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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CALIFORNIA OAK FOUNDATION et al,
Plaintiffs and Appellants,

v.

A096363

DEPARTMENT OF FORESTRY AND
FIRE PROTECTION et al.,
Defendants and Respondents

(San Francisco County
Super. Ct. No. 314859

CALIFORNIA CATTLEMEN'S
ASSOCIATION,
Intervenor and Respondent.

This case presents the question of whether the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Resources Code, § 4511 et seq.)(the Forest Practice Act or Act), compels the State Board of Forestry and Fire Protection (the Board) to list and regulate various oak species as "commercial species." We conclude that it does not; and accordingly, we affirm the judgment of the trial court.

I. BACKGROUND AND PROCEDURAL HISTORY

A. *The Forest Practice Act and Implementing Regulations*

The Forest Practice Act and its implementing regulations, California Code of Regulations, title 14, section 895 et seq., govern timber harvesting in California. In enacting the Forest Practice Act, the Legislature declared it the policy of the 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 generation." (Pub. Resources Code, ¹ § 4512, subd. (c).) The Legislature also stated its intent to "create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to assure that : [¶] (a) Where feasible, the productivity of timberlands is restored, enhanced, and maintained. [¶] (b) The goal of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment." (§4513.)

The Forest Practice Act directs the Board to adopt forest practice rules and regulations "to assure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, and wildlife, and water resources, including, but not limited to, streams, lakes, and estuaries." (§ 4551.) Those rules and regulation must be made in accordance with the policies of the Act and pursuant to Government Code section 11340 et seq. For purposes of this appeal, the relevant provision is Government Code section 11342.2, which provides: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

The rules and regulations adopted by the Board must be based on "a study of the factors that significantly affect the present and future condition of timberlands" (§4552.) In formulating the rules, the Board must "consult with, and carefully evaluate the recommendations of, the [Department of Forestry and Fire Protection], the district technical advisory committees, concerned federal, state, and local agencies, educational institutions, civic and public interest organizations, and private organizations and individuals." (§4553.)

¹ All further statutory references are to the Public Resources Code, unless otherwise noted.

The Forest Practice Act requires approval for certain activities. Those who wish to conduct "timber operations" must submit a timber harvest plan to the Department of Forestry and Fire Protection (the Department). (§4581.) In addition, those wishing to convert "timberland" to a use other than timber must first apply for a timberland conversion permit. (§4621.)

The Act defines " '[t]imber operations' " to mean "the cutting or removal or both of timber or other solid wood forest products, including Christmas trees, *from timberlands for commercial purposes*, together with all the work incidental thereto" (§4527, italics added.) " 'Commercial purposes' " include "(1) the cutting or removal of trees which are processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade, or (2) the cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the growing of timber which are subject to the provisions of Section 4621, including, but not limited to, residential or commercial developments, production of other agricultural crops, recreational developments, ski developments, water development products, and transportation project." (*Ibid.*)

The definition of the term "timberlands" is crucial to this appeal. The Act provides: " 'Timberland' means land, other than land owned by the federal government and land designated by the board as experimental forest land, which is available for, and capable of, growing *a crop of trees of any commercial species* used to produce lumber and other forest products, including Christmas trees. *Commercial species shall be determined by the board on a district basis after consultation with the district committees and others.*" (§4526, italics added.)

Pursuant to this mandate, the Board adopted a regulation identifying the trees designated as commercial species. (Cal. Code Regs., tit. 14, § 895.1 (rule 895.1).) The regulation contains a separate list of commercial species for the Coast Forest District, the Northern Forest District, and the Southern Forest District. Each list is divided into group A and group B; the regulation provides that commercial species are "those species found in group A and those in group B that are found on lands where the species in group A are now growing naturally or have grown naturally in the recorded past." (*Ibid.*) Oak species are not found in group A for any of the tree districts. Certain oak species are

found, however, in group B for each of the districts. For the Coast Forest District and the Northern Forest District, group B contains Oregon white oak and California black oak; for the Southern Forest District, group B contains California black oak. (*Ibid.*)

B. Procedural History

Plaintiffs California Oak Foundation and Mountain Lion Foundation brought this action in the San Francisco Superior Court on September 5, 2000, seeking a declaration that defendants have a policy of failing to enforce the requirements of the Forest Practice Act with respect to timber operations on oak woodlands, and an injunction requiring defendants to discontinue this policy and institute a new policy "to review the clearing of oak woodlands and other non-commercial timber species on timberlands under the Timber Harvest Plan and Timberland Conversion Permit review process." The California Cattlemen's Association intervened in the action.

