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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ENVIRONMENTAL PROTECTION INFORMATION CENTER et al., **Plaintiffs and Respondents,** **v.** **CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION et al.,** **Defendants and Appellants;** **PACIFIC LUMBER COMPANY et al.,** **Real Parties in Interest and Appellants.**	**A104828** **(Humboldt County Super. Ct. No. CV990445)**

[And three other cases.*]

In this appeal from an administrative mandamus proceeding, we review environmental decisions concerning the Headwaters Forest Project made by two state agencies--the California Department of Forestry and Fire Protection and the California Department of Fish and Game--for land owned by Pacific Lumber Company, Scotia Pacific Company LLC, and Salmon Creek Corporation (collectively, PALCO). The trial court found that the state agencies failed to proceed in the manner required by law, and

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts VI and VII.

* *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (A105391)*; United Steelworkers of America v. California Department of Forestry and Fire Protection* (A104830)*; United Steelworkers of America v. California Department of Forestry and Fire Protection* (A105388).

the court granted a peremptory writ commanding the state agencies to set aside their administrative determinations. We reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

PALCO owns approximately 211,000 acres of timberlands in Humboldt County that have been used for commercial timber production for as long as 120 years. In 1986 PALCO was acquired by Maxxam Incorporated, and in order to pay off Maxxam's debt for the buyout, PALCO began cutting down old growth redwoods at a faster rate than ever before. The deforestation led to litigation and considerable local protest.

In the 1990s, as a result of federal and state litigation, PALCO was enjoined from harvesting a particular stand of old-growth timber that served as the habitat for the marbled murrelet, an endangered bird. PALCO, in turn, filed lawsuits alleging an unlawful taking by the state and federal governments of the land declared unusable for timber production and harvesting.

To resolve the existing controversies, PALCO entered into the Headwaters Agreement of 1996 with the State of California and the United States. Under the agreement, PALCO agreed to dismiss its pending lawsuits and to sell an old-growth forest known as the Headwaters Forest and other land to the state and federal governments to create a permanent wildlife preserve. In return, PALCO was to be allowed to harvest its remaining timberlands subject to the review and approval of certain plans and permits by state and federal agencies.

By February 1998, the permit approvals had not yet occurred, and the parties entered into a Pre-Permit Application Agreement in Principle that outlined the actions to be taken with respect to the federally-mandated Habitat Conservation Plan and the state Sustained Yield Plan. The Pre-Permit Application Agreement in Principle called for federal environmental review under the National Environmental Policy Act to be combined with state environmental review under the California Environmental Quality Act. On October 2, 1998, a joint draft environmental impact statement and environmental impact report (EIS/EIR) was issued for the Headwaters Forest acquisition

and PALCO's Habitat Conservation Plan and Sustained Yield Plan.[1] The draft EIS/EIR explained that the matters under review consisted of the entire package of approvals needed for the Headwaters Agreement, including the Sustained Yield Plan, the federal and state Incidental Take Permits, and a Streambed Alteration Agreement.

Meanwhile, federal and state funding and approval were required in order to implement the Headwaters Agreement. In October 1997, Congress authorized an appropriation of $250 million to purchase the Headwaters Forest from PALCO, conditioned upon federal and state agency approval of the plans and permits. Under the federal legislation, all permits had to be approved on or before March 1, 1999. Likewise, in August 1998 the state Legislature enacted Assembly Bill No. 1986 (AB 1986) to authorize $245.5 million for the purchase of the Headwaters Forest. By the time the state Legislature acted, a draft Habitat Conservation Plan and Sustained Yield Plan had been released for public review and comment. The Legislature required as a condition of its funding that additional restrictions be placed on PALCO's timber operations beyond those contained in the draft Habitat Conservation Plan and Sustained Yield Plan.

The draft EIS/EIR, issued October 2, 1998, noted that PALCO's draft Habitat Conservation Plan and Sustained Yield Plan had not yet been modified in response to AB 1986, but an environmental analysis was included in the draft EIS/EIR of not only the then-current version of the Habitat Conservation Plan and Sustained Yield Plan but also of the components required by AB 1986 "should the provisions contained in that legislation become part of PALCO's final HCP [Habitat Conservation Plan]."

In January 1999, after the close of the public comment period, the final EIS/EIR was released. Because of the coordinated review, the final EIS/EIR contained both the

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[1] Under the National Environmental Policy Act, the environmental review document is an environmental impact statement (EIS), while under California Environmental Quality Act the document is called an environmental impact report (EIR). The administrative regulations promulgated to implement CEQA (Cal. Code Regs., tit. 14, § 15000 et seq., hereafter Guidelines) expressly provide for cooperation with federal agencies in the environmental review process and preparation of a joint EIS/EIR. (See generally Guidelines, §§ 15220-15226.)

Habitat Conservation Plan and the Sustained Yield Plan. The final Habitat Conservation Plan reflected the changes that had been mandated by AB 1986 as well as changes made in response to public comments The federal wildlife agencies approved the Habitat Conservation Plan and issued a federal Incidental Take Permit, but those federal approvals are not challenged in the litigation here.

On February 25, 1999, the California Department of Forestry, as lead agency, certified the final EIS/EIR, and on March 1, 1999, the Director of the Department of Forestry approved PALCO's Sustained Yield Plan. On February 26, 1999, PALCO entered into a Streambed Alteration Agreement with the California Department of Fish and Game. On March 1, 1999, the California Department of Fish and Game, as responsible agency, certified the final EIS/EIR and issued an Incidental Take Permit.

Thirty days later, on March 31, 1999, an administrative mandamus action was filed by the Environmental Protection Information Center and the Sierra Club (hereafter the environmental plaintiffs). The lawsuit challenged (1) the approval of the Sustained Yield Plan by the Department of Forestry, (2) the issuance of the Incidental Take Permit by the Department of Fish and Game, (3) the approval of the Streambed Alteration Agreement by the Department of Fish and Game, and (4) the findings issued by both state agencies under the California Environmental Quality Act (CEQA) concerning the Headwaters Forest Project. Simultaneously, the United Steelworkers of America also petitioned for administrative mandamus to challenge only the Sustained Yield Plan.[2]

The trial court proceedings involved an extensive preliminary dispute over the contents of the administrative record. Despite the fact that the review process had been consolidated, the trial court ordered the state agencies to deliver separate administrative records for each of the challenged administrative decisions. Eventually, the state agencies' Third Amended Certifications of the Administrative Record were accepted by the trial court as containing all the documents that had been relied upon by the agencies

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[2] Also named as a plaintiff in the Steelworkers' lawsuit is an individual, Donald Kegley. For the sake of simplicity, we will refer to the plaintiffs in that second lawsuit collectively as "the Steelworkers."

in making their administrative decisions. The court then held several days of evidentiary hearings on whether certain materials had been excluded from the administrative record—i.e., whether documents exist that should have been considered by the agencies. The environmental plaintiffs and the Steelworkers were granted leave to amend their complaint to allege a failure by the state agencies to provide an accurate administrative record.

As to the merits of environmental plaintiffs' challenges to the administrative decisions, the trial court heard lengthy argument and issued a statement of decision on July 22, 2003, adopting nearly all of their objections to the administrative decisions and concluding that the Sustained Yield Plan, the Incidental Take Permit, and the Streambed Alteration Agreement should be vacated.

The trial court then held a further hearing to decide whether PALCO's timber operations should be enjoined. The court concluded that timber operations being conducted pursuant to timber harvest plans approved prior to the court's July 22, 2003 statement of decision would not be enjoined but that cutting of timber would be enjoined under any timber harvest plan approved after that date that relied upon the now-vacated Sustained Yield Plan. Separate judgments were entered in the lawsuits filed by the environmental plaintiffs and by the Steelworkers, and the trial court issued a peremptory writ of mandate in each case. Both PALCO and the state agencies have appealed from each judgment. We initially consolidated the appeals of PALCO and the state agencies with respect to each lawsuit, and we later consolidated all four appeals for purposes of oral argument. We now order all four appeals consolidated for purposes of the opinion.

THE ADMINISTRATIVE DECISIONS

I. Standard of Review

The approval of the Sustained Yield Plan by the Department of Forestry and the issuance of the Incidental Take Permit by the Department of Fish and Game were adjudicative decisions subject to review by administrative mandamus. (Cal. Code Regs., tit. 14, §§ 783.5 [incidental take permit process], 1091.10 [sustained yield plan process];

Code Civ. Proc., § 1094.5; Pub. Resources Code, § 4514.5.)[3] The inquiry here is whether the agencies prejudicially abused their discretion. A prejudicial abuse of discretion is established if the agency failed to proceed in a manner required by law, if the agency's decision is not supported by its findings, or if the findings are not supported by substantial evidence. (Code Civ. Proc., § 1094.5, subd. (b).)

When, as here, no fundamental vested right is implicated, the trial court and the appellate court essentially perform identical roles in examining the administrative record to determine whether the agency complied with the required procedures and whether the agency's findings are supported by substantial evidence. We review the record de novo and are not bound by the trial court's conclusions.[4] (*Bixby v. Pierno, supra,* 4 Cal.3d at p. 149, fn. 22; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 674; *Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 557.)

In the present case, the trial court rejected the allegations in the environmental plaintiffs' writ petition that the administrative findings were unsupported by the evidence. The trial court found that the environmental plaintiffs failed to present a summary of the material evidence or any argument on the sufficiency of the evidence. In essence, the trial court found that the environmental plaintiffs waived or abandoned their challenges to the factual bases for the administrative decisions. The environmental plaintiffs have not cross-appealed, nor do they dispute that the focus of our review is whether the state agencies committed legal, not factual, error. Hence, for purposes of our review, we will accept that the administrative findings were supported by the evidence and we will

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3 As we discuss in part V.F. below, the decision by the Department of Fish and Game to enter into the Streambed Alteration Agreement is not governed by Code of Civil Procedure section 1094.5.

4 When an administrative decision affects a fundamental vested right the roles are different. The trial court exercises its independent judgment of the administrative record and reweighs the facts underlying the administrative decision. The appellate court focuses on the trial court's findings to determine whether the trial court's findings are supported by substantial evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10.)

confine our review to determining whether the state agencies failed to proceed in a manner required by law. The parties are in accord that we exercise de novo review of that issue.

In our review of the administrative decisions we give substantial deference to the agencies. The administrative determinations are presumed correct, and we must resolve all doubts in favor of the administrative determination. Because the role of the appellate court is the same as the role of the trial court, the burden on appeal to establish error is the same as the burden in the trial court, i.e., on the parties who challenge the administrative decisions. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, supra,* 102 Cal.App.4th at p. 674; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336.)

Even if error is shown, an administrative decision will be set aside only if the manner in which the agency failed to follow the law is shown to be prejudicial or is presumed prejudicial. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 565.) Prejudice is presumed when an absence of information frustrated the public's right to comment or hindered the agency's decision-making. (7 Cal.4th at pp. 1236-1237; 55 Cal.App.4th at pp. 575-576.)

II. Habitat Conservation Plan

The central document for the administrative approvals here is the Habitat Conservation Plan, which was a prerequisite to the issuance of the federal incidental take permit under the federal Endangered Species Act. (16 U.S.C., § 1539(a)(2)(A).) Although the federal incidental take permit is not challenged in this appeal, the Habitat Conservation Plan is intertwined with the state administrative approvals in the following ways: (1) the Habitat Conservation Plan was combined with the Sustained Yield Plan for environmental review; (2) the Habitat Conservation Plan was incorporated into the state Incidental Take Permit; (3) the Habitat Conservation Plan was conditioned upon the Streambed Alteration Agreement; and (4) on March 3, 1999, the state agencies joined the

federal agencies and PALCO in executing an Implementation Agreement to carry out the Habitat Conservation Plan.

PALCO's Habitat Conservation Plan is a long-term plan covering the 50-year duration of the federal Incidental Take Permit, designed to protect identified wildlife and plant species from anticipated harm resulting from PALCO's timber operations. It sets up operating programs to conserve and enhance the habitats of identified species, focusing on the marbled murrelet and the northern spotted owl with the notion that the protective measures for those two birds will benefit a broad range of species. The key feature of the Habitat Conservation Plan is the creation of Marbled Murrelet Conservation Areas in which no harvesting will be allowed for the 50-year duration of the incidental take permit.

One particular aspect of the Habitat Conservation Plan deserves mention, as the point carries over into several issues in this appeal. Under AB 1986, the Legislature required as a condition of the funding for the Headwaters Forest that additional protections be included in the Habitat Conservation Plan, including a complete watershed analysis of PALCO's lands to be conducted within five years. In the interim (until the watershed analysis is completed), AB 1986 required certain no-cut buffer zones around the streambeds to protect aquatic habitat and aquatic species. The final version of the Habitat Conservation Plan and its Implementation Agreement carry out the requirements of AB 1986. Both documents require PALCO to undertake a complete watershed analysis within five years so as to develop site-specific information that was not available at the time the EIS/EIR was prepared. The final Habitat Conservation Plan imposes the interim streambed protections established in AB 1986.[5] And, the Habitat Conservation

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[5] In a separate agreement relating to the enforcement of AB 1986, PALCO agreed to comply with the interim streambed protections until the watershed analysis is completed and site-specific prescriptions have been established.

The interim restrictions include riparian management zones (or buffer zones): (1) For Class I streams, 170-foot-wide buffer zone with 30-foot restricted entry band. (2) For Class II streams, 130-foot-wide buffer with 30-foot restricted entry band. Only selective harvesting is allowed and only in the outer bands. Inner bands are no-cut areas

Plan provides for future site-specific prescriptions to be established by the wildlife agencies based upon the completed watershed analysis.

The Habitat Conservation Plan also requires PALCO to submit a "timber harvest plan" before any particular forest stand can be harvested. A timber harvest plan is a statutory requisite for timber harvesting operations. (Pub. Resources Code, § 4581 et seq.) Among other things, a timber harvest plan is an environmental review document equivalent to an EIR. (Pub. Resources Code, § 21080.5, *Sierra Club v. State Bd. Of Forestry, supra,* 7 Cal.4th at p. 1230; *County of Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.App.4th 826, 830.) The Habitat Conservation Plan requires that site-specific prescriptions developed by the wildlife agencies upon completion of the watershed analysis be included in and implemented by future timber harvest plans.

The deferral of specific prescriptions until later timber harvest plans rendered the environmental review process here a "tiered" review, as the environmental plaintiffs acknowledge. "Tiering" is a concept that appears in CEQA meaning an analysis of general matters and environmental effects in a broader EIR (sometimes called a program EIR) covering a policy or plan followed by a later, narrower or site-specific EIR that incorporates by reference the discussion in the broader EIR and concentrates on issues specific to the later project. (Pub. Resources Code, § 21068.5; Guidelines, §§ 15152(a), 15385; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 36-38.) Here, the broad environmental issues were dealt with in the EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan in expectation that more detailed examination of specific watershed sites will be forthcoming in the timber harvest plans. As the Implementation Agreement provides, the Habitat Conservation Plan and the Sustained Yield Plan serve as "program level" documents for tiering with later individual timber harvest plans.

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that will always be preserved. After the watershed analysis, the interim buffer zones may be modified but must be maintained at a minimum of 30 feet on each side of Class I or Class II streams.

III. Sustained Yield Plan

Under the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Resources Code, § 4511 et seq.), the State Board of Forestry and Fire Protection is authorized to adopt 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 . . . ." (Pub. Resources Code, §§ 4521.3, 4551.) To that end, the Board of Forestry has established the Forest Practice Rules, which govern timber harvest plans (Cal. Code Regs., tit. 14, § 896 et seq.)[6] and also prescribe the preparation and approval of a "sustained yield plan." (FP Rules, § 1091.1 et seq.)[7]

A sustained yield plan is not a substitute for a timber harvest plan. (FP Rules, § 1091.2.) A timber harvest plan is statutorily required before timber operations are conducted on a specific piece of property and is effective for three years. (Pub. Resources Code, § 4581 et seq.) In contrast, a sustained yield plan is a long-range plan that may be submitted at the option of the landowner to address environmental issues over a large landscape. (FP Rules, § 1091.1(b).) A sustained yield plan examines a planning horizon of 100 years (FP Rules, § 1091.3), though it is effective for 10-year increments and must be updated and reapproved every 10 years. (Pub. Resources Code, § 4551.3, subd. (a); FP Rules, § 1091.45(b).) Few sustained yield plans have ever been approved , and we are not aware of any appellate case examining one.

The Forest Practice Rules specify the contents of a sustained yield plan (FP Rules, §§ 1091.4-1091.8) and set up a three-step review process by the Director of the Department of Forestry and Fire Protection (FP Rules, § 1091.10). The first step calls for the Director to determine whether the sustained yield plan is in proper order and acceptable for filing. Once the sustained yield plan is accepted for filing, the second step requires the Director to determine whether the sustained yield plan "contains sufficient

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[6] All further references to the "FP Rules" are to sections of title 14 of the California Code of Regulations.

[7] The Sustained Yield Plan is a creature of the administrative regulations, but the Legislature has acknowledged its existence (Pub. Resources Code, § 4551.3).

and complete information to permit further review by the public and other agencies." (FP Rules, § 1091.10(a).) After this so-called "sufficiency review," the Director schedules a 90-day period for public and agency comment, including a public hearing. At the end of the comment period, the Director undertakes the third review to determine whether the sustained yield plan should be approved as being "in conformance with the [Forest Practice] rules." (FP Rules, § 1091.10(e).)[8]

In the present case, the prescribed procedure was followed. Although a sustained yield plan is ordinarily optional, the Headwaters Agreement required PALCO to submit one. PALCO submitted a draft Sustained Yield Plan to the Department of Forestry in December 1996, and the document was accepted for filing. Over the ensuing months, the Department of Forestry solicited comments from other agencies on that early draft, advised PALCO of various deficiencies, and accepted additional information from PALCO.[9] In June 1998, PALCO incorporated changes and additions into another draft, and in July 1998 the Department of Forestry released a revised version, designated the "Public Review Draft," for public review and comment.

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[8] The three-step review process for a sustained yield plan is not quite the same as the review process for a timber harvest plan (FP Rules, §§ 1037.1-1037.10). (See *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331, 1339-1342 [timber harvest plan review].)

