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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PACIFIC LUMBER COMPANY et al., Plaintiffs and Respondents, v. CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, Defendant and Appellant.	A102399 (Humboldt County Super. Ct. No. DR010860)

Does the Forest Practice Act establish an exclusive regulatory framework that precludes other agencies from enforcing the laws they are charged with administering when logging activities implicate those laws? We conclude that it does not and that it was error to issue a writ of mandate preventing the California State Water Resources Control Board from enforcing water quality protection measures against a timber company.

The Pacific Lumber Company (Pacific Lumber) owns property in the Headwaters Forest. It obtained approval from the California Department of Forestry and Fire Protection for an amended Timber Harvest Plan authorizing it to harvest timber along the South Fork of the Elk River. Before it could begin, however, the California State Water Resources Control Board (State Water Board) issued an order requiring Pacific Lumber to monitor water quality in the Elk River. Pacific Lumber sought a writ of mandate, and

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

the trial court issued the writ, holding that the State Water Board lacked jurisdiction to enforce water quality laws against Pacific Lumber. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In the mid-1990's, the Elk River Timber Company (predecessor in interest to Pacific Lumber) planned to log approximately 700 acres of redwood forest along the South Fork of the Elk River, in the Headwaters Forest in Humboldt County. In California, all timber harvesting is regulated by the Z'berg-Nejedly Forest Practice Act of 1973 (Forest Practice Act). (Pub. Resources Code, §§ 4511-4628.) Under the Forest Practice Act, no timber harvesting can occur until a Timber Harvest Plan (THP) has been submitted and approved by the California Department of Forestry and Fire Protection (Department of Forestry). (Pub. Resources Code, § 4581.)

On December 31, 1997, the Elk River Timber Company submitted a proposed THP to the Department of Forestry. Because of previous logging along the North Fork of the Elk River, the Elk River had been classified as an "impaired water body" by the responsible regional water board, the Regional Water Quality Board, North Coast Region (Regional Water Board). (See 33 U.S.C. § 1313, subd. (d).) Consequently, when the Elk River Timber Company submitted a proposed THP for the South Fork of the Elk River, the Regional Water Board submitted comments to the Department of Forestry recommending a water quality monitoring program. (Public Res. Code, § 4582.6, subd. (a).) The Elk River Timber Company's registered professional forester agreed generally with this recommendation. On August 24, 1998, the Department of Forestry approved the proposed THP (THP 520). No formal water quality monitoring program was incorporated, but Elk River Timber Company agreed to carry out voluntary monitoring.

The next month, the Legislature passed A.B. 1986,[1] which authorized public acquisition of the land that is now the Headwaters Forest Preserve. A.B. 1986 provided

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[1] Assem. Bill No. 1986 (1997-1998 Reg. Sess.), Stats. 1998, ch. 615.

funding to carry out the Headwaters Agreement, an agreement between the state and federal governments and Pacific Lumber that would allow acquisition from Pacific Lumber of 5,600 acres of old-growth forest and formation of the government-owned Headwaters Forest Preserve. (See *Coho Salmon v. Pacific Lumber Co.* (N.D.Cal. 1999) 61 F.Supp.2d 1001, 1005.) The land covered by THP 520 was not included in the Headwaters Forest Preserve; instead, as part of the Headwaters Agreement, Pacific Lumber acquired it from the Elk River Timber Company. THP 520 remained in effect and authorized timber harvesting on the 705 acres known as the "Hole in the Headwaters."

Because of limits on its access to the Hole in the Headwaters, Pacific Lumber submitted an amendment to THP 520 that would allow it to use helicopters to remove trees. The Department of Forestry initially approved the amendment as a "minor amendment" without public review, but a private lawsuit resulted in a preliminary injunction that required the proposed amendment to be resubmitted as a "major amendment" subject to a public review process.

The Regional Water Board participated in the public review process and submitted comments. It recommended that THP 520 be further amended to provide for an evaluation of pre-timber harvest water conditions and ongoing water quality monitoring. The Department of Forestry declined to adopt the Regional Water Board's recommendations, and on March 6, 2001, it approved the amendment to THP 520 without a water quality monitoring requirement or survey of initial conditions.

The Forest Practice Act authorizes the State Water Board to appeal Department of Forestry THP approvals to the State Board of Forestry. (Pub. Resources Code, § 4582.9.) The Regional Water Board asked the State Water Board to take an appeal, but the State Water Board chose not to do so.