Plaintiffs filed a motion for summary judgment. They argued they were entitled to summary judgment based on four facts they claimed were undisputed: (1) oak trees that are not considered commercial species grow on millions of acres of oak woodlands in California; (2) due to the Board's definition of commercial species, owners of oak woods are not required to comply with the requirements for timber harvest plans or timberland conversion permits; (3) oak trees on oak woodlands are harvested for commercial purposes; (4) this harvesting has the potential for significant adverse impacts on forest resources. Defendants filed a cross-motion for summary judgment. On July 3, 2001, the court denied plaintiffs' motion for summary judgment and granted that of defendants. The court ruled the Board's regulation defining "commercial species" was a reasonable interpretation of the Forest Practice Act, within the scope of the Board's statutory duties, and reasonably necessary to effectuate the purposes of the Forest Practice Act. Accordingly, the trial court concluded, there was no triable issue of material fact. Judgment was entered for defendants. This appeal ensued.

II. DISCUSSION

A. Standard of Review

1. Review of the trial court's action

We review de novo the trial court's action granting defendants' motion for summary judgment. "After examining the facts before the trial judge on a summary

judgment motion, an appellate court independently determines their effect as a matter of law." (*Diep v. California Fair Plan Assn.* (1993) 15 Cal.App.4th 1205, 1207.) In doing so, "the appellate court applies the same legal standard as did the trial court. Code of Civil Procedure section 437c, subdivision (c), requires the trial court to grant summary judgment if no triable issue exists as to a material fact, and if the papers entitle the moving party to a judgment as a matter of law [¶] . . . [W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." *Ibid.*; accord, *PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579.590.)

2. Review of the Board's regulation

We review the action of the Board in promulgating rule 895.1 under a different standard, which is set out in *County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826. There, Division Two of the First Appellate District considered whether the Board had authority to promulgate a rule providing a "financial emergency" exception to the normal requirements for a timber harvest plan. (*Id.* at pp. 833-834.) The court stated, "[I]t is the board, and not the courts, that establishes forest policy. [¶] . . . [I]n the absence of an ambiguity, we will uphold the board's rules as they are written unless we find them to be beyond the board's authority. Citations.]" (*Id.* at p. 834, quoting *Public Resources Protection Assn. v. Department of Forestry & Fire Protection* (1994) 7 Cal.4th 111, 120.)

The court then considered the impact of Government Code section 11342.2, discussed above, which provides that no regulation is valid "unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statutes." The court stated: "The first of the two criteria for regulatory validity set out in Government Code section 11342.2 requires judicial construction of the claimed source of the agency's rulemaking authority The task of the reviewing court in this regard has been described as ' "decid[ing] whether the [agency] reasonably interpreted the legislative mandate." [Citation.]' (*Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 . . .) As was explained in *California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverages Control* (1988) 201 Cal.App.3d 100 . . ., "[w]here the language of the governing statute is intelligible to judges their task is simply to apply it,

whether that be language of substantive limitation or the boundaries of a delegation of rulemaking authority. Where the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of a statutory scheme to invoke, the judicial role "is limited to determining whether the [agency] has reasonably interpreted the power which the Legislature granted it." [Citation.] (*Id.* at p. 107.)" (*County of Santa Cruz v. State Bd. of Forestry, supra*, 64 Cal.App.4th at pp.834-835.) The attitude of the reviewing court in determining whether an agency has the authority to issue a challenged regulation has been described as one of " 'respectful nondeference.' " (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022 (*EPIC*), quoting *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982.)

When assessing whether a regulation is reasonably necessary to effectuate the purpose of the statute, the standard of review is more deferential. As stated by the court in *County of Santa Cruz v. State Bd. of Forestry, supra*, 64 Cal.App.4th at page 835, this standard "requir[es] only reasonability by the promulgating agency. 'In the review of quasi-legislative actions of administrative agencies, judicial review is limited to a determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law. [Citations.]' (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7 ...; accord, *California State Employees' Assn. v. Way* (1982) 135 Cal.App.3d 1059, 1065 ...) In considering whether the regulation is " 'reasonably necessary,' " 'the court will defer to the agency's expertise and is not to superimpose its own policy judgment on the agency in the absence of an arbitrary and capricious decision. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411)"

Finally, "the burden of proof is on the party challenging the regulation. 'The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant.' [Citations.] Thus, in this case the [challenger] has the burden of demonstrating that the evidence on which the [agency] relied does not reasonably support the regulation in light of the purposes of the statute." (*Credit Ins. Gen. Agents Assn. v. Payne, supra*, 16 Cal.3d at p. 657.)