[9] The comments from other agencies were compiled in February 1997, and PALCO submitted responses thereto. In August 1997, PALCO submitted a revised "Agency Review Draft" that was combined with the Habitat Conservation Plan.

As defendants acknowledge, the circulation of a draft Sustained Yield Plan to other agencies prior to the release for public review is not expressly called for by the Forest Practice Rules. The Forest Practices Rules seem to contemplate review by other agencies *after* the Sustained Yield Plan is released for public review. (FP Rules, § 1091.10(a), (c).) But advance circulation to other agencies is not expressly precluded; the Forest Practice Rules encourage a "multi-disciplinary review." (FP Rules, § 1091.10.) (The review process that was undertaken here resembles the process prescribed for timber harvest plans, whereby a multi-disciplinary review team helps evaluate whether the plan is in conformance with the Forest Practice Rules before the plan is released for public review. (FP Rules, § 1037.5(a), (b).) Plaintiffs do not complain about the extent of review given to the Sustained Yield Plan.

The Public Review Draft was a combined Habitat Conservation Plan and Sustained Yield Plan, as was the earlier Agency Review Draft. (See fn. 9, *ante*.) Public review of the Sustained Yield Plan was the public review on the EIS/EIR. The EIS/EIR explains that "SYPS [Sustained Yield Plans] are normally processed as stand-alone planning documents. In this case, PALCO and CDF [the California Department of Forestry] agreed to add the EIR process to provide greater efficiencies, given that the federal agencies would be preparing an EIS for the HCP and the ITP [Incidental Take Permit] under the ESA [Federal Endangered Species Act]." Consequently, the environmental review document was denoted an EIS/EIR for both the Sustained Yield Plan and Habitat Conservation Plan.

During the public comment period, the California Legislature passed AB 1986, which required certain no-harvest buffer zones around the streambeds until the watershed analysis was completed. (See fn. 5, *ante*.) Because the July 1998 Public Review Draft did not reflect the buffer zones, PALCO submitted revised projections on timber inventory, growth, and harvest for the Sustained Yield Plan; they were added to the final EIS/EIR as Appendix Q. Furthermore, because the outcome of the watershed analysis was unknown, the Department of Forestry asked PALCO to make additional revisions in its timber projections. In February 1999, PALCO submitted several alternative updated projections, each alternative based on differing assumptions concerning the restrictions that might be imposed after completion of the watershed analysis.

On February 25, 1999, the Director approved the Sustained Yield Plan as being in conformance with the Forest Practice Rules. The Director indicated that "alternative 25a is the only alternative with constraints on timber harvesting that are consistent with the interim mitigations required by the federal Habitat Conservation Plan (HCP) and the EIS/EIR." Immediately thereafter, the Department of Fish and Game asked the Director to reconsider its selection of "alternative 25a," asserting that alternative 25, rather than alternative 25a, "most accurately reflects the HCP and the FEIR's proposed action." The

United States Department of the Interior made a similar request for similar reasons.[10] On March 1, 1999, the Director issued a new determination, again finding the Sustained Yield Plan to be in conformance with the Forest Practice Rules but this time accepting alternative 25 as satisfying the requirements for maximum sustained timber production "consistent with the interim mitigations required by the federal Habitat Conservation Plan (HCP) and [the EIS/EIR]."

A. Finding of Sufficiency

The environmental plaintiffs complain that the Director of the Department of Forestry failed to follow the procedures required by law in that he failed to make an express finding at the second step of the review process that the Public Review Draft of the Sustained Yield Plan was "sufficient" to proceed for further review. The regulations impose no requirement of an express finding. The regulations require the Director to make a determination of sufficiency and to notify the submitter in writing of any deficiencies. (FP Rules, § 1091.10(a).) "When the submitter provides adequate written response to each of the deficiencies, the SYP will be scheduled for further review. The Director shall deny the SYP if the information is not provided or is insufficient. [¶] Once the SYP is ready for public and agency review the Director shall schedule a date for the start of a 90 day or longer period . . . ." (FP Rules, § 1091.10(a).)

Here, the Director communicated with PALCO about deficiencies in the earlier drafts of the Sustained Yield Plan, received written responses, and ultimately scheduled a period for public and agency comment on the revised Public Review Draft. By scheduling a period for review and comment, the Director impliedly found the Public Review Draft sufficient to go forward to the next step. The absence of an express written finding did not violate the Forest Practice Rules.

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10 The Department of Fish and Game and the federal wildlife agencies considered the interim prescriptions in the Habitat Conservation Plan to be overly restrictive. The agencies expected that the post-watershed analysis prescriptions would allow more harvesting within the buffer zones.

The environmental plaintiffs' real complaint is that the Public Review Draft of the Sustained Yield Plan actually was not sufficient when it was released for public comment and that the Director's implied finding of "sufficiency" was legally incorrect.[11] Yet, the basis for environmental plaintiffs' argument is that the contents of the Public Review Draft did not satisfy the requirements of the Forest Practice Rules. In other words, environmental plaintiffs have erroneously equated the standard for determining "sufficiency" at the second step of review with the standard for approval of the sustained yield plan at the third step of the review process, asserting that at both steps the sustained yield plan is measured for conformity with the Forest Practice Rules. (FP Rules, § 1091.10(a), (e).)

The standards are not the same for the separate steps of review. In this respect, the review process for a sustained yield plan differs from the review process for a timber harvest plan. For a timber harvest plan, a multi-agency review team helps to evaluate whether the plan conforms to the Forest Practice Rules *before* the plan is released for public comment. (FP Rules, § 1037.5.) In contrast, for a sustained yield plan, the threshold test for release for public comment is whether the plan is "sufficient and complete . . . to permit further review . . . ." (FP Rules, § 1091.10(a).) The determination of conformance with the Forest Practice rules is made *after* the plan has been subject to public review and comment. (FP Rules, §1091.10(e).)

The environmental plaintiffs have made no showing that the public and agency review process was hindered in any way by the asserted deficiencies in the Public Review Draft. Indeed, the public review of the Sustained Yield Plan was also the public review

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11 Defendants (the state agencies and PALCO) characterize environmental plaintiffs' argument as raising an issue of substantial evidence to support the Director's (implied) factual finding that the Public Review Draft was sufficient to proceed to the third step of review. We disagree that the Director's "sufficiency" finding was a factual finding subject to review for substantial evidence. The contents of the Public Review Draft are not in dispute; the issue raised by environmental plaintiffs is a legal one concerning the legal adequacy of the Public Review Draft for purposes of the second step of the administrative approval process.

of the draft EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan. The EIS/EIR provides a comprehensive description and analysis of the Sustained Yield Plan. The draft EIS/EIR explains that the Department of Forestry would be using the EIS/EIR to evaluate the Sustained Yield Plan and to determine whether the Sustained Yield Plan was in conformance with the Forest Practice Rules. In the absence of any showing that the public review was hampered, environmental plaintiffs have not demonstrated that the Public Review Draft was insufficient or that the Director of the Department of Forestry failed to follow the requisite procedures at the second step of the review process. (We will discuss below the separate question whether the contents of the Sustained Yield Plan conformed to the Forest Practice Rules so as to support the Director's approval of the Sustained Yield Plan at the end of the third step. We will also discuss in part VII, *post*, the environmental plaintiffs' arguments that the EIS/EIR was inadequate.)

B. Contents of the Sustained Yield Plan

The environmental plaintiffs and the Steelworkers make several challenges to the adequacy of the information contained in the Sustained Yield Plan. They argue that the Sustained Yield Plan was not in conformance with the Forest Practice Rules and, consequently, the Director erred as a matter of law in finding otherwise at the third and final step of the review process.[12] It bears emphasizing here that when an environmental assessment involves complex scientific questions requiring a high level of technical expertise, we leave the conclusions to the informed discretion of the agency. (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection, supra,* 123 Cal.App.4th at pp. 1351-1352.)

(1) Sustained Timber Production Assessment

A principal goal of the Forest Practice Rules is to assure that timber harvesting continues in perpetuity. This goal is expressed as the achievement of "maximum

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[12] Again we disagree with the assertion by defendants (the state agencies and PALCO) that the issue is one of substantial evidence to support the administrative aproval. Whether the Sustained Yield Plan was in conformance with the Forest Practice Rules is a question of law for our de novo review.

sustained production" of high quality timber products while giving consideration to economic and environmental issues. (FP Rules, § 1091.1(b).) A sustained yield plan must "clearly demonstrate how the submitter will achieve maximum sustained production of high quality timber products while giving consideration to regional economic vitality and employment at planned harvest levels during the planning horizon." (FP Rules, § 1091.45(a); see also FP Rules, § 913.11(b).) Several components must be included in the assessment of sustained timber production, including a description of the existing forest stand types, a projection of forest growth and harvest, a discussion of the accuracy of the inventory data and methods to improve accuracy over time, and a discussion of the methods used to project inventory, growth, and harvest. (FP Rules, § 1091.45(c).) Also required in the timber assessment is "[a]n estimate of the long-term sustained yield . . . stated in terms of board feet per year . . . and a description of how the estimate was reached." (FP Rules, § 1091.45(c)(2).)[13]

The environmental plaintiffs do not dispute that the requisite components were included in the Sustained Yield Plan. Instead, the environmental plaintiffs complain that the projections contained within the timber production assessment were not demonstrably accurate; hence, the Sustained Yield Plan should not have been found in conformance with the Forest Practice Rules. We reject the argument.

The timber production assessment within a sustained yield plan is contemplated to be an informed prediction--"a *projection* of growth and harvest" and "an *estimate* of the long-term sustained yield."[14] The Forest Practice Rules expressly recognize that "the

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[13] "Long term sustained yield" is defined in the Forest Practice Rules as the average annual growth sustainable by the inventory predicted at the end of a 100-year planning period. (FP Rules, § 895.1; see also FP Rules, § 913.11(b)(4).) Put another way, it is the long-term goal—the amount of timber that will be produced during *the last decade* of the planning horizon in accordance with the projected inventory, growth, and harvest levels.

[14] The term "accuracy" is used only in conjunction with inventory data. What is required is a "discussion of the accuracy of the inventory data . . . [with a description of] how the submitter will, over time, make reasonable progress to improve inventory estimates . . . ." (FP Rules, § 1091.45(c)(4).) Plainly the inventory data, too, are expected to be only estimates.

accuracy of, and therefore the need for, detailed future projections becomes less as the time horizon lengthens. It is not the intent of this Article that speculation shall be promoted such that analyses shall be undertaken which would produce only marginally reliable results or that unneeded data would be gathered." (FP Rules, § 1091.1(b).) The Sustained Yield Plan here provided all that was required by the Forest Practice Rules.

The Public Review Draft supplied inventory data, projections on growth and harvest spanning 120 years, and an evaluation of the accuracy of the model for long-term sustained yield. The long-term sustained yield was set at 233,520 thousand board feet net (mbfn) per year. Under the Forest Practice Rules, the average annual harvest projected for any 10-year period must be lower than the estimated long-term sustained yield. (FP Rules, § 1091.45(a).) The projected annual harvest level for the first decade was 2,335,188 mbfn, with harvest levels declining for several decades and then increasing later in the 120-year planning period.

For the reasons already discussed, we will not evaluate the "sufficiency" of the Public Review Draft at the second step of the review process. As part of the third step of the review process, the EIS/EIR analyzed PALCO's projections and recognized the same failings that the environmental plaintiffs put forth. The EIS/EIR explains that "[long-term sustained yield] is based on several factors, including forest inventory, silvicultural prescriptions, site index information, and yield projections. PALCO's site index information covers too narrow a range and its intensive management prescriptions have not been implemented for long enough to determine their full effect on [long-term sustained yield]. Therefore, there may be errors in PALCO's LTSY [long-term sustained yield] projections." The EIS/EIR also states: "PALCO proposes to manage its land intensively and bases its LTSY [long-term sustained yield], in part, on accomplishing this level of intensive management. PALCO has not managed its land using these intensive management practices until recently. Therefore, there is no record to judge PALCO's likely success at achieving the projected growth increases."

Further, the EIS/EIR notes that growth and yield projections are based on statistical computations that can be fairly accurate for short-term projections but not for

long-term projections. The EIS/EIR acknowledges the danger that a forest could be over-harvested beyond its sustainable harvest capacity if the growth of the forest is overestimated. The EIS/EIR recommends using conservative growth estimates "to absorb statistical errors . . . as well as changes in management direction and unforeseen events."

The Public Review Draft contains an independent evaluation showing the projections of timber growth and yield to be conservative. The evaluator concludes: "The biggest problem which exists is lack of sufficient data for which to make yield projections. It is impossible to know if these choices provide accurate yield estimates without adequate data to judge the growth of particularly the intensively managed stands. Nonetheless the projections appear to be conservative and hence true yields are expected to surpass those projected."

Moreover, in order to deal with the inherent flaws in the growth and yield projections, the Public Review Draft and the EIS/EIR set up a monitoring and reporting program to assess whether the growth and yield projections for the 120-year planning period are correct and whether intensive management is successful.

The EIS/EIR evaluates five separate alternatives, covering harvest levels ranging from 868,780 mbfn to 2,335,188 mbfn in the first decade. The proposal for timber operations under the Habitat Conservation Plan and Sustained Yield Plan (alternative 2) has the highest projected harvest volume of 2,335,188 mbf in the first decade. However, that figure was later adjusted downward.

At the end of the public comment period, the wildlife agencies determined that additional restrictions on harvesting of old growth forests were needed to protect the wildlife. These additional mitigation measures (added to the final Habitat Conservation Plan) reduced the land available for harvest and, hence, adversely affected the long-term sustained yield. Furthermore, the final EIS/EIR recognizes that the long-term sustained yield would be affected by the possibility of additional lands being withdrawn from timber production through a future purchase of stream buffer zones by the state and a future need to enlarge the Marbled Murrelet Conservation Areas. "These and other

mitigation measures listed in [the Habitat Conservation Plan] could reduce [long-term sustained yield] by approximately 15 percent . . . ." On the other hand, the final EIS/EIR notes that the watershed analysis "could determine that less area needs to be withdrawn for stream protection." The EIS/EIR declares that the effect of these contingencies on the long-term sustained yield could not be determined accurately, but a "reduction of 15 percent seems reasonable." Appendix Q to the final EIS/EIR provides changed projections on long-term sustained yield to take account of the new mitigation measures in the final Habitat Conservation Plan. The new long-term sustained yield was set at 196,500 mbfn per year. And, the estimated harvest volume for maximum sustained production was 1,761,516 mbfn in the first decade.

In February 1999, PALCO submitted even more revised projections at the request of the Department of Forestry using different assumptions about the outcome of the watershed analysis. Alternative 25 assumes that the restrictions set out in the final Habitat Conservation Plan (which went beyond the interim measures imposed by AB 1986) would remain unchanged after the watershed analysis. Alternative 25a, on the other hand, assumes that even wider no-cut buffer zones would be required after the watershed analysis. Under alternative 25 the long-term sustained yield is set at 196,400 mbfn per year, and the projected harvest level in the first decade is 188,200 mbfn per year. Under alternative 25a, the long-term sustained yield is set at 196,100 mbfn with a projected harvest level of 145,900 mbfn per year in the first decade. The Director's ultimate approval of the Sustained Yield Plan accepted the projections in alternative 25, and the Director found that "the requirements for maximum sustained production are satisfied." We find no violation of the Forest Practice Rules.

(2) Economic Considerations

The Steelworkers, too, rely upon the requirement in the Forest Practice Rules that a sustained yield plan "clearly demonstrate how the submitter will achieve maximum sustained production of high quality timber products while giving consideration to regional economic vitality and employment at planned harvest levels during the planning horizon." (FP Rules, § 1091.45(a); see also FP Rules, § 913.11(b).) However, the

Steelworkers take an approach different from the environmental plaintiffs and argue that the Sustained Yield Plan failed to give adequate consideration to economic and employment issues.

The Steelworkers do not dispute that the Sustained Yield Plan contains a discussion of regional economic vitality and employment. The Steelworkers complain that the discussion gives too little consideration to the effects on the workers, as the discussion covers only the first decade and not the entire "planning horizon" of 100 years. The complaint is unsound in several respects.

First, the Sustained Yield Plan does cover the entire planning horizon. The Public Review Draft contains a short discussion of the potential effects on the regional economy that covers a planning period of 120 years. Using a formula of six jobs per year for every million board feet harvested, the Public Review Draft presents a chart showing the estimated jobs for the projected harvest levels over 12 decades. The harvest levels, too, are separately given in the Public Review Draft covering a 120-year period from 1998 to 2118. The Public Review Draft concludes that the projected job loss over the 120-year period would be less than 1.5 percent, which would not constitute a significant adverse impact on a regional scale.

The Steelworkers' complaint is actually directed to one chapter of the EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan that covers the economic and social effects of the Headwaters Forest Project. Included within that chapter is a detailed discussion of the employment base as well as the timber industry, but the analyses of the impacts examine the harvest volume only for the first decade. The EIS/EIR explains: "The first decade of the planning period is the short-term period of analysis used in this EIS/EIR. This period of analysis also is the only period appropriate for economic and social effects. Too many variables, including economic diversity of the local economy, strength of the local timber industry, and timber-related tax revenue, would not be constant over a longer-term analysis period. Thus, a discussion of social and/or economic effects beyond 2012 would be very uncertain, if not speculative, and would not be appropriate in either an EIS or an EIR."

Nevertheless, the EIS/EIR reiterates the formula set forth in the Public Review Draft that six workers are required to log and mill 1,000 mbf of timber. And, the EIS/EIR contains a separate chapter on the timber resources. In that chapter the projected harvest levels are given for 12 decades for each of the four alternatives.[15] In response to public comments on the long-term impact on logging jobs, the final EIS/EIR explains: "As shown in each of the alternatives evaluated in the EIS/EIR, timber harvest volumes on PALCO timberlands would decline over the next 40 to 50 years and then timber harvests would gradually increase again in the later decades of the 120-year planning period . . . ."

In any event, we do not read the Forest Practice Rules to require a detailed analysis of economic and employment issues across the full span of 100 years. The goal of the Forest Practice Rules is to achieve "maximum sustained production." (FP Rules, § 1091.1(b).) The Forest Practice Rules require a demonstration of how *maximum sustained production* will be achieved in that time span. (FP Rules, §§ 913.11(b), 1091.45(a).) The Forest Practice Rules expressly recognize that "the accuracy of, and therefore the need for, detailed future projections becomes less as the time horizon lengthens. It is not the intent of this Article that speculation shall be promoted such that analyses shall be undertaken which would produce only marginally reliable results or that unneeded data would be gathered." (FP Rules, § 1091.1(b).)

