

CALIFORNIA OAK FOUNDATION SUES THE STATE FOR FAILING TO REGULATE THE COMMERCIAL HARVEST OF OAK TREES

For almost three decades, the California Board of Forestry (“Board”) and the California Department of Forestry and Fire Protection (“CDF”) has allowed oak woodlands in California to be harvested for firewood, or converted to residential subdivisions without regulation oversight as authorized under the state Forest Practice Act. Recently, the cutting of oak woodlands across California to make room for expanding vineyard production has accelerated the loss of oaks, and highlighted the failure of the Board and CDF to provide any sort of regulatory protection.

In September 2000, in response to the rapid demise of oaks in California, including the rapid spread of the sudden oak death disease, the California Oak Foundation, along with the Mountain Lion Foundation, brought suit against the Board and CDF in San Francisco Superior Court (Case No. 314859), challenging the legality of these agencies’ decision not to regulate the cutting and conversion of oak woodlands in California, despite their authority to do so.

In March and April 2000, both sides moved for summary judgment on the legal issue of whether or not the Forest Practice Act required the agencies to regulate oaks. After two separate hearings, Judge David Garcia ruled against the Oak Foundation, finding that the Forest Practice Act gave the Board and CDF discretion as to whether to regulate oaks. Because of the importance of this suit to future protection for oak woodlands in California, the Oak Foundation and the Mountain Lion Foundation plan to appeal Judge Garcia’s ruling to the 1st District Court of Appeal.

Legal and Factual Background

The regulation of timber harvesting on private lands in California is controlled by the Forest Practice Act, enacted in 1974. A central purpose of the Forest Practice Act is “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* Public Resources Code § 4512(c)). To ensure regulatory oversight, the Forest Practice Act requires that an applicant submit a Timber Harvest Plan (“THP”) to CDF for approval prior to conducting “timber operations.” A THP is an informational and analytical report, and a plan of operations, intended to ensure that timber harvesting is conducted in conformance with the Forest Practice Act, with the Forest Practice Rules (at 14 C.C.R. § 895.1 *et seq.*) and with the general policies of the California Environmental Quality Act (“CEQA”) (*See* Pub. Res. Code §§ 21000 *et seq.*) The timber harvest plan is the document that generally functions as the equivalent of an environmental impact report under CEQA

In addition to CDF’s review, a THP is reviewed by other resource management agencies such as the California Department of Fish and Game and the California Regional Water Quality Control Board. Perhaps most importantly, the public must be provided an opportunity to review and comment on the THP. CDF is required to consider the recommendations and mitigation measures made by other agencies and input from the public, and to respond to those comments.

If, after review of the THP and consideration of the other agencies' and public's comments, CDF determines that the THP does not conform to all of the applicable rules and regulations, it must reject the THP.

The THP requirement invokes CDF's regulatory jurisdiction over timber harvesting. Under the Forest Practice Act, a THP is required for all "timber operations." The Act defines "timber operations" as the cutting or removal of wood forest products from "timberlands" for "commercial purposes." The Act defines "commercial purposes" as including two types of activities: logging to sell or exchange timber and converting "timberland" to other land uses. The Act defines "timberlands" as 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." (emphasis added) . The same section goes on to state that commercial species shall be determined by the Board.

The Board has always assumed it possesses complete discretion under the Forest Practice Act to determine which tree species are "commercial species" and thus subject to the Act's THP requirement. Utilizing such "discretion," the Board has listed softwood conifer species such as pine, fir and redwood as "commercial species," but ignored the many oak species occurring on oak woodlands in California. In the early 1980s, internal reports to the Board and CDF recommended that the Board redefine its commercial species definition to include oaks occurring on oak woodlands as a means to exert needed state jurisdiction over the increased harvesting and conversions taking place. The State Attorney General's office added their own opinion that the harvesting of oaks should be subject to regulation:

[T]he language of [the Forest Practice Act] says the Board "shall" determine what is a commercial species. This suggests that the Board must take affirmative steps to consider and review the classification of not only hardwoods but all species capable of identification as commercial species. If certain hardwood species appear to meet the test the Board may be able to say when the classification will take place (i.e. when sufficient knowledge of cutting impacts or stocking standard is available) but the mandates of resource and environmental protection will sooner or later compel the Board to bring such hardwood species within the protection and regulation of the Act.

