petitioner's interest as akin to an "expectancy" rather than a "right." The Court further noted that California has "expanded upon the federal analytical base [of due process] by focusing on the administra-

180. Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 407, 764 P.2d 278, 293, 253 Cal. Rptr. 426, 441 (1988); CAL. ADMIN. CODE tit. 14, § 15091(b) (1986).
181. CAL. ADMIN. CODE tit. 14, § 15384(a) (1986).
182. CAL. PUB. RES. CODE § 21000(a) (West 1986).
185. 39 Cal. 3d at 566, 702 P.2d at 535, 216 Cal. Rptr. at 378. This description applies to the Board's current administrative procedures, whereby petitioner and others may comment on the timber harvest plans submitted by timber companies, but are not allowed to respond to the Board's proposed decision and the grounds for it.
186. Id.
The court concluded that the Bar’s procedures must at a minimum “give petitioner and other applicants an opportunity to respond to the Bar’s proposed disposition of the request for reimbursement” and “afford applicants a reasonable opportunity to raise objections to the particular action the Bar desires to take.”

Because the public’s interest in the protection of environmental values from the harvest of timber is at least as great as a mere expectancy, procedural due process protection must be granted.

IV. The Road to Reform

There are a number of steps the California Legislature can and should undertake to reform the vague language regarding the EIR exemption. First, the California Legislature should amend the Guidelines to provide for delivery of the notice of conformance to the timber harvest applicant concurrently with the Board’s responses to public comments. This procedure would allow the public to know the grounds for approval before trees may be cut and will provide an opportunity to obtain judicial review before timber harvesting and irreparable harm to the environment takes place.

Second, the legislature should amend section 1037.8 of the California Administrative Code to require the Director of Forestry to indicate “reasons for determining that various effects of a project are not substantial and consequently have not been discussed in detail.” This change also would inform the public of the basis for the Director’s decision at the time the applicant commences lumbering. The Code also should provide for a waiting period from the date a plan is approved and the time action on the plan may commence, during which the Director’s responses may be distributed.

Third, the legislature should require periodic recertification of California Department of Forestry’s regulatory program to ensure that the timber harvest plan review process continues to meet the EIR exemption requirements set forth in section 21080.5 of the California Public Resources Code. There is an extremely short statute of limitations for objections to the Secretary’s certification finding. If the circumstances

187. Id.
188. Id.
190. CAL. PUB. RES. CODE § 21100 (West 1986).
191. There is a thirty-day statute of limitations on challenges to the Secretary’s certification of exempt programs. Id. § 21080.5(g)-(h) (West 1986 & Supp. 1989).
192. Id. § 21080.5(f) (West Supp. 1989).
of timber harvesting in place today\textsuperscript{193} existed at the time the Secretary certified the timber harvest plan review process, it is questionable whether the Secretary would have certified the program. Thus, the Secretary should review again the timber harvest plan process and possibly establish a balancing test to determine whether timber harvest plan review considers cumulative effects in sufficient depth to meet CEQA requirements. A balancing test might weigh the policy of promoting the productivity of timberlands with a thorough consideration of the cumulative environmental impact of their harvest.

Finally, if the legislature fails to amend these statutes to delineate more clearly the requirements and provide due process to the public, the California Supreme Court should accept this matter for review. The supreme court, in its analysis of the situation, should require that "all action necessary to protect, rehabilitate, and enhance the environmental quality of the state\textsuperscript{194} apply to timber harvest plan preparation and review \textit{and} that the public be ensured grounds upon which to challenge approval of a timber harvest plan by requiring substantial evidence in the record to support the grounds for approval.

**Conclusion**

Currently, CEQA is the most viable vehicle for relief from environmental pillage in California. The legislative intent of CEQA is to maintain a quality environment by making the "long-term protection of the environment . . . the guiding criterion in public decisions."\textsuperscript{195}

Despite the timber harvest plan exemption from the EIR requirement, the statutes and cases agree that the timber industry still must comport with CEQA and the EIR Guidelines. Because the timber harvest plan must be construed within CEQA's framework, the CEQA requirement that the public be involved at every stage of the review and determination process also applies to the timber harvest plan.

The people of California have a constitutional liberty interest in freedom from arbitrary adjudication\textsuperscript{196} of statutorily created rights. To satisfy the constitutional due process requirements, the Department of Forestry must not permit logging to commence under an approved timber harvest plan until a notice of conformance that informs the public of the grounds for approval has been issued. In the alternative, the legisla-

\textsuperscript{193} See supra notes 1-6 and accompanying text.
\textsuperscript{194} CAL. PUB. RES. CODE § 21001(a) (West 1986).
\textsuperscript{195} Id. § 21001(d).
ture should amend section 1037.8 of the California Administrative Code to require the Director of Forestry to indicate "reasons for determining that various effects of a project are not substantial and consequently have not been discussed in detail." In addition, the legislature should review the Secretary of Resources finding that the timber harvest plan meets the EIR exemption requirements as laid out in section 21080.5 of the California Public Resources Code. Finally, if the legislature fails to amend these statutes to more clearly delineate their requirements and provide due process to the public, the California Supreme Court should accept this matter for review.

197. CAL. PUB. RES. CODE § 21100 (West 1986).