Furthermore, a sustained yield plan, though covering a planning horizon of 100 years, is effective for only 10 years and must thereafter be resubmitted and reapproved. (Pub. Resources Code, § 4551.3, subd. (a); FP Rules, § 1091.45(b).) Each decade PALCO will be required to submit information to show that consideration is being given to employment and economic issues.

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15 The projections were later revised (Appendix Q to the EIS/EIR) in light of the additional restrictions added to the final Habitat Conservation Plan. And, in February 1999, PALCO submitted further revisions to the projected harvest levels using different assumptions about the outcome of the watershed analysis.

(3) Old Growth Timber

The Steelworkers emphasize that the Forest Practice Rules require a sustained yield plan to demonstrate how maximum sustained production "of *high quality timber products*" will be achieved. (FP Rules, §1091.45(a), italics added.) The Steelworkers reason that because old growth timber constitutes the highest quality timber product, the Sustained Yield Plan was required to demonstrate maximum sustained production of old growth timber.

It is true that the Public Review Draft, the EIS/EIR, and the supplemental information submitted by PALCO in February 1999 all examine old growth forests as a special category. Old growth forests have unique characteristics for wildlife habitat and provide high quality timber. However, there is nothing in the Forest Practice Rules to compel a discrete demonstration of the sustainability of old growth forests.

The Forest Practice Rules allow the landowner to decide which harvest products will be harvested. The Rules provide that maximum sustained production is demonstrated in a sustained yield plan "by providing sustainable harvest yields established by the landowner which will support the production level of *those high quality timber products the landowner selects* while at the same time [meeting certain other requirements]." (FP Rules, § 913.11(b), italics added.) Further, the long-term sustained yield estimate in a sustained yield plan must be stated in a measurement (e.g., board feet per year) "consistent with products *chosen by the owner* . . . ." (FP Rules, § 1091.45(c)(2), italics added.) PALCO's harvest estimates in the Sustained Yield Plan include redwood young growth, Douglas fir, white woods, and hardwoods in addition to redwood old growth and Douglas fir old growth.

In response to public comments on the issue of sustainability, the final EIS/EIR explains: "The premise [of the Sustained Yield Plan and Habitat Conservation Plan] is that sustainable, high-quality forest will be attained by converting most of the landscape to faster growing second-growth forests while protecting old growth in [the Marbled Murrelet Conservation Areas] and in riparian management [buffer] zones. The Board of Forestry allows a landowner to balance the harvest rate and growth over time as long as

they balance by the end of the planning period and as long as the harvest in an individual 10 year period does not exceed the [long term sustained yield]. The Board of Forestry allows the landowner to determine the rate of harvest as long as it is sustainable as indicated."

(4) Planning Watersheds

The Forest Practice Rules require a sustained yield plan to identify and map the "planning watersheds" and to analyze potential adverse environmental impacts thereon. (FP Rules, §§ 1091.4(a)(6), 1091.6(c).)[16] The environmental plaintiffs contend the Sustained Yield Plan failed to conform to this requirement because the Sustained Yield Plan did not analyze the impacts upon the "planning watersheds." Instead, the Sustained Yield Plan used much larger "Watershed Assessment Areas," ranging in size from 55,000 to 426,000 acres, that were also used in the Habitat Conservation Plan.

We find no error. First, the Forest Practice Rules expressly allow the Director to approve the use of assessment areas other than those mapped and identified as "planning watersheds." (FP Rules, § 895.1; fn. 16, *ante*.) In fact, the Forest Practice Rules state that "[t]he *minimum* assessment area shall be no less than a planning watershed. The assessment area may include multiple watersheds . . . ." (FP Rules, § 1091.6(a), italics added.) In approving the Sustained Yield Plan, the Director found that PALCO "has submitted the required watershed . . . assessments." That finding was at least an implied, if not an express approval of PALCO's use of the larger Watershed Assessment Areas.

Second, analysis of the smaller "planning watersheds" was deferred to future timber harvest plans. The EIS/EIR states that detailed, site-specific information on individual planning watersheds was not readily available, that the information available

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16 A "planning watershed" is defined as "the contiguous land base and associated watershed system that forms a fourth order or other watershed typically 10,000 acres or less in size. . . ." The Forest Practice Rules explain further that the Director of Forestry "has prepared and distributed maps identifying planning watersheds [that] plan submitters must use. Where a watershed exceeds 10,000 acres, the Director may approve subdividing it. Plan submitters may propose and use different planning watersheds, with the director's approval." (FP Rules, § 895.1.)

was at the scale of Watershed Assessment Areas. Under the federal Habitat Conservation Plan and Implementation Agreement, PALCO is obligated to provide a detailed watershed analysis within five years. The Sustained Yield Plan calls for site-specific information on the watershed impacts to be included in individual timber harvest plans based on completion of the upcoming watershed analysis.

Such deferral is expressly contemplated by the Forest Practice Rules. (FP Rules, § 1091.1(b).) As already noted, a sustained yield plan is not a substitute for a timber harvest plan. (FP Rules, § 1091.1.) However, a timber harvest plan may rely upon an approved SYP for information on timber production and environmental issues as long as the timber harvest plan does not substantially deviate from the sustained yield plan. (FP Rules, §§ 1091.2, 1091.13, 1091.14.) The aim of the Forest Practice Rules is that "all potential adverse environmental impacts resulting from proposed harvesting be described, discussed and analyzed before such operations are allowed." (FP Rules, § 1091.1(b).) The Forest Practice Rules expressly recognize that in some cases the information on all potential adverse environmental impacts will not be available. In such cases, the environmental analysis that is *not included* in the sustained yield plan--whether on new issues or on adverse effects not addressed in the SYP--must be contained in a timber harvest plan that relies on the SYP . . . . (FP Rules, § 1091.1(b).) Put another way, a timber harvest plan may rely upon an approved sustained yield plan only "to the extent that sustained timber production, watershed impacts and fish and wildlife issues are addressed in the approved SYP." (FP Rules, § 1091.2.)

PALCO's Sustained Yield Plan recognizes that before a particular forest stand can be harvested a timber harvest plan must be prepared and approved. The Habitat Conservation Plan, too, requires PALCO to submit timber harvest plans. In his approval of PALCO's Sustained Yield Plan, the Director stated that PALCO will be required to submit timber harvesting plans subject to environmental review, but the timber harvest plans may rely on information and conclusions in the SYP provided that all the relevant information is incorporated into the timber harvest plan. Contrary to environmental plaintiffs' assertion, there is no risk that a future timber harvest plan will be approved

without an adequate analysis of the effects on the watersheds. (E.g., see FP Rules, §§ 956.3-956.12, 1034, for watershed information required in a timber harvest plan.) A future timber harvest plan may rely upon the approved Sustained Yield Plan only "to the extent that" the watershed impacts were addressed in the Sustained Yield Plan. (FP Rules, § 1091.2.) Insofar as the "planning watershed" impacts were not addressed in the Sustained Yield Plan, they must be contained in the timber harvest plan. (FP Rules, § 1091.1(b).)

(5) Cumulative Impacts

The Forest Practice Rules require the Sustained Yield Plan to address potential adverse environmental impacts on fish and wildlife, water quality, and aquatic wildlife, and the analyses must include "cumulative impacts." (FP Rules, §§ 1091.5(b), 1091.6(b).) The environmental plaintiffs complain that the Sustained Yield Plan did not contain a discussion of the *cumulative* environmental impacts.

It is true that the Public Review Draft did not include an analysis of the cumulative impacts within the analyses of the watershed and fish and wildlife. Insofar as environmental plaintiffs' argument is an attack on the Director's "sufficiency" finding at the second step of the review process, we reject it for the reasons already discussed.

The cumulative effects analysis was ultimately deferred to future timber harvest plans.[17] The Habitat Conservation Plan requires PALCO to submit timber harvest plans. The Habitat Conservation Plan also requires PALCO to conduct a comprehensive

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[17] During the sufficiency review process, the Department of Forestry circulated PALCO's initial draft of the Sustained Yield Plan to various state and federal agencies for their review. (See fn. 9, *ante*.) Among the early comments received was a criticism from the National Marine and Fisheries Services that a cumulative impacts analysis was missing. A comment by the Department of Fish and Game noted that as a consequence of this omission the Sustained Yield Plan could not be relied upon *for future timber harvest plans*. In November 1997, the Department of Forestry advised PALCO that its draft required changes with respect to the cumulative impacts in order to make the Sustained Yield Plan adequate *for future timber harvest plans*: "These issues must be addressed in the SYP before CDF can approve it as sufficient to fulfill the *THP* requirements."

watershed analysis within five years in order to provide a cumulative effects assessment. The Public Review Draft expressly contemplates future site-specific prescriptions based on the watershed analysis, and the Public Review Draft discusses how *future timber harvest plans* will evaluate the cumulative impacts.

The EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan contains an analysis of the cumulative environmental effects, as environmental plaintiffs concede. Although the agencies found the EIS/EIR sufficient for CEQA purposes, the final EIS/EIR reports that the Department of Forestry found the cumulative effects analysis inadequate for reliance in future timber harvest plans; hence, future timber harvest plans will need to include a complete analysis. (See FP Rules, §§ 898, 912.9, requiring cumulative effects analysis within timber harvest plan.)

As we have already discussed, a timber harvest plan may rely on a sustained yield plan only to the extent that the requisite information is included in the Sustained Yield Plan. (FP Rules, §§ 1091.1(b), 1091.2.) Deferring the analysis of the cumulative effects did not violate the Forest Practice Rules.

(6) Late Succession Forest Stands

The Forest Practice Rules require special information when "late succession forest stands are proposed for harvesting and such harvest will significantly reduce the amount and distribution of late succession forest stands or their functional wildlife habitat value . . . ." (FP Rules, § 919.16(a).)[18] The special information required is "a discussion of how the proposed harvesting will affect the existing functional wildlife habitat for species primarily associated with late succession forest stands . . . or the planning watershed, as appropriate . . . ." (FP Rules, § 919.16(a).)

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18 "Late succession forest stands" are defined as "stands of dominant and predominant trees that meet the criteria of WHR [Wildlife Habitat Relationship] class 5M, 5D, or 6 with an open, moderate or dense canopy closure classification, often with multiple canopy layers, and are at least 20 acres in size. Functional characteristics of late succession forests include large decadent trees, snags, and large down logs." (FP Rules, § 895.1.)

The environmental plaintiffs complain that the Sustained Yield Plan here does not include such information. The Public Review Draft supplies an evaluation of "late seral forests," a classification that includes but is not limited to late successional forests.[19] The category of "late seral forests" is also used in the Habitat Conservation Plan and in the EIS/EIR.

We find no error. The Forest Practice Rules require only that the information on late successional forests be provided before timber harvesting is actually conducted—either in the Sustained Yield Plan *or* in the timber harvest plan. (FP Rules, § 919.16(a).) Leaving the evaluation to future timber harvest plans did not amount to a failure to follow procedures required by law.

In any event, the variant classification used by PALCO was harmless. The Public Review Draft provides an analysis of the adverse impacts on wildlife habitats by seral type. The environmental plaintiffs have made no assertion that the habitats of any particular wildlife species were overlooked or omitted by the analysis of late seral forests, rather than late succession forests. The EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan contains a comprehensive analysis of the impact of timber harvesting upon the existing wildlife habitats. The EIS/EIR acknowledges the difference between a late seral forest and a late succession forest and attempts to reconcile the two. In the final EIS/EIR, in a response to a public comment, the Department of Forestry recognized the "gap" in PALCO's evaluation but deferred the matter until the watershed analysis was undertaken pursuant to the Habitat Conservation Plan: "Monitoring efforts and agency consideration in the watershed analysis process will be focused on actual [late succession forest] stand attributes."

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19 The Public Review Draft of the Sustained Yield Plan defines a "late seral forest" as "stands with overstory trees that on average are larger than generally 24 [diameter breast height] and may have developed a multi-storied structure. It occurs in stands as young as 40 years old but more typically in stands about 50 to 60 years old and older. Late seral includes forests classified under the California Wildlife Habitat Relationships (CWHR) system as late successional types 5M, 5D, and 6."

C. Determination of Conformance

The environmental plaintiffs and the Steelworkers further assert that the Director of the Department of Forestry failed to follow the procedures required by law at the third step of review in his decision to approve the Sustained Yield Plan.

(1) Dual Rulings

The environmental plaintiffs contend that the Director made two separate and inconsistent determinations and that such dual rulings were procedurally improper. The Steelworkers, too, raise the point in a footnote to their brief. The argument is based on the fact that on February 25, 1999, the Director found the Sustained Yield Plan to be in conformance with the Forest Practice Rules and indicated that "alternative 25a is the only alternative with constraints on timber harvesting that are consistent with the interim mitigations required by the federal Habitat Conservation Plan (HCP) and the EIS/EIR." Following requests for reconsideration made by the Department of Fish and Game and the United States Department of the Interior, the Director issued a new determination on March 1, 1999, this time accepting alternative 25.

Environmental plaintiffs read too much into the Director's change from alternative 25a to alternative 25. The revision made on March 1, 1999, did not change the Director's determination that the Sustained Yield Plan was in conformance with the Forest Practice Rules. In fact, as environmental plaintiffs point out, only one formal Notice of Determination was issued by the Department of Forestry, showing an approval of the Sustained Yield Plan on February 25, 1999. The Director's revised acceptance of alternative 25 was a change in the contents of the Sustained Yield Plan concerning the projected timber inventory, growth, harvest, and yield. The shift from alternative 25a to alternative 25 was a shift in the assumptions about the amount of land that will be available for harvest after the watershed analysis.

In any event, an administrative body has inherent power to reconsider an action taken unless reconsideration is precluded by law. (*In re Fain* (1976) 65 Cal.App.3d 376, 389.) There is nothing in the Forest Practice Rules to preclude reconsideration of a sustained yield plan. The Director is given 30 days at the end of the review and comment

period to determine if the Sustained Yield Plan is in conformance with the rules. (FP Rules, § 1091.10(e).) Here, the Director acted within the 30-day period.[20] The fact that he changed some of the contents of the Sustained Yield Plan within the 30-day period is of no legal consequence. Obviously, the revised determination is the controlling one. We find no procedural error.

The core of environmental plaintiffs' complaint seems to be that the Director's approval of the Sustained Yield Plan with alternative 25 allows a higher level of timber harvesting than would have been allowed under alternative 25a. Under alternative 25a, the harvest level was 145,900 mbfn per year in the first decade, while under alternative 25 the harvest level was 188,200 mbfn. This argument misses the mark. The question is whether the Sustained Yield Plan was in conformance with the Forest Practice Rules, and the Forest Practice Rules do not define a particular level of harvest. There is no prescribed maximum in board feet or maximum percentage of available timber. Rather, the rate of harvest is set by the landowner and will meet the standards of the Forest Practice Rules as long as the harvest level is sustainable over the planning horizon. (FP Rules, §§ 913.11(b), 1091.45(c)(2), (c)(3).) The Director's acceptance of the harvest level in alternative 25 instead of alternative 25a did not violate the Forest Practice Rules.

Environmental plaintiffs argue that because the February 1999 revisions of timber harvest levels were submitted so late in the process the public was denied the opportunity to comment on the new information. The argument is not convincing. Environmental plaintiffs seem to analogize to the process prescribed by the CEQA Guidelines requiring recirculation of an EIR and a new round of public comments when significant new information is added to the final EIR. (Pub. Resources Code, § 21092.1; Guidelines, § 15088.5.)

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20 The public review and comment period, initially set to expire on October 12, 1998, was extended to November 16, 1998. Subsequently, included within a notice published in the Federal Register by the United States Department of Interior on the availability of the final EIS/EIR, was an announcement by the Department of Forestry that the public comment period for the Sustained Yield Plan was extended to February 22, 1999.

There is nothing in the Forest Practice Rules comparable to the recirculation requirement in the CEQA Guidelines. The Forest Practice Rules expressly empower the Director to consider recommendations and mitigation measures from other agencies before making the final determination of conformance. (FP Rules, § 1091.10(e).) Thus, the rules contemplate that changes may be made in the sustained yield plan to bring it into conformance with the Forest Practice Rules. In any event, even under the CEQA Guidelines, recirculation is required only when the new information changes the EIR in a way that "deprives the public of a meaningful opportunity to comment" upon a new significant impact or a substantial increase in the severity of the impact. (Guidelines, § 15088.5(a); see generally *Laurel Heights Improvement Assn. v. Regents of University of California (Laurel Heights II)* (1993) 6 Cal.4th 1112, 1126-1130; *Chaparral Greens v. City of Chula Vista*, *supra*, 50 Cal.App.4th at pp. 1147-1151.) Here, the changes in the projections for timber growth, harvest, and yield did not deprive the public of a meaningful opportunity to comment on the harvest levels. The revised harvest levels fell within the range of harvest levels analyzed in the EIS/EIR. Moreover, the EIS/EIR concludes that while the outcome of the watershed analysis was unknown and the effect on the long-term sustained yield could not be determined accurately, "a long-term reduction of 15 percent seems reasonable." The long-term sustained yield in alternative 25 of the February 1999 revised projections (196,400 mbfn) is 15.9 percent below the long-term sustained yield of alternative 2 (the proposed Sustained Yield Plan) examined in the EIS/EIR (233,520 mbfn).[21]

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21 Environmental plaintiffs argue that because the harvest level in the first decade under alternative 25 is about 19 percent greater than the harvest level in the first decade under alternative 25a**,** alternative 25 constitutes a "substantial deviation" and requires a whole new Sustained Yield Plan with a whole new review process. They mistakenly rely on rule 1091.13 of the Forest Practice Rules, which states that a *timber harvest plan* may not rely upon an approved Sustained Yield Plan if the *timber harvest plan* "substantially deviates" from the Sustained Yield Plan. A "substantial deviation" is a variation in harvest level greater than 10 percent in a 10-year period. (FP Rules, §1091.13(a).) Rule 1091.13 has nothing to do with revised projections made before final approval of a sustained yield plan.