In 1987, despite the recommendations of its own staff, and the State Attorney General's Office, the Board determined that it was premature to regulate oak woodlands. Instead, the Board opted for a three-pronged strategy of research, monitoring and education, to be implemented by an academic group at the University of California at Berkeley called the Integrated Hardwood Range Management Program ("IHRMP").

Over the next 13 years, the IHRMP published many "reports" and conducted studies regarding the ecology of oak woodlands, and the causes of oak woodland harvesting. Meanwhile, the loss of oak woodlands in California continued unabated.. The Board's 1993 Status Report on oak woodlands noted that "conversion of hardwood rangelands by land use change" was having the largest impact on the sustainability of the resource, but provided no numbers to gauge this impact.

The rise in vineyard development across the state has accelerated the trend in oak woodland loss. Data from Santa Barbara County, for example, indicate that vineyard development has increased by over 50% in the last 6 years, mostly at the expense of oak woodlands. Similarly, in Sonoma County between 1990-1997, IHRMP researchers identified 11,600 acres of new vineyards, over 7,000 acres of which had replaced oak habitats.

The accelerating loss of woodlands in these counties are only snapshots of what is happening throughout the state. Comprehensive data for losses of oak woodlands on a state-wide level is, however, unavailable, due to the failure of the Board and CDF to follow through on their 1987 promise to “monitor” oak woodland losses. The 1994 6th Progress Report of the IHRMP acknowledged this shortcoming:

Due to the problems associated with changing technologies, CDF has not been able to definitively estimate changes in hardwood cover over the last decade. The short term monitoring results, generated by an informal method, are of unknown accuracy and precision. Monitoring data is critical, nonetheless, to assessing the sustainability of oak woodland ecosystems. Monitoring is essential to tracking changes in the system and to providing for adaptive policy making and resource management.

Without such comprehensive data, the actual numbers of acres of oak woodland habitat lost each year statewide through harvesting or conversion can only be estimated.

In the absence of state leadership, the job of protecting oak woodlands has fallen on local jurisdictions. Unfortunately, despite the IHRMP’s research and education programs, most local jurisdictions have not adopted mandatory ordinances regulating the harvest or conversion of oak woodlands. Even in the few counties which have adopted ordinances, oaks still lack protections against harvesting and conversion. “Grading ordinances” such as those adopted in Napa, Santa Barbara or Sonoma Counties, for example, do not require any special protection for oak woodlands, outside of minimal erosion control. In Sonoma County, for example, researchers estimate that only 20% of new vineyard conversions will even require an erosion control plan.

The continued and unregulated cutting of oak woodlands in California is a cause of great concern for the California Oak Foundation. Oak woodlands provide necessary habitat for wildlife, including sensitive wildlife species, as well as aesthetic and recreational enjoyment to citizens of the state. Numerous studies (including those conducted by the Board and CDF) have established that oak woodlands support an unusually high amount of wildlife, approximately 331 breeding species, the largest number of any habitat type in California. These habitats support a rich wildlife fauna because they are complex and diverse, with many plant species and layers, providing many habitats and niches. Oak Woodlands also provide a rich source of feeding for wildlife species. A classic 1951 study of wildlife food habits found that oaks were fed upon by 96 species of wildlife, more than any other plant group. Wildlife browse leaves, twigs and flowers of oak, gnaw on bark and tender wood, and eat acorns, galls, lichens and mistletoe. Predators catch prey that live in and on oak trees. The list of plant foods, predators, and prey expands rapidly if one considers the entire oak stand or forest, not just individual trees.

The most important single food supplied by oaks are acorns, which are considered to be

as important as any forest wildlife food in the United States. Indeed, many California species are almost wholly dependant on seasonal supplies of acorns, including deer, black bear, wild pig, western grey squirrel, wild turkey, wood duck, and acorn woodpecker. Acorns are especially important for deer in California, making up 75% or more of the diet when they are available.

Oaks also play an important role in stabilizing soil, maintaining nutrients, and reducing erosion runoff to streams in oak woodland habitats. Oaks were also found to contribute to improved watershed conditions by contributing to higher infiltration rates, soil fertility, and increased organic matter, compared to open grasslands without oaks. Studies have demonstrated, for example, that the removal of oak canopy cover below 20% has significant adverse impacts on soil fertility.