The Regional Water Board then issued its own order requiring water quality control monitoring. The Regional Water Board's order required Pacific Lumber to establish five monitoring stations along the South Fork of the Elk River, and required in-stream trend monitoring, timber harvest plan compliance monitoring, and stream crossing

monitoring. Pacific Lumber appealed to the State Water Board, which held a series of hearings, vacated the Regional Water Board's order, and issued its own order imposing water monitoring requirements. The State Water Board order reduced the number of monitoring stations required to two, one above and one below the area where timber harvesting would occur. It also required monthly visual inspections of watercourse crossings during winter.[2]

Pacific Lumber filed a petition for writ of mandamus, seeking to prevent the State Water Board order from taking effect. It argued that the State Water Board order was unlawful because it was precluded both by the Department of Forestry's exclusive jurisdiction over timber harvesting issues and by the State Water Board's failure to take an appeal from the approval of the amendment to THP 520. The State Water Board argued that its jurisdiction over water quality issues was concurrent, and that when timber harvesting operations affected water quality, it was authorized to issue its own orders

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[2] During the administrative process, both the United States Environmental Protection Agency (EPA) and the Department of Forestry weighed in in support of additional monitoring requirements. When the State Water Board was considering the appeal from the Regional Water Board order, the EPA wrote, "EPA believes that water quality monitoring, specifically for turbidity, is more than reasonable in this instance. [¶] Monitoring in conjunction with [THP 520] is appropriate for several reasons. The planned timber harvest is a major operation with significant potential to affect water quality adversely. The South Fork Elk River supports sensitive beneficial uses, including domestic water supply and habitat for fish listed as threatened under the federal Endangered Species Act. An adjacent watershed, the North Fork Elk River, has experienced severe water quality degradation during a period of recent timber harvesting. The Elk River has been listed as impaired under Section 303(d) of the Clean Water Act due to excessive sedimentation . . . . Clearly, monitoring designed to detect possible adverse water quality effects during timber harvesting, especially impacts related to sediment, is appropriate in this situation."

The Department of Forestry reviewed a draft of the State Water Board order and offered minor suggestions, while acknowledging its belief that the state and regional orders did *not* intrude on Department of Forestry jurisdiction: "[The Department of Forestry] has always acknowledged and supported the Regional Water Quality Control Board's authority to set water-monitoring requirements." The Department of Forestry concluded that the proposed State Water Board order was "well thought out."

regulating those impacts. After a hearing, the trial court held that the Department of Forestry's jurisdiction was exclusive, and it granted Pacific Lumber's petition.

DISCUSSION

I. *Public Resources Code Section 4514 Permits the State Water Board to Regulate Timber Harvest Impacts*

On appeal following the trial court's decision on a petition for a writ of mandamus, we review questions of law and issues of statutory interpretation de novo. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129; see *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224.)

The starting point for our analysis is Public Resources Code section 4514,[3] which provides: "No provision of this chapter or any ruling, requirement, or policy of the [Forestry] board is a limitation on any of the following: [¶] (a) On the power of any city or county or city and county to declare, prohibit, and abate nuisances. [¶] (b) On the power of the Attorney General, at the request of the board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution or nuisance. [¶] (c) *On the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer.* [¶] (d) On the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in Part 3 (commencing with Section 3479) of Division 4 of the Civil Code or for any other private relief." (Emphasis added.)

On its face, Public Resources Code section 4514, subdivision (c) directly addresses the inter-agency issue. It provides that notwithstanding orders of the Department of Forestry (such as the approval of a THP or THP amendment), other state agencies may continue to enforce those laws entrusted to them. The other subdivisions of section 4514 reinforce the notion that the Forest Practice Act is not the sole means of

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[3] Stats. 1973, ch. 880, § 4, p. 1615.

regulating the impacts of timber harvesting activities. Subdivisions (a), (b), and (d) authorize public prosecutors and individual citizens to bring actions if and when warranted. Under section 4514, timber companies must comply with Department of Forestry directives *and* all other applicable laws.

Public Resources Code section 4514 mirrors Water Code section 13002, a provision that underlines the Legislature's intent to provide for concurrent, overlapping jurisdiction. Water Code section 13002 provides, "No provision of this division or any ruling of the state board or a regional board is a limitation: [¶] (a) On the power of a city or county or city and county to adopt and enforce additional regulations, not in conflict therewith, imposing further conditions, restrictions, or limitations with respect to the disposal of waste or any other activity which might degrade the quality of the waters of the state. [¶] (b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances. [¶] (c) On the power of the Attorney General, at the request of a regional board, the state board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution or nuisance. [¶] (d) *On the power of a state agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer*. [¶] (e) On the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in the Civil Code or for relief against any contamination or pollution." Thus, the Department of Forestry's jurisdiction does not foreclose the State Water Board from regulating water quality, and the State Water Board's jurisdiction does not foreclose the Department of Forestry from regulating timber harvesting. The State Water Board cannot, for example, prevent the Department of Forestry from approving a THP based on water quality impacts. Public Resources Code section 4514 and Water Code section 13002 demonstrate an intent to grant the State Water Board concurrent jurisdiction with other entities. (Cf. *People v. City of Los Angeles* (1958) 160 Cal.App.2d 494, 503.)