(2) One Integrated Document

The environmental plaintiffs and the Steelworkers complain that the Sustained Yield Plan, as finally approved, does not appear in a single integrated document. Instead, it is composed of several parts. First is the six-volume document labeled the Public Review Draft that was submitted by PALCO, revised under the "sufficiency review" step of the process, and ultimately made available in July 1998 for public and agency review. To enable public review and comment, copies of the Public Review Draft were made available through a website, on a compact disc, and in hard copy at various locations around the state.

Thereafter, the Sustained Yield Plan was the subject of environmental review through the EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan. In the final EIS/EIR, released at the end of the public comment period, the Habitat Conservation Plan appears as a discrete document (Appendix P) , while Appendix Q explains that the entire final EIS/EIR constitutes the final Sustained Yield Plan. To save paper and avoid duplicating the full proposed plan, Appendix Q provides a "cross walk" that cites to the places within the EIS/EIR containing the information to satisfy the elements of the Sustained Yield Plan. Appendix Q also contains changes in the timber inventory, growth, harvest and yield projections to reflect the buffer zones imposed by the final Habitat Conservation Plan.

Subsequently, in February 1999, PALCO submitted additional information at the request of the Department of Forestry, with revised timber projections (including alternatives 25 and 25a) in light of the constraints that might arise from the upcoming watershed analysis required by AB 1986.

In the third and final step of administrative review, the Director's statement approving the Sustained Yield Plan makes clear that the Director evaluated all the segments of the Sustained Yield Plan--the Public Review Draft "in combination with provisions of the HCP, EIS/EIR, supplemental information received from PALCO on February 16, 1999, [and information submitted on reconsideration]." The Director required as one of several conditions of approval of the Sustained Yield Plan that PALCO

submit an integrated document: "Prepare an updated report on Alternative 25 that contains the SYP information contained in Appendix Q to the EIS/EIR and incorporates information from the July, 1998 public review draft of the SYP/HCP."[22]

For purposes of the administrative mandamus proceedings in the trial court, the Department of Forestry compiled exhibit R-3, which pulled together the disparate parts of the Sustained Yield Plan. However, the trial court took evidence that PALCO *itself* had in fact not submitted an integrated document to the Department of Forestry. From this evidence, the environmental plaintiffs and the Steelworkers argue that the Director's approval of the Sustained Yield Plan was ineffective because the condition of an integrated document has not been fulfilled. The environmental plaintiffs further argue that in the absence of a single integrated document submitted by PALCO there was no "plan" for the Director to approve.

We reject the arguments. An integrated document was not a condition *precedent* to approval of the Sustained Yield Plan; it was a condition *subsequent*. That is, PALCO's compliance was not required to make the Sustained Yield Plan effective; rather, its failure to comply supplies a ground for revoking the Sustained Yield Plan. This point is made clear by section 4551.3 of the Public Resources Code, which provides for "continuing monitoring" of an approved sustained yield plan by the Department of Forestry, including a hearing whenever an interested party comes forth with evidence of potential noncompliance with the terms and conditions of the approval of a sustained yield plan. If, after the hearing, the Director finds that implementation of a sustained yield plan is not in compliance with the terms and conditions of the original approval (or with the Forest Practice Rules or with other legal requirements), then the sustained yield

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[22] Just prior to the Director's approval of the Sustained Yield Plan, an internal memo by one of the project managers at the Department of Forestry raised the question "what constitutes the final document . . . . Would it be possible to give conditional approval based on the company preparing a consolidated document containing SYP information?" That conditional approval is exactly what the Director gave.

plan will be deemed ineffective for the remainder of its 10-year term. (Pub. Resources Code, § 4551.3, subd. (c).)

Here, the assertion by the environmental plaintiffs and the Steelworkers to the trial court in the administrative mandamus proceedings that PALCO failed to provide the integrated document was misdirected and premature. When an administrative remedy is provided by statute, relief must be sought from the administrative body and exhausted before the courts will act. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292; *Plaza Hollister Limited Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 29-30, 33.) The remedy available to the environmental plaintiffs and the Steelworkers was to request a hearing by the Department of Forestry pursuant to section 4551.3 of the Public Resources Code. Having failed to exhaust their administrative remedies, the environmental plaintiffs and the Steelworkers were not entitled to assert that PALCO failed to comply with the condition for approval of the Sustained Yield Plan.

(3) Response to Comments

The Director's obligation at the third step of review is to "respond in writing to the issues raised and determine if the SYP is in conformance with the rules." (FP Rules, § 1091.10(e).) The environmental plaintiffs contend the Director failed to make a written response to comments made by the public and by other agencies. The record shows no such failing.

In interpreting an analogous requirement for timber harvest plans, the courts have held that the Department of Forestry abused its discretion in providing responses that were conclusory or that omitted a significant environmental objection. (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 628-629; *Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 954.)[23] At the same time, the courts have recognized that the public agency need not respond to every comment raised in the course of the review process; the agency need only provide a good faith,

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[23] The Director's duty when approving a timber harvest plan is to include a "written response to the Director to significant environmental issues raised during the evaluation process." (FP Rules, § 1037.8.)

reasoned analysis why specific objections were not accepted. (76 Cal.App.3d at p. 954; see also *Ebbetts Pass Forest Watch v. Dept. of Forestry*, *supra*, 123 Cal.App.4th at pp. 1356-1357.)

Here, the public review of the Sustained Yield Plan was the public review of the EIS/EIR for the Habitat Conservation Plan and Sustained Yield Plan. The EIS/EIR was intended to inform the Director's determination whether the Sustained Yield Plan was in conformance with the Forest Practice Rules. As lead agency under CEQA, the Department of Forestry had an obligation to provide within the final EIR a written response to significant environmental points raised during the public comment period. (Guidelines, § 15088.) The final EIS/EIR reports that approximately 16,000 written comments were received. "Because comments were made on the draft HCP/SYP and IA [Implementation Agreement] at the same time [as comments on the draft EIS/EIR] and usually in the same letters, responses to comments on those documents and the entire interrelated process are included here as well." The final EIS/EIR contains over 300 pages of written responses to the public comments. That the Director referred to the EIS/EIR in his determination of conformance without reciting all 300 pages of responses did not constitute a failure to follow the requisite procedure.

We will discuss in part VI.B. below, the separate question raised by the Steelworkers whether the administrative record on the Sustained Yield Plan fails to include all the public comments received during the public review period.

IV. Incidental Take Permit

The California Endangered Species Act (Fish & Game Code, § 2050 et seq.) seeks to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. (Fish & Game Code, § 2052.) Pursuant to the act, the Fish and Game Commission keeps lists of endangered and threatened species, with species added or removed as scientific information warrants. (Fish & Game Code, § 2070; Cal.Code Regs., tit. 14, §§ 670.2, 670.5; see generally, *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104.) A "candidate" species is one that is under

review for possible addition to the list of endangered or threatened species. (Fish & Game Code, §§ 2068, 2074.2, subd. (a)(2).)

The Endangered Species Act prohibits, among other things, the "taking" of an endangered or threatened species. (Fish & Game Code, § 2080.) To "take" means to capture or kill. (Fish & Game Code, § 86.) At the same time, the act allows the Department of Fish and Game to authorize, by permit, a "take" that is incidental to an otherwise lawful activity.[24] (Fish & Game Code, § 2081(b); see also Cal. Code Regs., tit. 14, § 783 et seq.)[25]

The Incidental Take Permit issued to PALCO in conjunction with the Headwaters Agreement authorized the incidental taking of two wildlife species: (1) the marbled murrelet, an endangered bird, and (2) the bank swallow, a threatened bird. The environmental plaintiffs raise several challenges to the Incidental Take Permit.

A. Mitigation of Impacts on the Marbled Murrelet

Among the conditions statutorily required for issuance of an incidental take permit is the full mitigation of adverse impacts from the taking: "*The impacts of the authorized take shall be* minimized and *fully mitigated*. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any

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[24] The Fish and Game Commission (as distinct from the Department of Fish and Game) is likewise empowered to allow a taking, subject to terms and conditions it prescribes, of any candidate species. (Fish & Game Code, § 2084.) Pursuant to that statutory authority, the Fish and Game Commission has issued special orders allowing the take of chinook and coho salmon during the candidacy period. (Cal. Code Regs., tit. 14, §§ 749, 749.1.)

[25] The Federal Endangered Species Act (16 U.S.C. 1531 et seq.) has an analogous scheme.

act that would cause the proposed taking." (Fish & Game Code, § 2081, subd. (b)(2), italics added.)

The environmental plaintiffs contend the Department of Fish and Game failed to proceed as required by law with respect to the marbled murrelet because the Department of Fish and Game deferred full mitigation to some time in the future.[26] We reject the contention.

The Department of Fish and Game expressly found that the impacts on the marbled murrelet will be fully mitigated. First, the Incidental Take Permit states that the mitigation measures imposed as a condition of the permit satisfy section 2081(b) of the Fish and Game Code. Furthermore, the Incidental Take Permit incorporates by reference the final Habitat Conservation Plan and its accompanying Implementation Agreement. The Incidental Take Permit requires PALCO to implement and adhere to the protective measures therein for the 50-year duration of the permit. The Habitat Conservation Plan, in turn, provides operating programs for conservation of the marbled murrelet, among other species. The Incidental Take Permit states that the measures set out in the Habitat

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26 The environmental plaintiffs' argument chiefly rests upon language in the Implementation Agreement. Section 8 of the Implementation Agreement deals with revocation or relinquishment of the federal and state Incidental Take Permits, and section 8.5 requires PALCO to continue its mitigation measures even if the permits are relinquished or revoked *unless* the wildlife agencies determine that the impacts from all takings of all species covered by the permits have been fully mitigated. Section 8.5.2 then defines how to determine that all impacts have been fully mitigated. Within that definition is the key language relied upon by plaintiffs: "This analysis [of full mitigation] will take into consideration, among other factors, . . . with respect to the marbled murrelet, the extent to which habitat conditions have improved within the residual old growth stands within the [Marbled Murrelet Conservation Areas]."

The environmental plaintiffs argue that the quoted language from the Implementation Agreement amounts to a concession that full mitigation is not achieved by the measures put in place at the outset and that full mitigation will be achieved only at a future time when the habitats have improved. What plaintiffs overlook is that the Implementation Agreement keeps the protective measures in place to ensure full mitigation over the long-term, regardless of the existence of the Incidental Take Permit.

Conservation Plan "fully mitigate anticipated take and other impacts on Covered Species."

The Habitat Conservation Plan refers to chapter 3 of the EIS/EIR for analysis of the impacts on the covered species. The EIS/EIR contains a detailed discussion of the impacts on and mitigation measures for the marblet murrelet and other wildlife. The EIS/EIR reports that the proposed timber harvesting (known as alternative 2) would have "short-term direct and indirect effects on murrelets; however, in the long term, these effects would be minimized and mitigated."[27] Further, the EIS/EIR concludes that the cumulative effects on the murrelets would be "minimized, mitigated, and less than significant in the long term" due to the restrictions of the Habitat Conservation Plan and the creation of conservation areas. In response to a public comment, the EIS/EIR explains that the final Habitat Conservation Plan, which includes additional measures beyond those discussed in the draft EIS/EIR, would fully mitigate the impacts from the incidental take of marbled murrelets. Another response to a public comment explains that the mitigation will occur over the life of the 50-year Incidental Take Permit: "The 50-year permit term was chosen in part because a permit period of that length is important to insure that the mitigation provided for the marbled murrelet will be fully realized . . . . There is no requirement under NEPA or CEQA to address longer or shorter permit terms, particularly where, as here, the applicant has requested a 50-year term and the wildlife agencies believe such a 50-year term is necessary to mitigate for the effects of take of the covered species."

In its CEQA findings, the Department of Fish and Game found that the final EIS/EIR "identifies potential short-term effects to marbled murrelet due to the incidental take and loss of some suitable nesting habitat, which may result in reduction of reproductive success." The Department of Fish and Game further found that the mitigation measures identified in the EIS/EIR, as described in the Habitat Conservation

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[27] Elsewhere in the EIS/EIR, "short term" is characterized as 50 years (the duration of the Incidental Take Permit), while "long term" is greater than 200 years.

Plan and Implementation Agreement, "will likely mitigate the potential significant effects to the marbled murrelet in the long-term." The Department again ordered PALCO to implement those measures as a condition of approval of the Incidental Take Permit. The Department expressed the following rationale: "The required mitigation measures use the best available science to preserve the highest quality habitat, in a matrix of buffering second growth and residual forest in areas of suitable size to sustain the marbled murrelet population in the short and long-term future."

Contrary to the environmental plaintiffs' suggestion, there is nothing in the law to require that full mitigation be achieved in the short term or concurrently with the issuance of the incidental take permit. The statute says only that the adverse impacts from the taking "shall be . . . fully mitigated." (Fish & Game Code, § 2081, subd. (b).) The word "fully" means completely, entirely, and thoroughly. (Webster's 3d New Internat. Dict. (1981) p. 919.) It does not connote temporal immediacy. By necessity, efforts to remedy adverse effects upon some species will take some time. This is especially so here, where the mitigation measures involve the slow process of developing forest habitat for the marbled murrelet. We conclude that the Department of Fish and Game satisfied the statutory conditions and made the necessary findings that the adverse impacts from the permitted incidental taking will be fully mitigated.[28]

B. PALCO's economic objectives

As already indicated, the Incidental Take Permit requires PALCO to implement the Habitat Conservation Plan, which, in turn, establishes a detailed Marbled Murrelet Conservation Plan. That plan sets up certain Marbled Murrelet Conservation Areas in which timber harvesting is prohibited. On the rest of the PALCO lands, the Marbled Murrelet Conservation Plan sets up a phased harvesting program. The old growth redwood stands are to be divided into two categories of roughly equal acreage, one designated "low quality" habitat and the other "high quality" habitat. The high quality

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28 We find it unnecessary to consider the legislative history materials presented in PALCO's request for judicial notice. The request is denied.

habitat is then subject to further restrictions on harvesting, including a procedure for prioritizing the murrelet habitat and then phasing the timber harvesting so as to minimize the impact on the murrelet. The key language states: "The [federal wildlife agency and the Department of Fish and Game], and PALCO will work cooperatively to schedule harvest of old-growth redwood and residual old growth redwood outside the [Marbled Murrelet Conservation Areas] in a manner which *minimizes* impacts to marbled murrelets *while recognizing PALCO's operational needs*. PALCO shall work cooperatively with the wildlife agencies to schedule and conduct old-growth redwood timber harvest so as to prioritize entry of the lower quality habitat group over timber stands of the higher quality habitat group, *to the extent practicable* given other required constraints of the [Habitat Conservation Plan] and [Incidental Take Permits], *while giving consideration to PALCO's operational needs*."[29] (Italics added.)

The environmental plaintiffs contend that this provision improperly replaces the standard of "full mitigation" with a balancing of the needs of the endangered murrelet against the economic needs of PALCO. They argue such balancing violates the mandate of the Deparment of Fish and Game to protect the endangered wildlife. The argument is unfounded.

First, the statute not only allows but expressly compels giving consideration to economic objectives. As already quoted above, the statute provides that when various mitigation measures are available, "the measures required shall maintain the applicant's objectives to the greatest extent possible." (Fish & Game Code, § 2081, subd. (b)(2).) The provision regarding harvest phasing was not a violation of law.

Furthermore, as already discussed, the Department of Fish and Game expressly found that the impacts on the marbled murrelet will be fully mitigated in accordance with section 2081 of the Fish and Game Code. The Department's findings on "full mitigation"

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29 The EIS/EIR explains the phased harvesting as follows: "Consultation between the agencies and PALCO will occur to delay harvest of high-quality marbled murrelet habitat as long as possible *while satisfying timber volume needs of PACLO*." (Italics added.)

were based upon the totality of the protective measures put in place through the Habitat Conservation Plan. The EIS/EIR indicates that the combination of protective measures in the Habitat Conservation Plan, including the creation of conservation areas and buffer zones, prioritization of habitat blocks, and funding of research and population surveys, all serve to mitigate the permitted taking of the murrelets over the 50-year term of the incidental take permits. The environmental plaintiffs' complaint focuses on one of those measures (the harvest phasing) taken in isolation. Contrary to their assertion, the statement in the Habitat Conservation Plan that the phased harvesting must "minimize" the impact on marbled murrelets does not contradict the finding that the overall set of protective measures will fully mitigate, over time, the incidental taking of marbled murrelets.

C. Survey Data

Another statutory condition for the Incidental Take Permit is consideration of scientific information to determine the threat to survival of the species: "No permit may be issued pursuant to subdivision (b) if issuance of the permit would jeopardize the continued existence of the species. The department shall make this determination *based on the best scientific and other information that is reasonably available*, and shall include consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities." (Fish & Game Code, § 2081, subd. (c), italics added.)

The environmental plaintiffs do not dispute that the Department of Fish and Game made a determination that issuance of the Incidental Take Permit would not jeopardize the continued existence of the marbled murrelet. The environmental plaintiffs contend that the scientific data upon which the Department relied was in fact not "the best," that the scientific information should have included surveys of the murrelet population on PALCO's lands, including survey data from the Pacific Seabird Group Protocol. The complaint is unfounded.

The Incidental Take Permit refers to the EIS/EIR for information about the Covered Species and to the Habitat Conservation Plan for the mitigating measures. The EIS/EIR and the Habitat Conservation Plan contain a voluminous amount of information about the effects upon the marbled murrelet. The EIS/EIR explains that only part of PALCO's lands had been surveyed to determine the presence of marbled murrelets. The surveys that were conducted on PALCO's lands followed the Pacific Seabird Group Protocol. But surveys on land (rather than at sea) to count marbled murrelets and to determine their habitat use have had limited effectiveness. Therefore, the analysis of the effects upon the murrelet and its breeding habitat was primarily based upon assumptions derived from what is known about the murrelets' behavior and breeding habitat.

Among the protective measures set forth in the Habitat Conservation Plan are various measures designed to monitor the murrelet population on PALCO lands, in the Marbled Murrelet Conservation Areas, and at sea (during migration). The Habitat Conservation Plan states: "At this point, inland surveys are not, by themselves, thought to monitor marbled murrelet numbers effectively enough to allow estimates of population trends . . . ." The Habitat Conservation Plan does, however, call for future inland surveys: "Surveys will be carried out by staff or contractors, according to the basic methods set out in the 1998 Pacific Seabird Group protocol. Results will be used to determine . . . whether the harvest of residual old growth and second growth outside of the [Marbled Murrelet Conservation Areas] is having any detrimental effect on habitat quality within the [Marbled Murrelet Conservation Areas] and, if so, to determine the relative impact of the effect on the species."