The California Oak Foundation Lawsuit

As a result of the state's continuing refusal to exercise regulatory authority over the accelerating loss of oak woodlands in California, the California Oak Foundation, joined by the Mountain Lion Foundation, brought suit against the Board and CDF in September 2000 in San Francisco Superior Court. The suit alleged that the Board had unlawfully narrowed the scope of the Forest Practice Act by leaving oak woodlands outside the regulatory framework. Since such woodlands were clearly a "forest resource" which needed to be conserved for present and future generations, the Board's action was contrary to the legislative intent of the Act. In January 2001, the California Cattleman's Association intervened in the lawsuit as "interested parties" supporting the Board's position that the cutting of oaks need not be regulated..

In March, 2001, the Oak Foundation brought a "Motion for Summary Judgment" on the issue of whether the Board has acted unlawfully in exempting oaks. from regulation. In April, the Board and CDF, joined by the Cattleman's Association, brought a counter motion for summary judgment. Both motions were set for hearing before Judge David A. Garcia.

The primary issue posed in the two Motions centered on the Board's discretion under the Forest Practice Act to determine which trees were "commercial species," and thus subject to regulation under the Act. The Board and CDF argued that the Board's discretion was unlimited. The Oak Foundation disagreed, arguing that the Board's discretion must be limited by the overlying purposes of the Forest Practice Act, which required the Board to identify tree species as a "commercial species" whenever 1) such species was being harvested for commercial purposes; and 2) such commercial harvesting had the potential to have a significant impact on the environment. In support of its Motion, the Oak Foundation submitted numerous documents (mostly generated by the Board and CDF's own studies) demonstrating that oak woodlands were being harvested for commercial purposes on a large scale, and that the potential adverse impacts of these activities on the environment were clearly significant. Given the extent of the evidence submitted by the Oak Foundation, the Board and CDF did not attempt to challenge this factual showing.

The Oak Foundation argued that the Board's statutory interpretation that its discretion was unlimited was fundamentally flawed. The Board's interpretation allows the Board to determine, without legislative direction, the actual scope of the Forest Practice Act. If the Board's discretion was truly "unlimited," than what would prevent the Board at some later point

from determining that other trees species subject to commercial harvest such as redwood or douglas fir were also not “commercial species” and thus not subject to regulation? Moreover, the Board’s interpretation is unlawful under the general principle that legislative power may not be delegated, absent guiding standards, to an unelected administrative agency. The Oak Foundation argued that the Board’s interpretation of unlimited discretion would create such an unlawful delegation, since the Board would have no standards to guide its determination of which tree species were “commercial” and thus within the scope of the Forest Practice Act.

The Oak Foundation summary judgment motion was heard first on May 24, 2001. At the hearing, Judge Garcia took the matter under submission. A second hearing was held on June 28, 2001. After listening to arguments on both sides, the Court again took the matter under submission. Finally, on July 2, 2001, the Court entered its decision against the California Oak Foundation. The Court’s opinion states that:

The Board of Forestry’s regulation defining “commercial species” is a reasonable interpretation of the Forest Practice Act, and within the scope of the Board’s statutory duties. Moreover, the Board’s regulation is reasonably necessary to effectuate the dual purpose of the Forest Practice Act.

Future Action

California Oak Foundation strongly disagrees with the notion that the Board of Forestry is free under the Forest Practice Act to exclude Oak Woodlands from regulation under the Forest Practice Act. The trial court’s ruling was based on a legal conclusion that the Board of Forestry’s discretion to define which tree species shall be protected under the Act is unlimited. In contrast, California Oak Foundation believes that the Board’s discretion must be limited by 1) whether a species is harvested for commercial purposes and 2) whether such commercial harvest has the potential for significant environmental impacts. The trial court’s legal ruling assumed each of these factors to be true, but still ruled against regulation.

California Oak Foundation believes the trial court’s ruling is legally flawed and bad public policy. Thus, several weeks after the court’s ruling, California Oak Foundation appealed the decision to the 1st District Court of Appeal also located in San Francisco. Briefing for this appeal has not yet commenced.