B. The Board Was Authorized to Promulgate Rule 895.1

Based on the applicable standard of review, our first task is to determine whether rule 895.1 falls within the Board's delegated power. (See *Credit Ins. Gen. Agents Assn. v. Payne, supra*, 16 Cal.3d at p. 657.) Section 4526 provides, "[c]ommercial species shall be determined by the board on a district basis after consultation with the district committees and others." In rule 895.1, the Board determined which species are "commercial species" on a district basis. Plaintiffs do not claim the board failed to consult with district committees and other, as section 4526 requires. We see no reason to conclude that the rule's listing of commercial species does not fall within the Board's delegated power.

Plaintiffs claim, however, that the issue for this court is not whether the Board was authorized to promulgate a regulation listing commercial species, but whether the Board could properly *exclude* oaks from its listing of commercial species. According to plaintiffs, oaks are indisputably commercial species because they are used for commercial purposes; therefore, the board was *required* to include them as a commercial species. We disagree. Plaintiffs' true complaint is that the Board was mistaken in concluding that oaks (with the exception of those listed in group B, as mentioned above) are not commercial species. Despite plaintiffs' protestations, their action challenges the wisdom of rule 895.1, not whether the rule falls within the Board's authority.

Plaintiffs' reliance on *EPIC, supra*, 43 Cal.App.4th 1011 is misplaced. The court in *EPIC* considered the validity of a regulation issued by the Board excusing persons who owned three acres or less from having to comply with the requirement for a timber harvest plan. The enabling statute, section 4584, allowed the Board to exempt "any person engaged in forest management whose activities are limited to any of the following" (*EPIC*, at pp. 1022-1023.) The court concluded that, because the Legislature had specified directly and in detail what the Board could do regarding authorizing exemptions to the requirement of filing a timber harvest plan, the Board did not have the authority to materially broaden those exemptions by regulation. (*Id.* at p. 1023.)

Here, on the other hand, the Legislature expressly granted to the Board the authority to determine which types of trees should be considered commercial species. This authorization necessarily required the Board to exercise its discretion to include

some species and exclude others from the listing of commercial species. therefore, we conclude the first prong of Government Code section 11342.2 is met, and the Board acted within the boundaries of its rulemaking authority.

C. Rule 895.1 Is Reasonably Necessary to Effectuate the Statutory Purpose

Under the second prong of Government Code section 11342.2, a reviewing court must decide whether the administrative action was "reasonably necessary to effectuate the purpose of the enabling legislation." (*County of Santa Cruz v. State Bd. of Forestry, supra*, 64 Cal.App.4th at p. 837.) In deciding whether an agency's action meets this standard, we must determine whether the action is " 'arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law.' " (*Id.* at p. 835.)

The purposes of the Forest Practice Act are found in the language of the statute. There, the Legislature declared its intent that timberlands be regulated and used in order to "restore[], enhance[], and maintain[]" the productivity of timberlands, and that "[t]he goal of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment." (§4513.) The Legislature also directed the Board to adopt rules and regulations "to assure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, and wildlife, and water resources, including, but not limited to, streams, lakes, and estuaries." (§ 4551.) We must decide, then, whether plaintiffs have met their burden to show that rule 895.1 is arbitrary, capricious, or lacking in evidentiary support in light of these statutory purposes.

Plaintiffs argue that rule 895.1 is improper because woodland oaks are commercial species. They rely on large part on section 4527, which defines " '[t]imber operations,' " claiming this section compels the Board to include woodland oaks in its definition of commercial species. " 'Timber operations' " are defined to mean "the cutting or removal or both of timber or other solid wood forest products, including Christmas trees, from timberlands for commercial purposes 'Commercial purposes' includes (1) the cutting or removal of trees which are processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade, or (2) the cutting or removal of trees or other forest products during the conversion of timberlands to land uses other than the

growing of timber" (*Ibid.*) Plaintiffs argue that woodland oaks are used for fire logs and that they are on occasion removed in order to convert lands to other land uses. According to plaintiffs, because these uses are "commercial purposes" under section 4527, woodland oaks must be considered "commercial species" under section 4526.