There is nothing to suggest that the Department of Fish and Game acted without enough information to make an informed decision. (See *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection, supra,* 123 Cal.App.4th at pp. 1353-1354; cf. *Sierra Club v. State Bd. Of Forestry, supra,* 7 Cal.4th at pp. 1235-1236 [agency approval was made without information the agency had requested as being necessary for its decision]. Indeed, the Department of Fish and Game found that it had before it "the best

scientific and other information that is reasonably available . . . ." We can discern no failure by the Department of Fish and Game to proceed in the manner required by law.

D. Findings

The environmental plaintiffs do not dispute that the Department of Fish and Game made express findings that the criteria for issuance of the Incidental Take Permit had been met. The environmental plaintiffs complain that the findings merely recite the statutory language and do not explain the Department's reasoning.

Environmental plaintiffs rely on *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (*Topanga I*), which holds that in order to enable judicial review for substantial evidence under section 1094.5 of the Code of Civil Procedure an administrative agency must make findings that "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga I*, *supra*, 11 Cal.3d at p. 515.)

Topanga I does not apply here. We are not reviewing the Incidental Take Permit for substantial evidence. The question we must decide is the legal question whether the Department of Fish and Game failed to proceed in the manner required by law. In any event, the phrasing of the findings in statutory language does not render the findings inadequate. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1363-1364 (*Topanga II*).) The route to the administrative decision is sufficiently disclosed when reference to the administrative record informs the parties and the reviewing courts of the theory upon which the agency arrived at its ultimate decision and the agency in truth found those facts that are legally essential. (*Id*. at p. 1356; *Sierra Club v. California Coastal Com., supra,* 19 Cal.App.4th at p. 556.) Here, the ultimate decision was the decision to issue the Incidental Take Permit. The Incidental Take Permit itself refers to the EIS/EIR for an analysis of the impacts on the Covered Species and refers to the Habitat Conservation Plan for the mitigation measures. The Department of Fish and Game made specific findings on the several prerequisites for the permit. Nothing more was required.

E. No Surprises

The Incidental Take Permit incorporates the terms of the Habitat Conservation Plan and its Implementation Agreement. The Habitat Conservation Plan and Implementation Agreement, in turn, contain so-called "no surprises" assurances pertaining to changed circumstances and unforeseen circumstances. First, as to changes in environmental circumstances that can reasonably be anticipated, such as fire, flood, or earthquake, the Habitat Conservation Plan sets out certain response measures designed to mitigate the impact of such changes, and the Implementation Agreement states that PALCO will not be required to institute any response measures beyond those specified. Further, as to unforeseen circumstances, the Habitat Conservation Plan and Implementation Agreement provide that PALCO will not be required to commit additional land, water, or money. At most, PALCO may be required to modify its activities within the habitat conservation areas or its activities with respect to the habitat conservation programs, but no additional restrictions on land use or water use will be imposed.

The "no surprises" rule is an established policy of the federal wildlife agencies. (50 C.F.R. § 17.22.) It is intended to encourage landowners to factor into their day-to-day activities measures to protect endangered species. By bringing in an element of certainty, the no-surprise rule removes a disincentive a landowner might have to obtaining an incidental take permit and submitting to the mitigation measures. (See 63 Fed.Reg. 8859.) The no-surprises rule is reflected in state law, too, in the Natural Community Conservation Planning Act (Fish & Game Code, § 2800 et seq.), which was enacted in 2002, after the administration actions were taken in this case. The state act authorizes the Department of Fish and Game to enter into an agreement to implement a plan for comprehensive management and conservation of multiple wildlife species, and the act specifically authorizes the Department of Fish and Game to "provide assurances for plan participants commensurate with long-term conservation assurances and associated implementation measures . . . ." (Fish & Game Code, §§ 2820, subd. (f), 2810.) The "level of assurances" and the time limits for assurances must be based on

various factors, including the level of knowledge of the status of the covered species and the adequacy of analysis of the impact of take on covered species. (Fish & Game Code, § 2820, subd. (f)(1).) Moreover, the act specifically states that "additional restrictions on the use of land, water, or other natural resources shall not be required" in the event of unforeseen circumstances. (Fish & Game Code, § 2820, subd. (f)(2).) Although those statutory provisions do not govern the Implementation Agreement here, they do show the no-surprises provisions to be within the pale.

The environmental plaintiffs argue that the no-surprises provisions within the Habitat Conservation Plan and Implementation Agreement violate the duty of the Department of Fish and Game to ensure full mitigation of the impacts of the permitted taking, including mitigation of "all impacts on the species that result from any act that would cause the proposed taking." (Fish & Game Code, § 2081, subd. (b)(2).) We reject the argument.

The required responses to *changed circumstances* are designed to mitigate the impact of physical processes (such as fire, flood, earthquake) that can be anticipated in the course of the underlying activities. Insofar as the environmental plaintiffs contend that the responses will not in fact fully mitigate the adverse impacts, their contention is a challenge to the sufficiency of the evidence to support the Department's finding on full mitigation, and that challenge is foreclosed.

With respect to *unforeseen circumstances*, the full mitigation requirement does not apply. The focus of the full mitigation requirement is on adverse impacts that result from an "act"—i.e., a purposeful activity. (Fish & Game Code, § 2081, subd. (b); see *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1561.) Adverse impacts that result from unforeseen circumstances are impacts that cannot reasonably be anticipated, not impacts from purposeful activities.

F. Impact on Spotted Owl

The Fish and Game Code gives special protection to certain birds, including birds in the order of Strigiformes to which the spotted owl belongs. (Fish & Game Code, § 3503.5.) The statute makes it unlawful to take the birds or to take the nest or eggs of

such birds, with no provision for an incidental take by permit. The environmental plaintiffs contend that the Department of Fish and Game failed to comply with this law in that the Incidental Take Permit allows PALCO to destroy some nests of the spotted owl. The contention is not borne out by the record.

The Incidental Take Permit itself expressly does *not* authorize a taking of the spotted owl. The environmental plaintiffs' attack is actually directed to the Habitat Conservation Plan, which is incorporated by reference into the Incidental Take Permit. However, the Habitat Conservation Plan gives no authorization to kill spotted owls or to destroy their nests. The Habitat Conservation Plan provides a detailed Northern Spotted Owl Conservation Plan designed to retain and recruit the spotted owl's habitat. Under that plan, logging is allowed in some areas of spotted owl habitat, but restrictions are in place to maintain the habitat, to protect nesting pairs, and to maintain reproductive success. For example, no timber harvesting may occur within a 1,000-foot radius of a spotted owl nest tree during breeding season.[30] Even in habitat areas not preserved, all nest trees must be marked by PALCO's wildlife biologist and retained if the area is harvested. Contrary to the environmental plaintiffs' suggestion, there is no permit for destruction of spotted owl nests.

There is some confusion in the record brought about by the different meanings of the word "take" under federal and state law. Under California law, "take" means to capture or kill. (Fish & Game Code, § 86.) Under the federal statute, in contrast, "take" includes "harm," and the federal regulations construe "harm" to include injurious modification of the habitat. (16 U.S.C. § 1532(19); 50 C.F.R. § 17.3; see *Babbitt v. Sweet Home Chapter* (1995) 515 U.S. 687, 697-702.) The final EIS/EIR contains language indicating that the timber harvesting of spotted owl habitat sites will be a "take" of the spotted owl. However, the EIS/EIR goes on to say that the effects will consist of

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30 In addition, PALCO must each year give special protection to at least 80 "activity sites." No harvesting is allowed on 500 acres within .7 miles of any such site.

habitat removal, with no direct effect on the owl and only an indirect effect through *displacement* of some individual birds and the elimination of *future* nest sites.[31]

The EIS/EIR expressly recognizes the statutory protections given to the spotted owl. And the EIS/EIR reports that the habitat losses will be mitigated. The CEQA findings made by the Department of Fish and Game, too, making no mention of the spotted owl, impliedly found no significant adverse effect upon the spotted owl. (See Pub. Resources Code, § 21081; Guidelines, § 15091 [findings required whenever significant effect is identified].) In short, the record reveals no failure by the Department of Fish and Game to proceed in a manner required by law with respect to the spotted owl.

G. Unlisted Species

The Incidental Take Permit identifies 13 species on PALCO's lands that were not then listed as endangered or threatened--denominated Unlisted Species.[32] In addition to allowing the incidental take of the marbled murrelet and the bank swallow, the Incidental Take Permit goes on to allow an incidental take of the 13 Unlisted Species in the event any such species should become a candidate species in the future--i.e., without any further need for an additional permit. The permit states: "Because PALCO has agreed to implement measures pursuant to the Final [Habitat Conservation Plan] and [Implementation Agreement] that will avoid, and/or minimize and fully mitigate impacts

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31 Plaintiffs erroneously suggest that the harvesting allowed by the Habitat Conservation Plan will let some spotted owls be killed. The EIS/EIR reports that the baseline owl population could potentially be reduced by 33 percent because of the loss of nesting habitat, but that this scenario is unlikely. The loss would be due to the lack of reproduction, not the death of individual birds.

32 The species named in the Incidental Take Permit as Unlisted Species are the Northern Spotted Owl, Snowy Plover, Pacific Fisher, Red Tree Vole, Chinook Salmon, Coho Salmon, Cutthroat Trout, Steelhead, Southern Torrent Salamander, Red-legged Frog, Yellow-legged Frog, Tailed Frog, and Western Pond Turtle. Although the northern spotted owl is identified as unlisted, it is, as we have already discussed, entitled to special statutory protection. (Fish & Game Code, § 3503.5.) The coho salmon north of San Francisco has since become a candidate species, and the Fish and Game Commission has, by special order, allowed the incidental take during the candidacy period subject to the terms of the PACLO permit. (Cal. Code Regs., tit. 14, § 749.1.)

on the Unlisted Species, this [Incidental Take Permit] shall become effective as to each Unlisted Species upon its acceptance as a candidate species . . . provided PALCO complies with the above conditions of approval. No additional [incidental take permit] or authorization shall be required by the Department to allow incidental take of such Covered Species from Covered Activities . . . ."

This provision parallels provisions within the Implementation Agreement for the Habitat Conservation Plan. The Implementation Agreement contains "federal assurances" that the federal incidental take permit will be effective for a species identified in the permit that is not currently listed as endangered or threatened but that later becomes listed. And the Implementation Agreement contains "state assurances" to the same effect for the state Incidental Take Permit.

We agree with the environmental plaintiffs that the Department of Fish and Game exceeded its authority in granting the permit-in-advance for the Unlisted Species. Before we examine the substance of environmental plaintiffs' argument, we find it necessary to explain our rejection of PALCO's argument that the issue is not ripe for decision. We recognize, of course, that at the present time, when the Unlisted Species have not yet become candidate species, no incidental take permit is required at all, and the Incidental Take Permit does not purport to permit the taking of unlisted species.[33] (See *People v. Murrison* (2002) 101 Cal.App.4th 349, 362-363 [until water restrictions are actually established, landowner's claim of a taking is not ripe].) Yet, the ripeness doctrine may be relaxed when it is clear that the agency will not perform its future duty when the time for performance arrives. (*Young v. Gnoss* (1972) 7 Cal.3d 18, 21, fn. 4 [county clerk announced voter registration would not be accepted].) Here, the Department of Fish and Game has made clear by the terms of the Incidental Take Permit that the Department *will*

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33 The Incidental Take Permit states that "take of Unlisted Species is not authorized under this ITP until such time as such species is accepted as a candidate species . . . ." The Incidental Take Permit does, however, provide current protections for the Unlisted Species that would not otherwise be imposed and extends those protections for the 50-year duration of the Incidental Take Permit.

not require an additional incidental take permit when the time comes and an Unlisted Species becomes a candidate species entitled to the protections of the Endangered Species Act.

Another flaw in PALCO's ripeness argument is that the environmental plaintiffs' lawsuit is not an action for traditional mandamus to compel the Department of Fish and Game to perform its duty under the Endangered Species Act. If it were, then the ripeness argument might be more persuasive. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 169-174.) This lawsuit is an administrative mandamus action challenging the validity of the Incidental Take Permit that was issued. The ripeness doctrine is not violated by our determination that one provision in the Incidental Take Permit is invalid.

The Department of Fish and Game has never identified any statutory basis for issuance of the permit-in-advance for unlisted species. Apparently, the notion of automatic future authorization comes from the Natural Community Conservation Planning Act (former Fish & Game Code, § 2800 et seq.).[34] Under that act, the Department of Fish and Game is expressly empowered to permit the taking not just of listed species but of "any identified species whose conservation and management is provided for in a department approved natural communities conservation plan." (Former Fish & Game Code, § 2835.)[35] In the present case, PALCO requested that the Habitat Conservation Plan be deemed a "natural community conservation plan" in order to allow the Department of Fish and Game to authorize the take of unlisted as well as listed species. Subsequently, however, the final EIS/EIR reported that the Department of Fish

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34 The act was repealed in 2002 and replaced by a new act, identically titled. (Stats. 2002, ch. 4, § 2.) The former version applies to agreements entered into before January 1, 2002. (Fish & Game Code, § 2830, subd. (a).)

35 Likewise, the current version of Fish and Game Code section 2835 allows the Department of Fish and Game to "authorize by permit the taking of any covered species whose conservation and management is provided for in a natural community conservation plan approved by the department." "Covered species" means both listed and nonlisted species. (Fish & Game Code, § 2805, subd. (e).)

and Game concluded that the Habitat Conservation Plan did *not* qualify as a "natural community conservation plan."[36] Nevertheless, despite the absence of any statutory authority, the Department of Fish and Game included the permit-in-advance provision in the Incidental Take Permit, while at the same time acknowledging that litigation might ensue.[37]

The environmental plaintiffs argue further that the automatic future authorization regarding unlisted species breaches the Department's statutory obligation to determine in the future--at the time the species becomes a candidate species--the two critical prerequisites for an incidental take permit: (1) whether the impacts of the taking on the species will be fully mitigated, and (2) whether the species' continued existence will be jeopardized by the taking. (Fish & Game Code, § 2081, subds. (b)(2), (c).) We agree with the latter assertion.[38]

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[36] A "natural community conservation plan" is one that identifies and provides for regional or areawide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth. (Former Fish & Game Code, § 2805, subd. (a).) The phrase "development and growth" suggests that the plan governs housing or other buildings on land, rather than commercial harvesting of timber or other vegetation.

[37] The Incidental Take Permit states in pertinent part: "No additional [Incidental Take Permit] or authorization shall be required by the Department to allow incidental take of such Covered Species from Covered Activities, *unless it is determined in a court of law* or by a binding administrative opinion (such as a formal opinion of the California Attorney General) *that the Department is not authorized to cause the [Incidental Take Permit] to become effective automatically as to Covered Species that are not currently listed* as described herein. In this event, the Department shall accept and give due consideration to the minimization and mitigation measures in this [Incidental Take Permit] in support of an application for a permit amendment or for a separate [Incidental Take Permit], as necessary and lawful to permit take of such Covered Species for the remaining term of this [Incidental Take Permit]." (Italics added.)

[38] We are not persuaded by the environmental plaintiffs' argument that the automatic future authorization violates the full mitigation requirement. The Department of Fish and Game expressly found that adverse impacts upon the Unlisted Species will be fully mitigated by the protective measures imposed by the Habitat Conservation Plan and its accompanying Implementation Agreement. Environmental plaintiffs' argument is essentially an assertion that the adverse impacts on the Unlisted Species will not, in fact,

Before issuing an incidental take permit, the Department of Fish and Game must find that the species would not be in jeopardy from a permitted incidental taking. The Department must determine the adverse impacts upon the species' capability to survive and reproduce "in light of (1) *known* population trends; (2) *known* threats to the species; and (3) reasonably *foreseeable* impacts on the species from *other* related projects and activities." (Fish & Game Code, § 2081, subd. (c), italics added.) The statute contemplates that the Department will review the information that is available *at the time* the Incidental Take Permit is issued. The statute states: "No permit may be issued . . . if issuance of the permit would jeopardize the continued existence of the species." (Fish & Game Code, § 2081, subd. (c).) An automatic permit-in-advance eliminates consideration of new information concerning population trends, threats to the species, or impacts from other projects.

The state agencies respond with the contention that the Department of Fish and Game retains the ability to reassess the jeopardy to a species in the future and to add new protective measures when an unlisted species becomes a listed species. The agencies rely on a provision within the Incidental Take Permit that allows amendment "without the concurrence of PALCO *as required by law*." (Italics added.) Further, the Department of Fish and Game made its finding of no jeopardy to the continued existence of any of the Covered Species (including the Unlisted Species) "based, in part, on the Department's express authority to amend the terms and conditions of the ITP *as required by law*." (Italics added.) Yet, the state agencies have put forth no basis in law that dictates an amendment of the Incidental Take Permit should a species come into jeopardy.[39]

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be fully mitigated and that future protective measures may be required. As already explained, the sufficiency of the evidence to support the Department's factual findings is not an issue before us.

[39] The Implementation Agreement allows for amendment of the Incidental Take Permit in accordance with state regulations. Those regulations, in turn, allow amendment by the Department of Fish and Game only with the consent of the permitee or "as required by law." (Cal.Code Regs., tit. 14, § 783.6(c)(2).) The regulations also allow the permitee to request an amendment. (Cal.Code Regs., tit. 14, § 783.6(c)(1).) But the

Indeed, the Implementation Agreement provides "assurances" that the Department of Fish and Game "shall, to the maximum extent permitted by law, not recommend or require that PALCO provide new, additional or different conservation or mitigation for Take of Covered Species by Covered Activities on the Covered Lands beyond that required pursuant to the HCP and this Agreement . . . ."