Public Resources Code section 4514, subdivision (c) authorizes the order challenged here. The State Water Board and regional water boards are expressly

entrusted with administering and enforcing California's Porter-Cologne Water Quality Control Act (Water Quality Act). (Wat. Code, §§ 13001, 13000 et seq.) Under the Water Quality Act, both the Regional Water Board and State Water Board may require water quality monitoring reports. (*Id.* §§ 13267, subd. (b)(1),[4] 13320.)[5] In this case, these two boards issued their water quality monitoring orders pursuant to that authority. Water Code section 13267 had been in place for three years when the Legislature passed Public Resources Code section 4514. We assume that when the Legislature enacts new laws, it is "aware of existing related laws and intend[s] to maintain a consistent body of rules." (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199.) We will not assume lightly that the Legislature intended to repeal or limit the State Water Board's power, particularly when an express contrary intent appears on the face of Public Resources Code section 4514, subdivision (c). Because the State Water Board is expressly authorized to issue a monitoring order, section 4514, subdivision (c) obligated Pacific Lumber to comply with that order in addition to the terms and conditions of THP 520.

This situation in which activities are subject to the overlapping and concurrent jurisdiction of multiple agencies is not unique. In *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, our Supreme Court addressed a dispute over regulation of the construction of two electric generating units. Southern California

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[4] Stats 1969, ch. 482, § 18, p. 1064.

[5] Under Water Code section 13267, subdivision (b)(1), "the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires." Under Water Code section 13320, parties affected by regional water board actions are permitted to petition the State Water Board for review. (Wat. Code, § 13320, subd. (a).) On review, the State Water Board may substitute its own action for that of a regional water board, and in so doing, "is vested with all the powers of the regional boards under [the Porter-Cologne Water Quality Control Act]." (Wat. Code, § 13320, subd. (c).)

Edison Company sought construction approval from the Orange County Pollution Control District (Pollution Control District) and the Public Utilities Commission (PUC). The Pollution Control District denied approval, concluding that the plants' emissions would exceed allowable limits. (*Id.* at pp. 949-950.) The PUC granted approval and ordered immediate construction, asserting paramount jurisdiction. (*Id.* at p. 950.) The Supreme Court reversed. It held, "We conclude that the Legislature has established one statutory scheme for the general regulation of public utilities, another for the general regulation of air pollution. . . . [T]he [PUC] must share its jurisdiction over utilities regulation where that jurisdiction is made concurrent by another (especially a later) legislative enactment." (*Id.* at pp. 953-954.)

So it is here. The Legislature has established one statutory scheme for the regulation of timber harvesting and another for the maintenance of water quality. Where logging activities implicate water quality issues, a timber company must comply with requirements imposed by the State Water Board in addition to the Department of Forestry. The exclusivity of PUC jurisdiction is even more well-established and clear cut than that of the Department of Forestry (see *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 924); if utilities matters can be subjected to concurrent regulation in the absence of a statute expressly providing for concurrent jurisdiction, then forestry matters can certainly be subjected to concurrent regulation in the presence of two statutes expressly providing for concurrent jurisdiction.

Pacific Lumber relies on a Ninth Circuit case, *Resource Inv., Inc. v. U.S. Army Corps of Eng'rs.* (9th Cir. 1998) 151 F.3d 1162 (*Resource Investments*), to argue that the State Water Board should not be permitted to regulate the impacts of logging on water quality. In *Resource Investments*, a private entity sought approval from county authorities and from the federal Army Corps of Engineers (Army Corps) for construction of a landfill that would affect wetlands. Although county officials issued permits, the Army Corps denied approval. (*Id.* at p. 1165.) The Ninth Circuit reversed the Army Corps's decision based on its reading of the Clean Water Act (33 U.S.C. §§ 1341-1346) and the Resource Conservation and Recovery Act (42 U.S.C. §§ 6941-6949a). These

laws contained no provisions resolving whose authority should control in matters implicating both EPA (and by delegation state and county official) authority over waste management and Army Corps authority over navigable waters. The Ninth Circuit concluded that these statutes did not create concurrent, overlapping jurisdiction and were not intended to require landfill construction projects to obtain permit approval from both county officials and the Army Corps. (*Id.* at p. 1169.) Instead, it concluded that exclusive jurisdiction for garbage disposal regulation should rest with the EPA and its authorized state and local delegates. (*Ibid.*)