The problem with this argument is that it proves too much. There is no indication that the Legislature intended the Board to list as a commercial species every type of tree that can be used for firewood or cleared to make way for development. If the Legislature had so intended, it could have said so. Instead, in deciding what species should be considered commercial, the Board could reasonably look to the legislative intent that the "*productivity of timberlands [be] restored, enhanced, and maintained,*" and that "[t]he goal of maximum sustained production of high-quality timber products [be] achieved," while giving consideration to conservation and economic values. (§ 4513, italics added.)

The evidence supports the conclusion that woodland oaks are not viewed as producing high-quality timber and that woodland oaks are frequently seen as a "weed" species. For instance, a 1986 paper prepared by the staff of the Board stated that there is no significant saw timber or furniture grade lumber industry for California hardwoods (including oak species), and that the California furniture industry instead relies on lumber imported from the Eastern United States or abroad. The same paper states, "historically, hardwoods have generally been regarded as weed species and government has even helped pay for their clearing." It also explained that the state of knowledge about regeneration of certain oak species was incomplete. Other evidence in the record indicates that hardwood-range lands have historically not been held for nontimbering uses; that hardwoods on these lands have been harvested primarily when clearing for ranching or development; that the owners of hardwood-range lands have historically tended to be ranchers, rather than timber growers; that while the demand for fuel wood increased in the 1970's and 1980's, the hardwood trees used for fuel were usually cleared for other purposes; and that the silvicultural knowledge of California's hardwood species (such as how to regenerate hardwoods) is limited.

The evidence also shows the Board took conservation values into account in deciding whether to list hardwood such as oaks as commercial species. The 1986 staff report explained that hardwoods have uses other than timber, such as viewsheds,

recreation, and wildlife uses. The report explained that governmental agencies do not agree among themselves about the proper approach to take with regard to hardwoods. As a result, it discussed various nonregulatory approaches that could be taken to address the issue of hardwoods, including increased communication to define joint approaches, research, monitoring, assessment, programs to increase compensation to landowners for leaving hardwoods, and increased landowner information.

At a 1987 meeting, the Board heard testimony and considered whether to regulate hardwoods.² It then adopted a policy stating in part: "While the Board believes that it has the authority and obligation under the Forest Practice Act to protect the hardwood resource, we conclude that it is premature to declare hardwoods as commercial species at this time. Some benefits may come from statewide regulation; however, the costs appear greater, both in dollars and in reduced responsiveness of local governments and landowners, than nonregulatory programs. [¶] The Board believes that the most promising and effective action to address problems related to regeneration, conversion, and wildlife habitat is an intensive educational program involving landowners, state agencies, and local governments, U. C. Extension, and interest groups. Improved communication between these entities can improve understanding and lead to faster issue resolution. And ultimately, if these approaches fail, the Board can still initiate regulations."³

Based on the evidence of the limited commercial use for California's hardwood species and the limited state of knowledge of how to regenerate hardwoods, we conclude the Board did not act unreasonably in declining to list most hardwoods as commercial species. Nor can we conclude the Board neglected to consider environmental factors. The record shows instead that the Board considered the wildlife habitat and other

² Some of this testimony came from a deputy attorney general, who had stated in an earlier memorandum to the Board his belief that the Board had the ability to regulate hardwood timber harvesting; that whether it did so depended on the Board's evaluation of hardwoods as a commercial species; and that if certain hardwood species met the test, the Board would sooner or later have to regulate those species. In light of our conclusion, discussed below, that the Board acted reasonably in deciding not to list woodland oaks as commercial species, this letter does not undermine the validity of rule 895.1.

³As a result, the Integrated Hardwood Range Management Program was developed as a cooperative effort among the University of California, the Department, and the Department of Fish and Game. In 1994, the Fish and Game commission and the Board adopted a joint policy on hardwoods, which established a hardwood conservation policy. That policy indicates that, on at least one occasion, during the early 1990's, the Board reviewed the need for statewide regulation of hardwoods and decided that such controls were not warranted at that time.

noncommercial values associated with hardwood species, and decided the best way to protect those values was to use an educational approach. In light of the evidence in the record, we cannot say the Board's action was arbitrary, capricious, or lacking in evidentiary support.