It is true that automatic authorization would not deprive the Department of Forestry of its authority to review future timber harvest plans. Under the Forest Practice Rules the Director of the Department of Forestry may disapprove a timber harvest plan if, among other things, the plan would harm or jeopardize the existence of a listed species. (FP Rules, § 898.2(d).) However, this separate authority by a separate agency does not cure the breach of duty by the Department of Fish and Game to assess the jeopardy to the species before issuing an incidental take permit. When an incidental take permit has been issued by federal or state authorities, the Director of Forestry may approve a timber harvest plan regardless of the jeopardy to a species. (FP Rules, § 898.2(d).)

The state agencies contend that the Department of Fish and Game could suspend or revoke the Incidental Take Permit if need be. But the Implementation Agreement calls for suspension or revocation only if PALCO fails to comply with the conditions of the permit or if a statutory enactment prohibits continuation of the permit.[40] In other words, it will take a legislative enactment to revoke the terms of the Incidental Take Permit.

Although we agree with the environmental plaintiffs that the automatic future authorization is invalid, we cannot affirm the trial court's grant of a peremptory writ of mandate to set aside the Incidental Take Permit in its entirety. The remedy here is to strike the offending provision, not to invalidate the entire Incidental Take Permit. The Incidental Take Permit expressly anticipates the possibility of severance of the automatic

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Department of Fish and Game has no ability to demand an amendment. (See *T.R.E.E.S. v. Department of Forestry & Fire Protection* (1991) 233 Cal.App.3d 1175, 1182.)

[40] The Implementation Agreement requires that all activities undertaken by PALCO "be in compliance with all applicable [f]ederal and state laws and regulations, including CESA (including Section 2081) . . . ."

future authorization upon judicial invalidation and provides the consequences of such severance. (Fn. 37, *ante*.) We will direct the trial court to grant the environmental plaintiffs' petition to the extent that the writ compels the Department of Fish and Game to strike the automatic future authorization for incidental take of unlisted species.[41]

H. Violation of Public Trust

The Legislature has declared that the policy of this state is to "encourage the preservation, conservation, and maintenance of wildlife resources . . . ." (Fish & Game Code, § 1801.) And the Legislature has declared the Department of Fish and Game to be "trustee" of the fish and wildlife resources of the state. (Fish & Game Code, §§ 711.7, subd. (a), 1802.) Both sides in this dispute have invoked the public trust duties of the Department of Fish and Game. The environmental plaintiffs argue that three particular aspects of the Incidental Take Permit constitute an abandonment by the Department of Fish and Game of its public trust obligations.[42] The three challenged aspects pertain to what the environmental plaintiffs perceive to be an absence of continuing supervision by the Department of Fish and Game to assure that fish and wildlife are protected throughout the 50-year term of the Incidental Take Permit. For its part, the Department of Fish and

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[41] While a writ of mandate may not be used to control the exercise of discretion by an administrative agency (Code Civ. Proc., § 1094.5, subd. (f)), striking the automatic authorization for Unlisted Species does not interfere with the discretionary power of the Department of Fish and Game. The Department has already specified within the Incidental Take Permit the consequences of a judicial invalidation of the automatic authorization. There is no reason to remand the matter to the Department of Fish and Game for further action. (Cf. *Pulaski v.Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1342 [severing invalid portion of regulation].)

[42] The particular aspects challenged are (1) the no-surprises assurances regarding changed and unforeseen circumstances; (2) assurances in the Implementation Agreement that the Department of Fish and Game will not require any new or different conservation or mitigation measures beyond those imposed by the Habitat Conservation Plan, the Implementation Agreement, and the Streambed Alteration Agreement ; and (3) conservation measures in the Northern Spotted Owl Conservation Plan of the Habitat Conservation Plan allowing PALCO to make its own selection of particular habitat sites to be retained.

Game seems to rely on its public trust authority as a basis for assuring that the Unlisted Species do not come into future jeopardy. (See discussion in section G above.)

We reject the underlying premise of both parties that the Department of Fish and Game has been given extra-statutory powers by virtue of its status as "trustee" of the fish and wildlife. Within the same code section granting trustee status to the Department of Fish and Game, the Legislature has stated that the policy of wildlife preservation does not bestow "any power to regulate natural resources or commercial or other activities connected therewith, except as specifically provided by the Legislature." (Fish & Game Code, § 1801, subd. (h).) Thus, the authority of the Department of Fish and Game is strictly limited to the powers bestowed by statute.

In the present case, by reviewing PALCO's application for an incidental take permit and imposing conditions for its issuance, the Department of Fish and Game was implementing the Endangered Species Act and thereby fulfilling its statutory trustee duties. (See *Betchart v. Department of Fish & Game* (1984) 158 Cal.App.3d 1104.) Whether the Department correctly implemented the statute is a separate question, but the environmental plaintiffs have not shown that the three challenged aspects of the Incidental Take Permit violate the Endangered Species Act or any other statute. At the same time, as we have already discussed, the Department of Fish and Game has not shown any statutory basis for issuing an automatic future authorization for unlisted species.

The environmental plaintiffs further rely upon the common law "Public Trust Doctrine," which is a separate concept that empowers and obligates *the State* to take charge of wildlife resources. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 433-441; *see Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 144-145.) There is no basis for the environmental plaintiffs' assertion that the State has abdicated its public trust responsibilities. With respect to the Headwaters Forest Project, the State through its administrative agencies negotiated the Headwaters Agreement and the Implementation Agreement for the Habitat Conservation Plan, and through the Legislature approved and

funded the project. Moreover, in CEQA, the Endangered Species Act, the Forest Practices Act, and other statutes, the state Legislature has established regulatory schemes to protect the state's wildlife. There is no indication in this record that wildlife are being harmed by the absence of a regulatory scheme.

The environmental plaintiffs' argument discounts the provisions in the Habitat Conservation Plan for monitoring of PALCO's activities. The Habitat Conservation Plan contains a comprehensive "Mitigation, Monitoring and Reporting Program." Pursuant to the Implementation Agreement, the Department of Fish and Game will be responsible for monitoring implementation of the Habitat Conservation Plan and the Incidental Take Permit. Under the Habitat Conservation Plan, PALCO is required to fund a third-party entity to monitor not only PALCO's compliance with but also the effectiveness of the Habitat Conservation Plan. The monitor will issue regular reports to the state and federal agencies. The Habitat Conservation Plan also calls for what is known as "adaptive management," which allows modification of the prescriptions as new information becomes available on the effectiveness of those prescriptions. Adaptive management is called for with respect to the Northern Spotted Owl Conservation Plan and the Aquatics Conservation Plan.

Furthermore, the Habitat Conservation Plan and its Implementation Agreement give oversight authority to the Department of Forestry in its review of future timber harvest plans. All future timber harvest plans must contain the prescriptions of the Habitat Conservation Plan.

V. Streambed Alteration Agreement

Former section 1603 of the Fish and Game Code sets out a procedure for a streambed alteration agreement (sometimes referred to as a Section 1603 agreement).[43] In brief, the statute requires that before any person undertakes to substantially divert or obstruct the natural flow of a river, lake or stream, the person must enter into an

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43 In 2003, the statute was repealed and replaced by sections 1600 to 1616. (Stats. 2003, ch. 736.) However, the former version remains applicable to agreements entered into before January 1, 2004. (Fish & Game Code, § 1616.)

agreement with the Department of Fish and Game. First, the person must notify the Department of Fish and Game of the streambed diversion plans, and the Department must then, if the existing fish or wildlife would be affected, submit to that person its proposals for measures to protect the fish and wildlife. If the affected person does not accept the Department's proposals, the Department must negotiate a mutual agreement or, if no mutual agreement can be timely reached, the matter must be put to a panel of arbitrators. (See generally *People v. Murrison* (2002) 101 Cal.App.4th 349, 358, 361.)

The environmental plaintiffs raise six claims of error with respect to the procedures followed in connection with PALCO's Streambed Alteration Agreement, asserting that the Department of Fish and Game failed to protect the fish and wildlife. None of the claims has merit.

A. Notice to the Department

The environmental plaintiffs contend that PALCO failed to fufill the first step of giving notice to the Department of Fish and Game. This contention is ludicrous in the face of a completed Streambed Alteration Agreement. The record shows that on October 29, 1998, on the same day PALCO applied for the Incidental Take Permit, PALCO notified the Department of Fish and Game of its intention to seek a Streambed Alteration Agreement. Even before then, PALCO engaged in negotiations with the Department of Fish and Game concerning a streambed alteration agreement along with the Incidental Take Permit and the Habitat Conservation Plan. The Public Review Draft of the Sustained Yield Plan and Habitat Conservation Plan released in July 1998 included a proposed streambed alteration agreement. The draft EIS/EIR stated that a Streambed Alteration Agreement was among the decisions to be informed by the environmental review. The fact that a formal notice of streambed alteration was belatedly filed is of no consequence.

The environmental plaintiffs further complain that PALCO did not specify the exact dates and locations of the diversions or obstructions. Environmental plaintiffs have confused two distinct notifications. The notification required by statute is a submission of "general plans sufficient to indicate the nature of a project" that will divert, obstruct, or

change the natural flow of a river, stream or lake. (Former Fish & Game Code, §§ 1601, subd. (a), 1603, subd. (a).) Clearly, the Department of Fish and Game obtained the requisite information, if not in the letter of October 1998 then from the concurrent proceedings on the Habitat Conservation Plan and Sustained Yield Plan and the Incidental Take Permit. The Streambed Alteration Agreement recites that PALCO's "submittal of a habitat conservation plan and sustained yield plan . . . describes the activities PALCO desires to conduct on the Covered Lands . . . ."

The second form of notification is called for in the Streambed Alteration Agreement itself. After identifying certain Covered Activities, the agreement requires PALCO to notify the Department of Fish and Game at least 14 days prior to commencing any such activity so that the Department can ensure that the applicable protective measures are in place. Such notification must include the exact dates and location of the activity along with the applicable timber harvest plan number.

The EIS/EIR explains that PALCO "has notified CDFG [the Department of Fish and Game] generally of its proposed activities. . . . While PALCO has not identified the specific locations and dates of these proposed activities, standard conditions can be developed to ensure that these proposed activities, wherever and whenever they may occur, do not substantially adversely affect such fish and wildlife resources . . . . The 1603 Agreement would enable PALCO to conduct specified activities in accordance with the terms and conditions of the 1603 Agreement, after giving notice to CDFG [the Department of Fish and Game] of the specific time and location of the proposed activity." The fact that PALCO did not provide such exact dates and locations before the Streambed Alteration Agreement was entered into was entirely consistent with the terms of the agreement and did not violate the statute.

B. Description of Fish and Wildlife

Under the statute, after the person notifies the Department of its intention to alter a watercourse, the Department must provide the person with a description of the existing fish or wildlife that may be substantially affected by the activity along with the Department's proposals for protective measures. "The department's description of an

existing fish or wildlife resource shall be specific and detailed and the department shall make available upon request the information upon which its conclusion is based that the resource may be substantially affected." (Former Fish & Game Code, § 1603, subd. (a).) The environmental plaintiffs assert that the Department of Fish and Game failed to provide PALCO with a detailed description of the affected fish and wildlife.

This assertion, too, is nonsensical in the circumstances of this case. The obvious purpose of the statutory requirement is to enable the affected person to evaluate the Department's proposals for protective measures and to enter into informed and intelligent negotiations with the Department. Here, PALCO was already well aware of the affected fish and wildlife from the simultaneous proceedings on the Habitat Conservation Plan and Sustained Yield Plan and on the Incidental Take Permit. The EIS/EIR contains an extensive description of the fish and wildlife affected by PALCO's activities, and the EIS/EIR was expressly intended to inform the Department of Fish and Game in its decision whether the fish and wildlife would be adequately protected by the proposed Streambed Alteration Agreement. Certainly PALCO never complained that it had insufficient information before entering into the Streambed Alteration Agreement. Any technical deviation from the statutory procedure was completely harmless.

C. Protective Measures

The Streambed Alteration Agreement coincided with the Habitat Conservation Plan and Sustained Yield Plan. In fact, the Streambed Alteration Agreement was made a condition of and incorporated into the operating conservation programs of the Habitat Conservation Plan. The Streambed Alteration Agreement added eight pages of protective measures beyond those set forth in the Habitat Conservation Plan. Nevertheless, the environmental plaintiffs complain that the Department of Fish and Game failed to submit proposals for measures necessary to protect the fish and wildlife from all of PALCO's activities.

It is true that the Streambed Alteration Agreement does not purport to cover all of PALCO's activities that are otherwise governed by the Habitat Conservation Plan. The Streambed Alteration Agreement is limited to permanent and temporary road crossings

and fords. However, the Streambed Alteration Agreement expressly provides that for watercourse alterations resulting from PALCO's other activities, including timber harvesting, PALCO must enter into separate, future Section 1603 agreements. Moreover, the Streambed Alteration Agreement provides for amendment as called for by "ongoing monitoring activities, changed conditions, and new information." The environmental plaintiffs have made no showing that PALCO will undertake any activities without complying with section 1603.

D. Master Agreement

The environmental plaintiffs complain that the Streambed Alteration Agreement here is a master agreement broadly covering all of the watersheds on PALCO's lands. The environmental plaintiffs seem to contend that the Department should have entered into separate agreements for each "planning watershed" on the 211,000 acres.

There is nothing in the statute to preclude a master agreement covering more than one watercourse affected by the landowner's activities. Nor is there anything to require an agreement at the "planning watershed" level. As noted above, the Streambed Alteration Agreement does not purport to cover all of PALCO's activities and expressly contemplates future agreements related to PALCO's timber harvesting. And it specifically provides for future amendment as called for by ongoing monitoring, changed conditions, and new information.

E. Conditioned Upon a Permit

The Streambed Alteration Agreement recites that the parties are simultaneously entering into a separate agreement, along with the Department of Forestry and the federal wildlife protection agencies, to implement the Habitat Conservation Plan. The Streambed Alteration Agreement provides that the terms of that so-called Implementation Agreement shall govern. The environmental plaintiffs contend that this provision violates the limitation in section 1603 that the Department of Fish and Game "shall not condition the streambed alteration agreement on the receipt of another state or federal permit." (Former Fish & Game Code, § 1603, subd. (c).)

The statute was not violated. The Streambed Alteration Agreement was not conditioned upon PALCO's obtaining a separate permit. The Implementation Agreement was entered into simultaneously with the Streambed Alteration Agreement as part of the package of approvals governing the Headwaters Forest Project. That the two are interrelated did not make the Implementation Agreement a prerequisite. In fact, the aim of the Streambed Alteration Agreement is to provide additional protective measures beyond those called for in the Habitat Conservation Plan. If anything, the Streambed Alteration Agreement is a condition to the Habitat Conservation Plan and the Incidental Take Permit, not the other way around.

In any event, the purpose of the statutory limitation is to protect the landowner and ensure that the streambed alteration agreement is negotiated promptly. Here, where a streambed alteration agreement was successfully negotiated and entered into without any complaint from the landowner concerning delay, the statutory limitation no longer has any relevance.

F. Findings

The environmental plaintiffs argue that the Department of Fish and Game failed to make any findings to explain its reasoning for entering into the Streambed Alteration Agreement. The environmental plaintiffs mistakenly rely on *Topanga I*, *supra*, 11 Cal.3d 506, which holds that an administrative agency rendering an adjudicatory decision must make findings that "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Id*. at p. 515.)

Topanga I was an administrative mandamus action for review of the decision of the county board of supervisors granting a variance. The governing statute was section 1094.5 of the Code of Civil Procedure, which provides for review of an administrative proceeding that is quasi-judicial character--one that required a hearing and a determination of facts. The Supreme Court reasoned that agency findings were compelled to enable judicial review for substantial evidence under section 1094.5 of the Code of Civil Procedure. (*Topanga I*, *supra*, 11 Cal.3d at pp. 514-517.)

As we have already explained, we are not reviewing the administrative decision for substantial evidence. Moreover, a streambed alteration agreement is not an adjudicatory decision that requires a hearing or factual findings. As its name denotes, a streambed alteration agreement is a contract entered into by the Department of Fish and Game pursuant to its executive functions. Section 1094.5 of the Code of Civil Procedure does not govern our review of the Streambed Alteration Agreement; our review is by traditional mandamus (Code Civ. Proc., § 1085). The question on traditional mandamus is whether the agency's decision was arbitrary, capricious, or totally lacking in evidentiary support or the agency failed to follow the procedures required by law. (*Jackson v. Gourley* (2003) 105 Cal.App.4th 966, 969-970; *Catalina Investments, Inc. v. Jones* (2002) 98 Cal.App.4th 1, 6.)

The environmental plaintiffs erroneously assert that the following language within the statute mandates a finding by the Department of Fish and Game: "It is unlawful for any person to commence any activity affected by this section *until the department has found that it will not substantially adversely affect an existing fish or wildlife resource* . . . ." (Former Fish & Game Code, § 1603, subd. (a); italics added.) Environmental plaintiffs ignore the remainder of the sentence: "*. . . or until the department's proposals,* or the decisions of a panel of arbitrators, *have been incorporated into the activity.*" A finding is not required when, as here, an agreement is negotiated containing protective measures (i.e., when the department's proposals are accepted).

The Streambed Alteration Agreement here recites that the Department of Fish and Game determined that specific measures were necessary to protect the fish and wildlife from possible substantial adverse effects. And the Streambed Alteration Agreement requires PALCO to incorporate certain detailed protective measures into its activities. No separate findings were required. The Department of Fish and Game followed the procedures required by law.

VI. Preparation of Administrative Record

A. Completeness of the Administrative Record

In the trial court proceedings, the environmental plaintiffs requested and the trial court ordered the state agencies (Department of Forestry and Department of Fish and Game) to prepare and certify the administrative record pursuant to section 21167.6 of the Public Resources Code.[44] Simultaneously, the Steelworkers similarly requested preparation of the administrative record pursuant to the Administrative Procedure Act (Gov. Code, § 11523), and the trial court so ordered. After some dispute over the contents of the administrative record, the trial court accepted the state agencies' Third Amended Certifications of Administrative Record. Those certifications declare that the administrative record is a complete record of all "information taken into account" by the agencies in their administration determinations.

Subsequently, the trial court ruled that evidence outside the certified administrative record would be admitted at trial to assess the accuracy and completeness of the administrative record as certified. The trial court also allowed the environmental plaintiffs and the Steelworkers to amend their mandamus petitions to include allegations that the Department of Forestry and the Department of Fish and Game failed to prepare a complete administrative record. At trial, then, the court took testimony and accepted documentary evidence concerning the completeness of the administrative record, ultimately finding that certain written materials submitted during the public comment period were absent from the certified administrative record and should have been included.