Resource Investments demonstrates that a legislative body may choose to allocate exclusive jurisdiction to one agency rather than another in matters that might otherwise implicate two agencies' jurisdiction. However, the statutory schemes at issue there bear no resemblance to the statutory schemes at issue here. As noted, they contain no provisions parallel to Public Resources Code section 4514 and Water Code section 13002, which each explicitly provide for concurrent jurisdiction. In addition, the agency conducting additional review in *Resources Investment*, the Army Corps, had very limited expertise in the subject it was being asked to regulate, garbage disposal. (*Resource Investments, supra,* 151 F.3d at p. 1169.) In contrast, the State Water Board has superior expertise in evaluating the need for water quality monitoring. Consequently, *Resource Investments* is not persuasive here.

Pacific Lumber summarily argues that Public Resources Code section 4514 did not authorize the State Water Board to regulate water quality issues arising from Pacific Lumber's logging activities because the State Water Board was not "specifically authorized" to override an approved Timber Harvest Plan that it had not appealed. (See Pub. Resources Code, § 4514, subd. (c).) This reading misconstrues the statute. The phrase "specifically authorized" in section 4514 requires only express authorization for the "enforcement or administration of any provision of law" entrusted to the State Water Board, such as the Water Quality Act. Under section 4514, an agency need only be "specifically authorized" to enforce a particular law. Once it is, section 4514 itself

provides authority for the agency to do so notwithstanding any act or order of the Department of Forestry.

Under Pacific Lumber's reading, Public Resources Code section 4514, which provides, "No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on any of the following . . . ," including the power of state agencies to enforce laws, *is* a limitation on the power of state agencies to enforce laws, absent some separate statutory provision specifying that the agency's authority extends to overruling Department of Forestry actions. In other words, according to Pacific Lumber, unless the Legislature amends the Water Code to expressly authorize the State Water Board to overrule Department of Forestry orders, section 4514 limits the State Water Board and prevents it from enforcing the Water Quality Act. This interpretation turns section 4514 on its head. We decline to interpret a section that provides that Department of Forestry rulings do not limit other agencies' granted powers as doing precisely the opposite and limiting their granted powers.

Pacific Lumber's interpretation is also inconsistent with Public Resources Code section 4514.3. That section provides, "Timber operations conducted pursuant to this chapter *are exempt from the waste discharge requirements of Article 4 (commencing with Section 13260) of Chapter 4 of Division 7 of the Water Code* as long as both the federal Environmental Protection Agency and the State Water Resources Control Board certify after January 1, 2003, that the provisions of this chapter constitute best management practices for silviculture pursuant to Section 208 of the Federal Water Pollution Control Act." (Pub. Resources Code, § 4514.3, subd. (a), emphasis added.) Section 4514.3 demonstrates that the Legislature knows how to specify that timber operations are exempt from other laws when it so intends.[6] Of greater significance, it establishes conditions for exempting timber operations from Article 4 of Chapter 4 of Division 7 of the Water

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[6] Public Resources Code section 4516.5 is of similar import. That section allows counties to offer suggestions for timber rules and regulations, but otherwise preempts them from regulating timber operations. (Pub. Resources Code, § 4516.5, subds. (a), (d); see *Big Creek Lumber Co. v. County of Santa Cruz* (2004) 115 Cal.App.4th 952.)

Code, which includes Water Code section 13267, the provision at issue here. Given that Public Resources Code section 4514.3 exempts timber operations from Water Code section 13267 once certain conditions are met, it would be anomalous to interpret a more general provision as silently creating a blanket exemption even before those conditions have been met.[7] In light of Public Resources Code section 4514.3, we do not interpret Public Resources Code section 4514 as exempting Pacific Lumber from investigation of water quality by the State Water Board under Water Code section 13267.

Pacific Lumber further argues that we should disregard Public Resources Code section 4514 because the Forest Practice Act was intended to be a "comprehensive system of regulation [for the] use of all timberlands." (Pub. Resources Code, § 4513.) Pacific Lumber points to regulations adopted by the State Board of Forestry that address water quality control issues (Cal. Code Regs., tit. 14, §§ 916-916.12; see Pub. Resources Code, § 4562.7) and provisions that allow the Regional Water Board to consult on THPs (Pub. Resources Code, § 4582.6) while reserving "final authority" to the Department of Forestry "to determine whether a timber harvesting plan is in conformance with the rules and regulations of the [State Board of Forestry] and with [the Forest Practice Act]" (Pub. Resources Code, § 4582.7, subd. (e)). Pacific Lumber also points to the head-of-agency appeal process (Pub. Resources Code, § 4582.9), and suggests that allowing regulation pursuant to section 4514 would render that process irrelevant.

