

**BOARD OF FORESTRY AND FIRE PROTECTION**

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**Memo: Legal Issues related to previous attempts at small landowner THPs****Background**

In 1994 to 1995, the Board attempted to craft a THP that was then known as a "checklist" THP (CTHP). It had similar attributes to the staff proposal to create a THP that mimics the negative declaration approach.

The Office of Administrative Law (OAL) characterized the proposal as:

*"a new alternative to filing a regular Timber Harvesting Plan for timber operations when there is believed to be no reasonable expectation of significant environmental impact."*

It reduced the informational requirements and preparation for timber operations determined not to have a significant environmental impact. The determination was to be made by a Registered Professional Forester (RPF) after the RPF has completed an environmental checklist.

The OAL disapproved this regulatory action because of inconsistencies with other provisions of law (including the California Environmental Quality Act) and because some of the regulatory provisions were unclear.

**Cumulative Effects**

Cumulative impact assessments are required for environmental impact reports and must include a list of past, present or reasonably anticipated future projects, a summary of the expected environmental effects to be produced by those projects, and reasonable analysis of the cumulative impacts of the relevant projects. In the event the effects on the environment are not found to be significant, the EIR shall contain a statement briefly indicating the reasons various possible significant effects of a project were determined not to be significant.

The rulemaking action by the Board required that an environmental checklist be submitted with the plan to show whether the CTHP, if implemented, would result in any significant adverse impact to the environment. The checklist included a list of 14 items under section II, "Potential Impact Evaluation," followed by boxes to be checked for a presence of a resource, potentially significant impact, potentially significant without mitigation, or a less than significant impact.

None of the categories of items or response boxes referred to cumulative impact, although the instructions in the checklist required that the RPF disclose the evidence or data upon which the RPF relied in making his or her evaluation of significance, "particularly that evidence used in evaluating the potential for cumulative effects."

Although the proposal required that any evidence or data used in evaluating for cumulative effects be provided, OAL made a determination that it did not specifically require any assessment of cumulative impacts. "No evaluation of the impact of the cumulative effect of past, present and future logging operations will be present in the CTHP, only the data relied upon, if any, by the RPF if a cumulative impact assessment of this nature was made."

In the checklist, where a determination of cumulative impact is asked for, the inquiry was directed not at the cumulative impact of past, present, and future logging operations. Instead, the determination was concerned with whether there are small impacts from the particular plan submitted on multiple resources where the cumulative effect may be significant.

The Board's response stated that if the oversight agencies identified a specific effect and provide substantial evidence, then an extensive cumulative effects analysis would be performed by the RPF.

The statement of reasons stated: "The CTHP operates in a manner similar to the negative declaration process under CEQA." Under CEQA, a negative declaration can only be used if there is no substantial evidence in light of the whole record that the project may have a significant effect on the environment. An EIR is required whenever substantial evidence in the record supports a "fair argument" that significant impact may occur.

As adopted by the Board, the regulation also stated: "Unless substantial evidence is presented in the CTHP or identified during the review process that harvesting with all proposed mitigation can reasonably be expected to have a significant adverse impact on the environment, the Director shall approve the plan within the review period provided in 14 CCR 1037.4."

This standard mandating approval of a CTHP by the Director unless substantial evidence is presented that the harvesting "can reasonably be expected" is not the same as the "fair argument" standard allowed by CEQA for negative declarations.

## **Alternatives**

Section 21080.5 of the Public Resources Code requires in subdivision(d)(3)(i) that the plan or other written documentation required by a certified regulatory program include "... a description of the proposed activity with alternatives to the activity, and

mitigation measures to minimize any significant adverse environmental impact." Although the contents of the CTHP as adopted by the Board included a description of the area in which the timber operations will be conducted and mitigation measures to protect watercourses and unique areas, no mention is made of any alternatives to the proposed activity.

Sections 15252 of title 14 of the California Code of Regulations which implements Public Resources Code section 21080.5 provides: "The document used as a substitute for an EIR or negative declaration in a certified program shall include at least the following items:

(a) A description of the proposed activity, and

(b) Either:

(1) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, or

(2) A statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion."

The CTHP outlined that, if the Director finds that the proposed timber operation will not have a significant effect on the environment then:

"I find that the proposed timber operation WILL NOT have a significant effect on the environment, and a CHECKLIST THP is appropriate.

In that the CTHP did not describe alternatives to the proposed activity, technically the above finding could have been augmented to be consistent.

## **Water Quality**

The CTHP lists environmental conditions on which the RPF must make a determination as to the potential of a significant adverse impact. These included:

- Timber operations shall not significantly degrade the quality or beneficial uses of water.
- Timber operations shall not significantly affect the quantity and/or quality of a domestic water supply.
- Timber operations shall not cause significant erosion or siltation of watercourses.

Operations meeting the requirements of the above will not necessarily comply with the requirements of the Clean Water Act and the Porter Cologne Act. These acts require that all operations meet a higher standard than "significantly degrade" in order to protect water quality.

The Board responded by stating that CTHP timber operations must comply with all on-site planning and operational rules of the Board which includes compliance with Water Quality Basin Plans and all other applicable federal, state and local laws and regulations. OAL felt this lacked clarity.

In addition, the OAL made other findings related to response to comment, and clarity.