The environmental plaintiffs and the Steelworkers now argue that the omissions from the certified administrative record constitute a failure by the state agencies to proceed in a manner required by law. Defendants (the state agencies and PALCO), on

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[44] Pursuant to section 21167.6 of the Public Resources Code, in any action to challenge the environmental review of a project under CEQA, the public agency must prepare the record of the administrative proceedings and certify its accuracy.

the other hand, argue that the trial court erred in admitting evidence outside the administrative record. We reject both arguments.

For their part, the environmental plaintiffs and the Steelworkers have failed to distinguish between two separate activities: (1) an agency's preparation of the record for purposes of judicial review--essentially a ministerial act--, and (2) the agency's underlying decision-making. The substantive task for the court on administrative mandamus is to evaluate what happened in the administrative agency's decision-making. (Code Civ. Proc., § 1094.5, subds. (a), (b).) A ruling on the agency's compilation of the administrative record, in contrast, is a decision on the procedure to be employed *in the trial court.* (See *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 11-13.) Defects in preparation of the administrative record have nothing to do with whether the agency committed error in making its decision.

At the same time, we reject defendants' objections to the admissibility of evidence outside the certified administrative record. Defendants rely upon the rule that *for purposes of reviewing the administrative decision* the trial court is ordinarily confined to a review of the administrative record. (Code Civ. Proc., § 1094.5, subd. (e); *Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101; *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1389-1392; *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881.)[45] That rule has no application, however, *for purposes of deciding what constitutes the administrative record*.

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[45] The statute allows the court to take evidence beyond the administrative record in limited cases--when the evidence could not have been produced with reasonable diligence at the hearing before the agency or the evidence was improperly excluded at the hearing before the agency. (Code Civ. Proc., § 1094.5, subd. (e).) Yet, in either instance, the court cannot admit the evidence for purposes of reviewing the agency's decision; the court must remand the matter to the agency for reconsideration in light of the new evidence. (Code Civ. Proc., § 1094.5, subd. (e); see *Toyota of Visalia, Inc. v. New Motor Vehicle Bd.*, *supra*, 188 Cal.App.3d at pp. 882-883; *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293, 299; see 8 Witkin, Cal. Procedure, Extraordinary Writs, § 322, p. 1126.)

In an administrative mandamus proceeding, the trial court may order all or part of the record of proceedings before the administrative body to be filed with the court. (Code Civ. Proc., § 1094.5, subd. (a).) The trial court so ordered here, directing the state agencies in the environmental plaintiffs' lawsuit to prepare and certify separate records for each administrative approval in accordance with Public Resources Code section 21167.6 and directing the Department of Forestry in the Steelworkers' lawsuit to prepare and certify a "complete" record pursuant to the Administrative Procedure Act . Public Resources Code section 21167.6 mandates inclusion of all written evidence or correspondence related to the project and any other written materials included in the agency's files. (Pub. Resources Code, § 21167.6, subd. (e)(7), (10).) The list of what must be included in the administrative record is so broad that one court has said that the record must include "pretty much everything that ever came near a proposed development *or* to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court, supra,* 113 Cal.App.4th at p. 8.)[46]

The trial court could properly investigate whether the Third Amended Certifications of Administrative Record submitted by the state agencies did in fact include all the written evidence and other papers. (See *County of Orange v. Superior Court, supra,* 113 Cal.App.4th 1; see *Buckhart v. Residential Rent Etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.) Although the evidence received went beyond the *certified* administrative record, the evidence was limited to documents that were before the state agencies in conjunction with their administrative determinations and review of the EIS/EIR. We find no error in the trial court's efforts to determine the completeness of the administrative record as certified by the state agencies. (*County of Orange v. Superior Court, supra,* 113 Cal.App.4th 1; see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575, fn. 5 [dictum: extra-record evidence might be admissible to determine accuracy of administrative record].)

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46 In light of the state agencies' obligation under Public Resources Code section 21167.6, we need not decide whether the Administrative Procedure Act (Gov. Code, § 11523) governs the preparation of the record in the Steelworkers' lawsuit.

The omissions from the certified administrative record are of no consequence in this appeal. The trial court received into evidence all the missing documents and decided that the documents should have been included in the administrative record. The trial court's admission of the missing documents into evidence, together with its finding that the documents should have been included in the administrative record, constituted an augmentation of the administrative record as certified. The missing documents have been transmitted to us as exhibits for our independent review. Any errors in the certifications of the administrative record were cured.

B. Failure to Consider the Missing Materials

The environmental plaintiffs and the Steelworkers have raised different arguments grounded on the omissions from the certified administrative record. The environmental plaintiffs argue that because certain comments and materials submitted by the public during the public comment period were not included in the EIS/EIR the omissions from the administrative record reflects a failure by the state agencies to respond to public comments on the EIS/EIR. We will discuss that argument in part VII.D. below.

The Steelworkers take a different tack. They expressly disclaim any argument that the omissions from the certified administrative record constitute a failure by the Director of Forestry to respond to the issues raised during the public comment period on the Sustained Yield Plan. The Steelworkers argue that because the Department of Forestry certified in the trial court that the administrative record was a complete record of all documents taken into account in the approval of the Sustained Yield Plan, the Director necessarily did not take the omitted documents into account.

The record does suggest that the missing documents were not taken into account. The trial court explained that the order for preparation of the administrative record required the Department of Forestry to prepare a record of all documents that were before the agency and taken into account—not just the documents from the agency's file compiled post hoc. Trial counsel for the Department (the Attorney General) conceded at trial that what was not in the certified administrative record was not taken into account.

The question, then, is whether the failure of the Department of Forestry to consider the missing documents rendered the Sustained Yield Plan invalid.

The missing materials fall into three categories. The *first category* consists of a set of scholarly articles submitted on November 16, 1998, the last day of the comment period on the EIS/EIR, to support comments made earlier by seven particular individuals. The articles themselves are not comments on the Sustained Yield Plan but are reference materials that were cited in comment letters that had been previously submitted. Those comment letters are in the certified administrative record and were responded to in the final EIS/EIR.

The *second category* consists of some written comments submitted at public hearings on the draft EIS/EIR. The testimony showed that the missing materials were inadvertently omitted from the certified administrative record. The documents were received and reviewed by Foster Wheeler Corporation, the consultant hired by the Department of Forestry to collect and categorize public comments for response. Foster Wheeler considered the documents to be duplicative of comments already responded to. Foster Wheeler mistakenly did not include the materials in the compilations of public comments in the final EIS/EIR. They were not discovered by the Department of Forestry until after the Third Amended Certification of Record had been filed with the court. Norman Hill, chief counsel for the Department of Forestry, was in charge of preparing the administrative record. He reviewed the missing documents and found them to be duplicative of comments already in the EIS/EIR. Nevertheless, Mr. Hill affirmed that the documents should have been included in the administrative record.

The *third category* of missing documents consists of some written public comments received in January and February 1999--after the close of the public comment period on the EIS/EIR. We agree with the Steelworkers that the comments were timely. The public comment period for the draft EIS/EIR closed on November 16, 1998, and the comment period for the Sustained Yield Plan initially closed the same day. However, the *federal* agencies opened a second comment period for the *final* EIS/EIR that ran until February 22, 1999. (See 40 C.F.R. § 1502.19.) The announcement by the federal

agencies in the Federal Register also stated that the Department of Forestry would take comments on the Sustained Yield Plan until February 22, 1999. We will accept that the public comment period was still open on the Sustained Yield Plan when the missing documents were received by the Department of Forestry.

The Steelworkers have failed to demonstrate any prejudice resulting from the absence of the documents from the certified administrative record--even if the Department of Forestry failed to take them into account. The Steelworkers do not dispute that the missing comments were duplicative, raising objections to the Sustained Yield Plan that were covered by over 16,000 written comments made by others during the public comment period and responded to in the final EIS/EIR.[47] Nor do the Steelworkers indicate how any of the missing materials relate to the substantive issues raised in this appeal or could have affected the decision by the Director to approve the Sustained Yield Plan.

ENVIRONMENTAL REVIEW

VII. EIS/EIR

The environmental plaintiffs raise numerous challenges to the EIS/EIR, asserting that the EIS/EIR violates CEQA and its implementing Guidelines. (See fn. 1, *ante*.) CEQA sets up two standards of review: (1) When the administrative agency was required to hold a hearing and take evidence, Public Resources Code section 21168 applies, and judicial review proceeds in accordance with section 1094.5 of the Code of Civil Procedure. (2) When no hearing was required in the administrative agency, Public Resources Code section 21168.5 applies, and the matter is treated as an ordinary mandamus proceeding under section 1085 of the Code of Civil Procedure. (*Laurel Heights Improvement Assn. v. Regents of University of California (Laurel Heights I)*

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[47] The *federal* agencies reviewed comments that were received after November 16,1998, in their comment period on the final EIS/EIR, and the federal agencies concluded that the comments raised no new issues beyond what had been raised in connection with the draft EIS/EIR. Those comments and the federal agencies' responses are included in the certified administrative record.

(1988) 47 Cal.3d 376, 392, fn. 5; *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1456, disapproved on another point in *Western States Petroleum Assn. v. Superior Court, supra*, 9 Cal.4th at pp. 570, fn. 2, 576, fn. 6.) Under Public Resources Code section 21168.5, judicial review is limited to whether there was an abuse of discretion--i.e., a failure to proceed in a manner required by law or a decision unsupported by evidence. The distinction between administrative mandamus (Code Civ. Proc., § 1094.5) and traditional mandamus (Code Civ. Proc., § 1085) is rarely significant. In both cases the issue is essentially the same--whether the agency prejudicially abused its discretion. (*Laurel Heights I, supra,* 47 Cal.3d 376*; Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25, 31.)[48]

In the present case, the lead agency on the EIS/EIR was the Department of Forestry, which was required to hold a public hearing on the Sustained Yield Plan. Our review of the Department of Forestry's compliance with CEQA is governed by section 21168 of the Public Resources Code and proceeds pursuant to section 1094.5 of the Code of Civil Procedure. (See *Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1235 [review of timber harvest plan is by administrative mandamus]; *Friends of the Old Trees v. Department of Forestry & Fire Protection, supra*, 52 Cal.App.4th at p. 1392 [same].) Hence, the trial court and the appellate court apply the same scope and standard of review. (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100 [trial court denied writ]; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277 [trial court granted writ].) As in the trial court, the burden on appeal is on the parties challenging the administrative action to establish prejudicial error by the agency. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617; *Al*

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48 The distinction comes into play with respect to the admissibility of evidence outside the administrative record to assess the soundness of the administrative decision. (See *Friends of the Old Trees v. Department of Forestry & Fire Protection, supra*, 52 Cal.App.4th at pp. 1389-1393.)

Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App.4th 729, 740.)[49]

The role of the court in reviewing a challenged EIR is not to pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informational document. (*Laurel Heights I, supra,* 47 Cal.3d at p. 392; *Neighbors of Cavitt Ranch v. County of Placer, supra,* 106 Cal.App.4th at p. 1100.) "When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. [Citation.] 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' [Citation.] 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citation.] Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. . . ." (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390-1391.)

Noncompliance with CEQA's procedural and informational requirements is not per se reversible. Prejudice must be shown. (Pub. Resources Code, § 21005, subd. (b).) The existence of prejudice does not turn on whether the information would have altered the agency's ultimate decision to approve the project. (Pub. Resources Code, § 21005, subd. (a); *Neighbors of Cavitt Ranch v. County of Placer, supra,* 106 Cal.App.4th at p. 1100.)[50] '"[A] prejudicial abuse of discretion occurs if the failure to include relevant

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[49] The Supreme Court has granted review in a case in which the Court of Appeal put the burden on the plaintiffs-appellants to show error in the trial court's conclusions. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* review granted June 8, 2005, S132972, previously published at 127 Cal.App.4th 490.)

[50] The Legislature has declared that "there is no presumption that error is prejudicial." (Pub. Resources Code, § 21005, subd. (b).) "[N]oncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome

information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Association of Irritated Residents v. County of Madera, supra,* 107 Cal.App.4th at p. 1391, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.)

With these principles in mind, we turn to the environmental plaintiffs' multiple challenges to the certification of the EIS/EIR by the Department of Forestry, as lead agency. The environmental plaintiffs' arguments fall into five main categories.

A. Incomplete Discussion

The environmental plaintiffs do not claim that the EIS/EIR completely omits any requisite elements. They contend that the EIS/EIR is insufficiently detailed in several respects: the descriptions of the project and the environmental setting ; the analysis of the adverse environmental impacts ; and the discussion of the cumulative environmental effects .[51] As we have already said, in the face of such a claim, we do not look for an exhaustive analysis in the environmental document; we look instead for adequacy, completeness and a good faith effort at full disclosure. (*County of Amador v. El Dorado County Water Agency, supra,* 76 Cal.App.4th at p. 954.)

Project Description. Although there is no single section within the EIS/EIR labeled "project description," the introductory paragraph is headed "Introduction—The Project Under Consideration." The chapter on "Alternatives" includes a description of "The Proposed Action/Proposed Project." The full text of the EIS/EIR sets out all the

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would have resulted if the public agency had complied with those provisions." (Pub. Resources Code, § 21005, subd. (a).)

[51] The CEQA Guidelines set out the information that must be given in descriptions of the project and of the environmental setting. (Guidelines, §§ 15124, 15125.) The Guidelines also prescribe an evaluative discussion of the significant environmental impacts and the cumulative effects. (Guidelines, §§ 15126.6, 15130.)

factors required by section 15124 of the Guidelines: the location and boundaries; the purpose of the project; the project's general characteristics; the agencies that will use the EIS/EIR in their decision-making; the permits and approvals needed to implement the project

The environmental plaintiffs complain that certain particular items are missing from the EIS/EIR. They are simply wrong. The *species* covered by the Incidental Take Permits are listed in the EIS/EIR and identified by status as federal or state endangered, threatened, etc. The *activities* covered by the Habitat Conservation Plan and Incidental Take Permit are summarized in the text of the EIS/EIR and set out in detail in Appendix P to the EIS/EIR. Environmental plaintiffs seem to have confused the *long-term sustained yield* with the level of harvest. The long-term sustained yield is a single figure that reflects the yield to be achieved at the end of the planning horizon. The projected timber *harvest levels* are given for each of the 12 decades.

Environmental Setting. The Guidelines require a description of the physical environmental conditions as they exist before the project so as to allow a determination of whether an impact is significant. (Guidelines, § 15125(a).) The EIS/EIR describes the existing conditions for each potential environmental impact such as fish, wildlife, vegetation, watersheds, wetlands, geology, soils, land use, economic conditions, and cultural factors.

The environmental plaintiffs complain that the EIS/EIR examines the Watershed Assessment Areas on PALCO's lands rather than smaller "planning watersheds." The environmental plaintiffs rely upon the Forest Practice Rules, which specify the planning watershed as the level of analysis for a sustained yield plan. (See discussion in part III.B.(4), *ante*.) However, there is nothing in CEQA or the Guidelines to require examination in an EIR at the planning watershed level. The EIS/EIR explains that the information then available was at the larger level of Watershed Assessment Areas. The EIS/EIR contains a description of the watershed areas based on the information that was known. Under the Habitat Conservation Plan, PALCO must complete a comprehensive

watershed analysis within five years, and site-specific prescriptions will be implemented in future timber harvest plans.

The environmental plaintiffs complain that the description of the watershed areas omits the Mad River. The complaint is unfounded. The complaint pertains to the description of fish habitat in one chapter of the EIS/EIR: the Mad River area is not described there because the area actually owned by PALCO is proportionately so small. Elsewhere in the EIS/EIR, however, the Mad River is included in the descriptions of the baseline environmental conditions. For purposes of analysis of the fish habitat, the Mad River is part of the Humboldt Watershed Management Area. Moreover, the EIS/EIR explains that the Mad River falls under the federal Clean Water Act, which requires analysis under a separate process through the State Water Resources Control Board and the North Coast Regional Water Quality Control Board.

Adverse Impacts. The environmental plaintiffs assert that the EIS/EIR fails to analyze the adverse impacts arising from the activities that will occur within the Marbled Murrelet Conservation Areas (MMCAs). The environmental plaintiffs have taken too narrow a view of the project. The project under consideration in the EIS/EIR consists of activities related to timber harvesting on PALCO lands as defined and constrained by the Sustained Yield Plan and Habitat Conservation Plan. The EIS/EIR identifies the activities to be undertaken by PALCO, including the activities within the MMCAs. The description within the EIS/EIR of the adverse environmental impacts from the proposed project includes the impacts on the marbled murrelet.

The MMCAs are areas that PALCO will continue to own (unlike the areas sold to the state and federal governments) but that will be unavailable for timber harvesting for the 50-year duration of the incidental take permits. While certain conservation activities are permitted within the MMCAs (such as storm-proofing of roads, fire suppression, and rock quarry operations), those activities are considered protective of or beneficial to the marbeled murrelets. Indeed, the creation of the MMCAs is one of the mitigation measures for the project, designed to protect the vegetation and wildlife and to offset the impacts from activities on other areas of PALCO's lands. Any proposed conservation

activities conducted within the MMCAs must be reviewed by the federal wildlife agency and by the Department of Fish and Game, which may impose protective measures.

The environmental plaintiffs also complain that the EIS/EIR fails to discuss the adverse impacts from the Streambed Alteration Agreement. Again, they take a too narrow focus. The environmental plaintiffs rely on a statement in the EIS/EIR that the streambed diversions by PALCO could affect the fish and wildlife. What environmental plaintiffs ignore is that the very purpose of the Streambed Alteration Agreement is to mitigate those affects. The Streambed Alteration Agreement is one of the constraints on PALCO's activities, setting up additional protective measures for PALCO's stream crossings and fords that go beyond the Habitat Conservation Plan. The Streambed Alteration Agreement is discussed in the EIS/EIR. And the impacts on fish and wildlife are extensively analyzed in the EIS/EIR.

Cumulative Effects. The Guidelines require a discussion of the cumulative impacts of the project. (Guidelines, § 15130.) The EIS/EIR contains a discussion of cumulative effects with respect to each potential environmental impact--e.g., air quality, timber resources, watersheds, fish, and wildlife. Contrary to the environmental plaintiffs' assertions, the discussion of the cumulative effects covers the marbled murrelet, the northern spotted owl, and coho salmon.