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[7] Both sides agree that the conditions necessary for the Public Resources Code section 4514.3 exemption to apply have not been met. The EPA has declined to certify that the Department of Forestry's Forest Practice Rules constitute "best management practices" for silviculture, as required by section 4514.3, subdivision (a). In fact, according to the EPA, "[t]he lack of adequate [water quality] monitoring and assessment is one reason EPA declined to certify the Forest Practice Rules as best management practices back in 1988, and we have reiterated this concern on several occasions since." Given that the section 4514.3 exemption does not apply in part because Department of Forestry regulations do not adequately ensure water quality monitoring, we see all the more reason for not reading an exemption from water quality monitoring into the more general provisions of Public Resources Code section 4514.

The Forest Practice Act comprehensively regulates timber harvesting matters. Understandably, it and its accompanying regulations incorporate provisions that address water quality and species habitat issues, and encourage consultation among the Department of Forestry, state and regional water boards, and the Department of Fish and Game. (Pub. Resources Code, §§ 4551.5, 4582.6, 4582.9.) Interagency lobbying, as happened here, allows one agency to educate another regarding matters within its jurisdiction that have outside impacts. That input might lead to a different decision or accommodations for impacts not otherwise accounted for by a single agency. Such provisions recognize the fundamental reality that the environment is not a set of discrete resources but an interdependent biosystem. The extraction of one resource may have an impact on other resources, and another agency may be able to contribute its greater expertise at an early stage. Provisions allowing for input do not compel the conclusion that the Department of Forestry's jurisdiction was intended to be exclusive.

Nor does our reading of Public Resources Code section 4514 render provisions allowing for such input, including the head-of-agency appeal process, irrelevant. Even though an agency may retain the power to regulate separately, it has no power to deny approval to any given THP. The head-of-agency appeal process allows the State Water Board and Department of Fish and Game to argue for outright denial of THPs, or modifications on matters within the exclusive jurisdiction of the Department of Forestry and State Board of Forestry. This process is permissive, not mandatory. Nothing in Public Resources Code sections 4582.9 or 4514 suggests that the State Water Board must exhaust the head-of-agency appeal process before enacting its own orders.

With respect to Pacific Lumber's argument that the Forest Practice Act is comprehensive and therefore supersedes State Water Board jurisdiction, we find it notable that this argument was raised and dismissed in the weeks immediately preceding passage of A.B. 227, the Forest Practice Act.[8] Before passage, the State Water Board and Department of Fish and Game each contacted bill author Edwin Z'Berg and expressed

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[8] Assem. Bill No. 227 (1973-1974 Reg. Sess.) Stats. 1973, ch. 880, § 4, p. 1615.

concern that A.B. 227 could be interpreted to supersede their regulatory authority. In August 1973, Z'Berg wrote the Legislative Counsel for an opinion. He noted that the language of proposed Public Resources Code section 4514, subdivision (c) "would seem to allow the [State Water Board] and the Regional Water Quality Control Boards to continue regulation of waste discharges from logging activities, including soil, bark, and other debris, whenever they affect water quality." (Assemblyman Edwin L. Z'Berg, sponsor of A.B. 227, letter to Legislative Counsel, Aug. 6, 1973.) However, he expressed concern that the detailed regulation of the use of streams and waterways authorized by proposed Public Resources Code section 4562.7 "might be considered by the courts to be such a clear expression of the Legislature as to the scope of regulations to be applied to logging that the State Board of Forestry rules would be considered paramount." (*Id.* at p. 2.) He sought confirmation as to whether his bill would "in any way limit jurisdiction or restrict the enforcement activities of the [State Water Board], the Regional Water Quality Control Boards or the Department of Fish and Game." (*Ibid.*)

The Legislative Counsel allayed these concerns. It concluded that proposed Public Resources Code section 4562.7 would not be construed to supersede State Water Board, regional water board, and Department of Fish and Game orders on matters within the scope of those agencies' authority. (Ops. Cal. Legis. Counsel, No. 16456 (August 10, 1973) Forestry (A.B. 227) p. 2.) It based that conclusion, as we do, on the express language of Public Resources Code section 4514. (*Id.* at pp. 3-4.) The next month, the Forest Practice Act passed without further amendment to section 4514.