Plaintiffs' backup contention is that if the Board indeed has such broad authority to identify "commercial species," then section 4526 is unconstitutional as an unlawful delegation of legislative power. But plaintiffs mischaracterize the delegation of authority as "unlimited." We agree with plaintiffs that the Legislature may not leave the resolution of fundamental policy issues to others, and a delegation of legislative authority to an administrative agency must include adequate standards to guide the agency's resolution of the issue. (See *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190; see also *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 10-11.) Here, the Legislature has made the fundamental policy decision that commercial species should be regulated under the Forest Practice Act. It has also provided adequate standards to guide the Board in specifying commercial species; our Supreme Court has concluded that "[s]tandards sufficient for administrative application of a statute can be implied by the statutory purpose." (*Carson Mobilehome Park Owners' Assn. v. City of Carson, supra*, 35 Cal.3d at p. 190, quoting *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 168.) The statutory purposes quoted above adequately direct the Board's exercise of its discretion.

The parties cite *County of Santa Cruz v. State Bd. of Forestry, supra*, 64 Cal.App.4th 826, which upheld a regulation adopted by the Board, noting that in that case, the relevant statutory provision "set[] out no policies or standards restricting the Board's administrative discretion in defining the general term 'emergency.'" (*Id.* at p. 837.) Despite this language, however, the court did not uphold an exercise of unbounded discretion; instead, it concluded that "the Forest Practice Act's plain language envisions that the Board, in exercising its rulemaking function, will achieve a sound balance between the public interest in protecting and preserving one of California's most precious natural resources and the private interest of those who use these resources to earn their livelihood." (*Id.* at p. 838) Likewise, the Board here was required to consider

both conservation values and the need to sustain the productivity of high-quality timberlands.

Plaintiffs also argue that, by failing to list woodland oaks as commercial species, the Board impermissibly created an exemption from the statutory scheme of the Forest Practice Act. They rely on *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195-196, and *EPIC, supra*, 43 Cal.App.4th at pages 1022-1024, both of which express the rule of construction *expressio unius est exclusio alterius*: Where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. According to plaintiffs, the Legislature has specified statutory exemptions to the application of the Forest Practice Act, and in promulgating a list of commercial species that did not include many woodland oak species, the Board impermissibly created new exemptions. Plaintiffs find those exemptions in section 4527, which provides in pertinent part that "[r]emoval or harvest of incidental vegetation from timberlands, such as berries, ferns, greenery, mistletoe, herbs, and other products, which action cannot normally be expected to result in a threat to forest, air, water, or soil resources, does not constitute timber operations," and in section 4584, which exempts certain activities from the provisions of the Act. According to plaintiffs, these are the only permissible exemptions from the reach of the Act. The Board, however, has not "exempted" woodland oaks from the statutory scheme; instead, acting under its statutory authority to define commercial species, it has determined that most oak species do not qualify as commercial species for purposes of the Act. (See § 4526.) The rule of *Wildlife Alive* and *EPIC* does not apply here.

Nor are we persuaded by plaintiffs' invocation of the California Environmental Quality Act (§ 21000 et seq.) (CEQA). As plaintiffs point out, the Forest Practice Act and CEQA must be read in harmony with each other and construed so as to uphold the provisions of both if possible. (See *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 965-966.) According to plaintiffs, the Board's decision not to regulate commercial harvesting of oak woodlands with the potential for adverse environmental impacts is inconsistent not only with the Act, but also with CEQA. We find nothing in the listing of commercial species in rule 895.1 that is inconsistent with or limits the scope of CEQA.

Plaintiffs also warn that, if the Board is not compelled to designate woodland oaks as commercial species, there will be a "statutory gap" in which woodland oaks will be either unprotected or "at the mercy of local jurisdictions." That is an argument to be made to the Board or to the Legislature, not to the courts. (See County of Santa Cruz v State Bd. of Forestry, supra, 64 Cal.App,4th at p. 840) In any case, we note that the Board's decision not to list most oaks as commercial species does not deprive oak woodlands of the protection of applicable local, state, and federal environmental and land use laws.

Therefore, we conclude plaintiffs have not met, and based on this record cannot meet, their burden to show rule 895.1 is an improper exercise of the Board's discretion. In the absence of a disputed issue of material fact, the trial court correctly granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment.⁴

III. DISPOSITION

The judgment of the trial court is affirmed.

RIVERA, J.

We concur:

KAY, P.J.

REARDON, J.

⁴ Because we conclude that, even taking into account the evidence submitted by plaintiffs, there is no triable issue of material fact, we do not decide whether the evidence plaintiffs have submitted as admissible.