The environmental plaintiffs contend that the cumulative effects analysis fails to examine the timber harvest plans approved in the past for PALCO's harvesting activities. We find no error.

The analysis of cumulative effects must include the impacts of both the project under review and relevant past, present, and future projects. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 119.) Here, the EIS/EIR employs the appropriate standard, examining the results "from the incremental impact of direct and indirect effects when combined with other, related or unrelated past, present, and reasonably foreseeable future management actions." The EIS/EIR examines the history of logging on PALCO's lands going back even before timber harvest plans were required. The EIS/EIR states: "Timber harvest practices were not regulated in

riparian zones until the 1970s; thus there were more than 120 years of human activity and 50 to 70 years of intensive harvest before mandated consideration of streamside protection."

The analysis of cumulative effects, like other aspects of an EIR, is subject to standards of practicality and reasonableness. (Guidelines, § 15130(b).) The Public Review Draft of the Sustained Yield Plan contains a list within the analysis of long-term sustained yield of all active (not yet harvested) timber harvest plans, covering about seven percent of PALCO's lands. Obviously, a list of all *past* timber harvest plans approved on PALCO's lands would have been unwieldy, impractical, and of no reasonable use.

In any event, the Guidelines call for one of two approaches on the cumulative effects analysis--either a *list* of past, present, and probable future projects or a summary of *projections* contained in prior planning documents. (Guidelines, § 15130(b)(1)(A), (B).) The EIS/EIR explains that a "projection approach" was used: "Cumulative effects for the proposed actions are considered primarily in relationship to other land uses and permitted activities in the watersheds within which PALCO has ownership (i.e., a projection rather than a list approach)." The EIS/EIR examines the project in light of an existing federal recovery plan for the marbled murrelet and a federal forest plan for the northern spotted owl and the coho salmon.

Finally, of course, the cumulative environmental impacts will be analyzed in future timber harvest plans, as we have already discussed. Deferring such analysis does not violate CEQA. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, supra,* 18 Cal.App.4th at pp. 746-747.)

B. No Project Alternative

Under the Guidelines, an EIR must discuss, along with the environmental effects of the proposed project, a range of reasonable alternatives to the project. (Guidelines, § 15126.6(a).) "An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives . . . ."

(Guidelines, § 15126.6(a).) The alternative of "no project" must also be evaluated, along with its impact. (Guidelines, § 15126.6(e)(1).)

Here, the EIS/EIR contains a 69-page chapter on "Alternatives," examining three alternatives to the Headwaters Forest Project. The EIS/EIR discusses a "no project" alternative—i.e., not proceeding with the Headwaters Agreement, the land transfers, the Habitat Conservation Plan, the incidental take permits, and the Streambed Alteration Agreement. Under that no-project alternative, timber harvesting would proceed under timber harvest plans as reviewed plan-by-plan. Environmental plaintiffs complain that the EIS/EIR did not consider the alternative of disapproving the incidental take permits so that no logging would be permitted on PALCO's lands. We reject the complaint for several reasons.

The environmental plaintiffs presuppose that if the incidental take permits were denied, no logging would be allowed because the activities would constitute a "take" of protected wildlife species. Yet, the analysis of the no-project alternative in the EIS/EIR concludes to the contrary that the potential for a take of protected species would be evaluated in the individual timber harvest plans and that harvesting would be allowed, albeit with no take.[52]

Within the context of this case, the "no project" alternative required by the Guidelines is "the continuation of the existing plan, policy or operation into the future." (Guidelines, § 15126.6(e)(3)(B).) The analysis of the "no project" alternative is a projection of "what would *reasonably be expected to occur* in the foreseeable future if the project were not approved . . . ." (Guidelines, § 15126.6(e)(3)(C), italics added.) PALCO's lands are zoned as Timberland Production Zone under the California Timberland Productivity Act (Gov. Code, § 51110 et seq.). For such lands, timber

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52 Although the EIS/EIR was a joint document, the analysis of the no-project alternative contained separate discussions under state (CEQA) and federal (NEPA) law. The analysis under state law contemplated that the timber harvest plans would be evaluated on a case-by-case basis to avoid a take of protected species. The analysis under federal law concluded that additional measures beyond those that could be imposed in a timber harvest plan would be necessary to avoid a take of protected species.

operations are statutorily "expected to occur." (Gov. Code, § 51115.1, subd. (b); *Big Creek Lumber Co. v. County of San Mateo* (1995) 31 Cal.App.4th 418, 425, fn. 12.) In response to a public comment, the final EIS/EIR explains that "no logging" was not viewed as a *reasonable* alternative: "It is not reasonable to conclude all timber harvesting would cease on [PALCO's lands]." The Guidelines require that consideration be given only to "reasonable" alternatives. (Guidelines, § 15126.6(e)(1).)

Finally, it bears emphasizing that Alternative No. 2 (the proposed Headwaters Project) was found to be more environmentally beneficial than the no project alternative. Alternative No. 2 imposes more land management requirements, preserves more timber land, and provides more protection for fish and wildlife and the watersheds. Another alternative examined in the EIS/EIR, Alternative No. 4, would have established an even larger 63,000-acre no-harvest reserve. And Alternative No. 3, which would not have allowed any old-growth harvesting, was actually found to be "environmentally superior."

In reviewing an EIR, we do not pass on the correctness of the environmental conclusions. Nor can we substitute our judgment for that of the governmental bodies. CEQA does not, indeed cannot, guarantee that governmental decisions will always favor environmental considerations. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 53 Cal.3d 553, 564; *Laurel Heights I*, *supra*, 47 Cal.3d at p. 393.)

C. Feasible Mitigation Measures

CEQA requires an EIR to consider and discuss feasible measures to minimize each significant adverse environmental impact from the proposed project. (Pub. Resources Code, § 21000, subd. (b)(3); Guidelines, § 15126.4.) The EIS/EIR contains a complete discussion of the protective measures in the Habitat Conservation Plan and concludes that the measures will result in environmental effects that are less than significant.

(1) Aquatics Conservation Plan

One part of the Habitat Conservation Plan is the Aquatics Conservation Plan, which sets up a program designed to maintain or achieve over time a properly functioning aquatic habitat. The "management objectives" portion of the Aquatics Conservation Plan identifies "target" habitat variables for a reasonably healthy aquatic habitat, such as water

temperature, canopy cover, sediment, and the presence of large woody debris. The discussion states that "not all variables will be attainable over the life of the Habitat Conservation Plan regardless of PALCO's efforts. . . . For this reason, and because habitat conditions are not static, the specific habitat variables are not enforceable standards under this Plan."

Relying on the quoted language above, the environmental plaintiffs complain that the Aquatics Conservation Plan is inadequate because the measures are conceded to be unachievable. We do not so read the Aquatics Conservation Plan.

The Aquatics Conservation Plan calls for a series of land management prescriptions, such as buffer zones, road management, and hillslope management, as well as site-specific prescriptions to be developed after the watershed analysis. The Plan includes a monitoring program to assess the effectiveness of those prescriptions as to each habitat variable and to examine the trend toward a healthy aquatic habitat. The Plan also calls for adaptive management, which allows the Aquatics Conservation Plan to be changed in response to a future determination that the prescriptions have not been effective in moving toward properly functioning aquatic habitat.

The EIS/EIR acknowledges that the fish populations are facing harm from other factors beyond the proposed project: "The target conditions are neither all-inclusive, nor do they provide total optimum conditions for maintaining or recovering coho salmon populations.[**53**] They do not address other factors such as predator-prey interactions, disease, ocean conditions, sport or commercial harvest, or food availability that may also significantly affect survival of coho salmon." The evaluation in the EIS/EIR states: "Even with conditions meeting requirements for a properly functioning aquatic system, however, there is no certainty that current [fish] populations will be maintained or recover." The EIS/EIR concludes that "[o]verall, . . . on a landscape level over the 50-year period of the Incidental Take Permit, the prescriptions would result in effects that

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53 The EIS/EIR explains that the prescriptions of the Aquatics Conservation Plan are primarily for coho salmon, with the assumption that if favorable habitat conditions are provided for coho salmon, then other fish species will also benefit.

are less than significant. Thus, over the period of the [Habitat Conservation Plan], a trend toward properly functioning aquatic conditions would be established."

(2) Geologic Impacts

The environmental plaintiffs complain that no mitigation measures were provided for the geologic impacts identified in the EIS/EIR. The complaint is meritless. The EIS/EIR found no significant adverse impacts on the geological or mineral resources; hence, no mitigation measures were called for.

The EIS/EIR contains a separate chapter on soils and geomorphology, which includes the mitigation measures of the Habitat Conservation Plan. The environmental plaintiffs point to criticisms of that section of the draft EIS/EIR voiced by the Department of Conservation, Division of Mines and Geology. But that criticism contains no proposals for any mitigation measures. At most, the Division of Mines and Geology supported the requirement that timber harvest plans address sediment loads on a site-specific basis.

(3) Deferral to Watershed Analysis

The environmental plaintiffs additionally argue that the mitigation measures in the Habitat Conservation Plan are inadequate because they defer mitigation and specific prescriptions until after the future watershed analysis is complete. The argument is unsound.

Deferring final design details of a project otherwise described until after approval of the project does not violate CEQA. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 34-36.) Likewise, deferring study of specific impacts is permitted within the concept of "tiering." (Guidelines, § 15152.) "A first tier EIR may defer for future study specific impacts of individual projects that will be evaluated in subsequent second-tier EIRs." (*Koster v. County of San Joaquin*, *supra*, 47 Cal.App.4th at p. 37.) And one court has recognized that formulating precise mitigation measures at the time of project approval may be infeasible or impractical and may be deferred: "In such cases, the approving agency should commit itself to eventually working out such measures as can be feasibly devised, but should treat the impacts in question as being

significant at the time of project approval. Alternatively, . . . where practical considerations prohibit devising [mitigation] measures early in the planning process, . . . the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029, quoting from Remy et al., Guide to the Cal. Environmental Quality Act (1991 ed.) pp. 200-201; see (1999 ed.) at pp. 427-430.)

The environmental plaintiffs contend that the rule of *Sacramento Old City Assn., supra,* has not been satisfied here because the approving agencies followed neither alternative: the agencies did not find the impacts of the project to be significant at the time of approval, nor did the agencies articulate "specific performance criteria" for future measures.

We disagree that no specific criteria were established for future mitigation measures. The Habitat Conservation Plan requires the watershed analysis to follow the objective criteria of the State of Washington Department of Natural Resources methodology. The future prescriptions are to be based on the matrix of conditions for a properly functioning aquatic habitat devised by the National Marine and Fisheries Service. The maximum and minimum limits for post-watershed prescriptions are given in the Habitat Conservation Plan.

In any event, we do not read the two alternatives identified in *Sacramento Old City Assn., supra,* as the exclusive method for devising future mitigation measures. In the present case, interim mitigation measures were established pending the outcome of the watershed analysis. Future prescriptions will be implemented in the timber harvest plans, which will provide "tiered" environmental review. Tiering of environmental review is one legitimate way to defer consideration of detailed analysis. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, supra,* 18 Cal.App.4th at pp. 746-747; *Koster v. County of San Joaquin, supra,* 47 Cal.App.4th at p. 37.)

D. Responses to Comments

The final EIR must respond to the public comments received during the review period. (Pub. Resources Code, § 21091, subd. (d)(2); Guidelines, § 15088.) The responses must reflect a "good faith, reasoned analysis" of the significant environmental issues raised. (Guidelines, § 15088(c).) Here, the final EIS/EIR contains over 300 pages of written responses to over 16,000 written comments received. The environmental plaintiffs argue that certain responses to certain comments were inadequate. But the environmental plaintiffs have not identified exactly which responses are challenged, nor have they directed our attention to where in the record the assertedly inadequate responses are found. We deem the argument waived.

The environmental plaintiffs complain that the response given to one commenter, Dr. Leslie Reid, fails to include a scientific report (on Jordan Creek) that was cited in the Department of Forestry's response. The complaint is unfounded. This is not a case in which the agency simply relied upon a forthcoming report with unknown and undisclosable contents. (Cf. *Environmental Protection Information Center, Inc. v. Johnson, supra*, 170 Cal.App.3d at pp. 628-629.) To the contrary: the Jordan Creek report is included in a list of references that accompanies the lengthy and informative response to Dr. Reid's comments. Reference materials used in preparation of an EIR need not be included in an EIR. (Guidelines, § 15148.) We can find no infirmity in failing to include the actual report in the response to Dr. Reid's comments.

The environmental plaintiffs further contend that the EIS/EIR is defective because certain comments and materials submitted by the public were not included in the administrative record as certified by the state agencies. As we have already discussed in part VI above, the preparation of the record for purposes of judicial review is completely distinct from the state agencies' compliance with CEQA in their approval of the EIS/EIR. The question before us is the latter--whether the EIS/EIR is adequate as an informational document.

As we have already detailed, the missing materials fall into three categories. The first is a set of scholarly articles that are not themselves comments on the EIS/EIR but are

reference materials that were cited in comment letters that had been previously submitted by seven particular individuals. The comment letters *are* in the certified administrative record and were responded to in the final EIS/EIR. The supporting articles were not required to be included in the EIR. (See Guidelines, § 15148 [scientific articles used in preparation of EIR are not to be included in the EIR].)

The second category consists of some written comments submitted at public hearings on the draft EIS/EIR. We have already explained that the testimony showed that the missing materials were inadvertently omitted from the certified administrative record. The environmental plaintiffs have failed to demonstrate any prejudice resulting from the absence of the comments from the EIS/EIR--even if the Department of Forestry failed to take them into account or make a response. The environmental plaintiffs do not dispute the testimony that the missing documents were in fact reviewed prior to release of the final EIS/EIR. Nor do they dispute that the missing materials were duplicative of other comments that were responded to in the final EIS/EIR. CEQA requires responses to significant *issues* raised by public comments, not responses to particular individuals. (Pub. Resources Code, § 21091, subd. (d)(2)(A); Guidelines, § 15088.)

The third category of missing documents is a set of written public comments submitted in January and February 1999--after the close of the public comment period on the EIS/EIR--mostly consisting of criticisms of the responses made in the final EIS/EIR to comments on the draft EIS/EIR. Although we have accepted that the comments were timely responses to the Sustained Yield Plan, the comments were untimely under CEQA, and, as such, did not require a response.[54] (Pub. Resources Code, § 21091, subd. (d)(1); Guidelines, § 15088(a).)

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[54] Four public hearings were held on the draft EIS/EIR in October and November 1998. The public comment period for the draft EIS/EIR closed on November 16, 1998. The *federal* agencies opened a second comment period for the *final* EIS/EIR that run until February 22, 1999. The process under CEQA is shorter than under NEPA Unlike a final EIR, a federal EIS must be circulated at least 30 days prior to project approval. (40 C.F.R. §§ 1502.19, 1506.10(b)(2); see *Laurel Heights II, supra*, 6 Cal.4th at p. 1129, fn. 14.)

E. Findings

CEQA requires the public agency to make certain findings before approving a project whenever the EIR identifies one or more significant environmental impacts. The agency must find that changes were incorporated into the project to mitigate or avoid the significant environmental impacts or that mitigation measures were infeasible. (Pub. Resources Code, § 21081; Guidelines, § 15091.)

Coho Salmon. The EIS/EIR identifies the impacts on coho salmon. The EIS/EIR concludes that "[o]verall, . . . the prescriptions [of the Habitat Conservation Plan] would result in effects that are less than significant. Thus, over the [50-year] period of the HCP [Habitat Conservation Plan], a trend toward properly functioning aquatic conditions would be established."

The environmental plaintiffs complain that the Department of Forestry, as lead agency, made no findings on coho salmon, though the Department of Fish and Game, as responsible agency, did. Environmental plaintiffs are wrong. The Department of Forestry found that the effects on the coho salmon had been minimized and mitigated to a level less than significant by the Habitat Conservation Plan and Sustained Yield Plan.[55]

Herbicides. The EIS/EIR concludes that "the effects of herbicide use on wildlife and aquatic species and their long-term persistence or broad accumulation effects are uncertain." Further, the EIS/EIR states: "Given existing uncertainty, the cumulative effects of herbicide use over the length of the permit period may possibly result in significant effects."

The federal agencies reviewed the comments received after November 16,1998, in their comment period on the final EIS/EIR, and the federal agencies concluded that the comments raised no new issues beyond what had been raised in connection with the draft EIS/EIR. Those comments and the federal agencies' responses are included in the certified administrative record.

[55] The Department of Fish and Game phrased its findings slightly differently, finding potential significant effects on the coho salmon but further finding that the effects had been avoided or substantially lessened by the mitigation measures contained in the Habitat Conservation Plan and Implementation Agreement.

The environmental plaintiffs complain that the findings of the two state agencies are inconsistent. The Department of Forestry found that the use of herbicides would not have a significant effect on the environment, but nevertheless required certain mitigation measures as conditions of approval of the Sustained Yield Plan and the EIS/EIR. The Department of Fish and Game made slightly different findings--that some herbicides could potentially impact some aquatic species--and the Department adopted mitigation measures to minimize the impact. The differences between the agencies' findings do not render the finding of the Department of Forestry inadequate.

Other Species. The environmental plaintiffs additionally contend that both state agencies failed to make findings with respect to certain wildlife species, even though the EIS/EIR identified significant environmental impacts. The contention is not borne out by the record.

The EIS/EIR concludes that with the prescriptions of the Habitat Conservation Plan all environmental effects on the wildlife would be less than significant. This conclusion is specifically applicable to the northern spotted owl, the California red tree vole, the pacific fisher, and species associated with late seral habitats.

DISPOSITION

The judgment granting a peremptory writ of mandate is reversed. The matter is remanded with directions to enter a judgment consistent with this opinion, denying the Steelworkers' petition in all respects and denying the environmental plaintiffs' petition in all respects except to compel the Department of Fish and Game to strike the provision in the Incidental Take Permit regarding automatic authorization for incidental take of unlisted species. Costs to appellants.

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Jones, P.J.

We concur:

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Stevens, J.

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Gemello, J.

Trial court:	Humboldt County Superior Court
Trial judge:	Hon. John J. Golden
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