Thus, neither the permissibility of input nor the extent of State Board of Forestry regulation alters the bottom line: each agency is responsible for final decisions regarding the use or preservation of the natural resources within its bailiwick. The Legislature's grant of final authority to the Department of Forestry and State Board of Forestry to decide on THPs (Pub. Resources Code, § 4582.7, subd. (e)) does not alter its equally clear grant of final authority to the State Water Board to decide on water quality monitoring (Wat. Code, §§ 13267-13268). While the Forest Practice Act establishes a comprehensive statewide program for timberlands, "the Porter-Cologne Water Quality

Control Act (Wat. Code, § 13000 et seq.) establishes a comprehensive statewide program for water quality control . . ." (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 109.) The Department of Forestry may permit trees to be cut, but the State Water Board may require that when trees are cut, water quality be preserved.[9]

In sum, we read Public Resources Code section 4514 as a legislative determination that the Department of Forestry's exclusive jurisdiction over timber harvesting does not give it exclusive jurisdiction over the *effects* of that timber harvesting. Instead, other agencies may regulate the impacts of logging to the extent those impacts implicate the substantive statutes they are charged with enforcing. Under Public Resources Code section 4514, agencies with expertise concerning a particular resource are granted final say concerning the use or preservation of that resource. The State Water Board cannot reach out to forbid logging that might have negative water impacts; conversely, the Department of Forestry cannot reach out to forbid water quality monitoring. Ultimately, the State Water Board's judgment about what is needed to protect the Elk River must be dispositive, not the judgment of the Department of Forestry. In the Legislature's view, the Department of Forestry's regulation of timber harvesting does not excuse Pacific Lumber from other agency requirements that it take steps to ensure the preservation of other resources negatively affected by that harvesting.

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[9] Amicus curiae California Forestry Association dismisses Public Resources Code section 4514 as "boilerplate." We decline to invent a boilerplate theory of statutory interpretation that would permit us to disregard the clear meaning of a legislative enactment. The concept of boilerplate has a place in understanding contracts, where the language of a printed boilerplate agreement may or may not reflect the parties' actual intent. (E.g., *Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1328.) In the context of legislative acts, the concept of boilerplate has no relevance. Nothing in the language of section 4514 indicates that it does not mean what it says, or that it should not be applied fully to the situation at hand. At most, similar statutes like Water Code section 13002 demonstrate that when the Legislature intends a particular resolution of inter-agency jurisdictional issues, it can and does know how to express it clearly.

II. *The Forestry Board's Timber Harvest Plan Does Not Estop the State Water Board from Regulating Logging Impacts*

In the alternative, Pacific Lumber argues that the State Water Board is estopped from requiring water quality monitoring because it failed to appeal the Department of Forestry's refusal to impose water quality monitoring. Because the application of the doctrine of collateral estoppel is an issue of law, we review the issue de novo. (*Appling v. State Farm Mutual Auto Ins. Co.* (9th Cir. 2003) 340 F.3d 769, 775; see *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667; *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1333 & fn. 2.)

Under the doctrine of collateral estoppel or "issue preclusion," when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a future lawsuit. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443; see *Dowling v. United States* (1990) 493 U.S. 342, 347; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.) Traditionally, collateral estoppel bars relitigation of an issue if (1) the issue necessarily decided at the previous proceeding is identical to the one sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849; *Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1230.) As the advocate of the application of collateral estoppel, Pacific Lumber bears the burden of proof that each prerequisite has been established. (*Dowling v. United States, supra,* 493 U.S. at p. 350; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

However, these principal requirements presuppose that the prior proceeding is of a type that may be accorded collateral estoppel effect. (See *People v. Sims* (1982) 32 Cal.3d 468, 477 (*Sims*), superseded by statute on another ground in *Gikas v. Zolin, supra,* 6 Cal.4th at pp. 851-852.) In *Sims*, the California Supreme Court recognized that while collateral estoppel ordinarily arises from prior court proceedings, it may also extend to administrative decisions. In such cases, the administrative proceeding must first be

evaluated to determine whether it is sufficiently judicial in nature to support an estoppel. (*Ibid.*)

"Collateral estoppel may be applied to decisions made by administrative agencies '[w]hen an administrative agency is *acting in a judicial capacity* and *resolves disputed issues of fact* properly before it which the parties have had an *adequate opportunity to litigate* . . . .' " (*Sims, supra,* 32 Cal.3d at p. 479, quoting *United States v. Utah Constr. Co.* (1966) 384 U.S. 394, 422 (*Utah Construction*), superseded by statute on another ground in *Alliant Techsystems, Inc. v. U.S.* (Fed. Cir. 1999) 186 Fed.3d 1379, 1380.) In evaluating the character of the earlier forum, "courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings." (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at p. 829.) In *Sims*, for example, the Supreme Court found that the administrative proceeding at issue could support a later estoppel because it was adversarial, it provided the opportunity to subpoena, examine, and cross-examine witnesses under oath and to present oral and written argument, a transcript was prepared, the hearing officer issued a written statement of reasons, and the decision itself entailed the application of a rule of law to particular facts. (*Sims*, *supra,* 32 Cal.3d at p. 480.) After the hearing, the losing party had a right to seek Superior Court review. (*Ibid.*)

In contrast, the Department of Forestry's approval of a THP lacks these judicial characteristics. It is not an adversarial proceeding. Testimony is not submitted under oath. There is no opportunity to call or cross-examine witnesses, subpoena witnesses, or present oral argument. No transcript is prepared. The Department of Forestry "shall prepare and make available written responses to significant issues raised at the hearing," but these responses do not rise to the level of the statement of reasons and written resolution of disputed issues of fact contemplated by *Sims* and *Utah Construction*. (See Pub. Resources Code, § 4582.6 [detailing procedures]; Cal. Code Regs., tit. 14, § 1037.5

[same].)[10] Because the THP approval hearing fails this initial test, we need not decide whether the other requirements for collateral estoppel are met.

Pacific Lumber principally relies on *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 (*Johnson*), but *Johnson* is not relevant to our inquiry. In *Johnson*, a city employee was dismissed and filed a grievance. His grievance was denied in a quasi-judicial administrative proceeding; without seeking mandamus to reverse the denial, he filed suit. The California Supreme Court concluded that his state discrimination claims were barred by his failure to exhaust judicial remedies. (*Id.* at p. 76.) However, the administrative proceeding in *Johnson* involved extensive and detailed procedural protections. (*Id.* at p. 72.) The issue presented here—whether the administrative proceeding was sufficiently judicial to support an estoppel—was undisputed in *Johnson*; Johnson conceded that defendant afforded him a full and fair opportunity to litigate his case within the meaning of *Sims* and *Utah Construction*. (*Johnson*, at p. 71, fn. 3.) *Johnson* thus sheds no light on how to apply the *Sims*/*Utah Construction* standards here.

Pacific Lumber also points to three cases that have concluded that THP approval is quasi-judicial or adjudicatory. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1235; *East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1121-1122; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 630, fn. 18.) However, each of these cases arose in the context of determining whether such a decision was subject to review by administrative (Code Civ. Proc., § 1094.5) or traditional (Code Civ. Proc., § 1085) mandamus, and thus whether the decision was quasi-judicial or quasi-legislative. This distinction is a very different inquiry from the one required by *Sims*; a decision may qualify as more "quasi-judicial" than "quasi-legislative" for purposes of identifying the

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[10] We need not decide whether, had an appeal to the State Board of Forestry been taken, that proceeding might have given rise to findings sufficient to support an estoppel. (See Pub. Resources Code, § 4582.9 [detailing appeal procedures].) No appeal was taken, and no hearing ever occurred.

correct means of review, and yet still lack enough of the essential judicial characteristics necessary to support an estoppel.[11]

One final factor militates in favor of the conclusion we reach. " '[C]ollateral estoppel is an equitable concept based on fundamental principles of fairness.' " (*White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763, quoting *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941.) Its application is appropriate only when consistent with public policy. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at p. 829; *Lucido v. Superior Court, supra,* 51 Cal.3d at pp. 342-343.) Applying collateral estoppel here would create significant policy difficulties.

On the one hand, a holding that the mere opportunity to review a THP and submit comments (Pub. Resources Code, § 4582.6) is enough to estop a regional or state water board from enacting its own measures would effectively nullify Public Resources Code section 4514 by implication. Neither state nor regional water boards (nor, for that matter, the Department of Fish and Game) would be able to take any independent action to preserve species or water quality affected by timber harvesting; all such authority for species and water quality preservation would rest with the Department of Forestry. Repeals by implication are strongly disfavored (*Astoria Federal S. & L. Assn. v. Solimino* (1991) 501 U.S. 104, 109; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249-250); where, as here, the two statutes were enacted at the same time, there is even greater reason not to conclude that one statute should eviscerate the other.

On the other hand, a holding that affirmatively choosing to participate in the THP approval process, either at the Department of Forestry level or through a State Board of Forestry appeal (Pub. Resources Code, § 4582.9), is enough to estop the participating agency would create perverse disincentives. It would encourage agencies to preserve

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[11] Moreover, two of the cases concluded that in some instances a THP approval might be subject to the traditional mandamus applicable to quasi-legislative decisions. (*East Bay Muni. Util. Dist. v. Dep't of Forestry & Fire Prot.*, *supra,* 43 Cal.App.4th at p. 1122, fn. 5; *Environmental Prot. Info. Ctr., Inc. v. Johnson, supra,* 170 Cal.App.3d at p. 630, fn. 18.)

their jurisdiction by refusing to cooperate and consult on ongoing timber harvesting projects. Such a ruling would undermine the interagency cooperation the Legislature sought to create, and would increase the likelihood of future disputes—precisely the opposite of the dispute-reduction and judicial economy policies underlying collateral estoppel. (See *Lucido v. Superior Court, supra,* 51 Cal.3d at p. 343.)

Consequently, the Regional Water Board's participation in the THP 520 approval process does not estop either the Regional Water Board or the State Water Board from exercising its own independent jurisdiction to enforce the Water Quality Act.

III. *Pacific Lumber Has Waived Its Takings Argument*

Pacific Lumber raises a constitutional claim on appeal. According to it, the State Water Board's order is an unconstitutional taking. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 9.) Not a word was mentioned in the trial court concerning this claim; no Takings Claim was included in Pacific Lumber's petition and complaint.

We need not reach the merits of Pacific Lumber's constitutional claim. The general rule is that a constitutional issue must be raised at the earliest opportunity in the trial court or it will be considered waived on appeal. (*Bonner v. City of Santa Ana* (1996) 45 Cal.App.4th 1465, 1476-1477 (*Bonner*), disapproved on other grounds in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 320-321; *In re Tania S.* (1992) 5 Cal.App.4th 728, 735; *Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1520.) "The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law." (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.)

We have discretion to address constitutional claims that raise only legal and constitutional issues on undisputed facts in the record. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [new legal theory may be raised for first time on appeal if no new factual issues are required to be adduced]; *Bonner, supra,* 45 Cal.App.4th at pp. 1476-1477 [new constitutional issues may be raised for the first time on appeal, but only if the facts are

undisputed].) This is not such a claim. Pacific Lumber bases its takings claim on the assertion that the State Water Board's order renders timber harvesting in the Hole in the Headwaters uneconomical. Pacific Lumber's argument contains no citation to the record in support of this proposition. The reason is clear: evidence establishing this factual assertion was never introduced. Because this claim involves mixed factual and legal issues, Pacific Lumber waived it by failing to develop it in the trial court. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

IV. *The State Water Board's Order Is Supported by the Weight of the Evidence*

Finally, Pacific Lumber argues that even if the State Water Board had authority to act, the administrative record does not support the order it issued. The trial court found it unnecessary to address this issue because of its ruling on the statutory question. However, because we affirm the trial court's order if it is correct on any legal basis, we must address the issue. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19, limited on other grounds in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 971, 944.)

In a Code of Civil Procedure section 1094.5 mandamus action challenging a State Water Board order, "the court shall exercise its independent judgment" in evaluating the evidence in the administrative record. (Wat. Code, § 13330, subd. (d).) The independent judgment standard is not equivalent to de novo review. Instead, a court "must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

A water quality monitoring order is authorized if two conditions are met. First, an order may only be issued to "any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its

region." (Wat. Code, § 13267, subd. (b)(1).)[12] Second, "[t]he burden, including costs, of these [monitoring] reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." (*Ibid.*)

The evidence in the record supports a connection between Pacific Lumber's timber harvesting, erosion, and landslides that affect the water quality of the Elk River. In September 1998, the Regional Water Board issued Cleanup and Abatement Order No. 98-100 in connection with Pacific Lumber's timber harvesting along the North Fork of the Elk River. Order No. 98-100 noted that the Department of Forestry had cited Pacific Lumber 51 times for violations of its forest practice regulations over the previous four years, and that "[t]hese violations of the California Forest Practice Rules resulted in the discharge and/or threatened discharge of soil to the North Fork Elk River and its tributaries and are violations and/or threatened violations of the waste discharge prohibitions contained in the Water Quality Control Plan for the North Coast Region." Order No. 98-100 relied on figures from a Pacific Lumber consultant's report that showed a 13-fold increase in the volume of landslides on slopes harvested within the last 15 years compared with slopes harvested more than 15 years ago. Order No. 98-100 concluded that Pacific Lumber had "discharged waste into the waters of the state" in violation of Water Code section 13304, subdivision (a). Pacific Lumber challenged Order No. 98-100, then settled the matter. As part of the settlement, Pacific Lumber stipulated that it would not contest the findings of Order No. 98-100 absent "significant new evidence that discharges and threatened discharges" from Pacific Lumber's land were lawful and would not "significantly adversely affect beneficial uses of water by downstream property owners."

The new evidence identified by Pacific Lumber does not refute the conclusions of Order No. 98-100. Pacific Lumber relies on its consultant's sediment source analysis

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[12] An order may also be issued to dischargers outside a given regional water board's region (Wat. Code, § 13267, subd. (b)(1)), but that situation is not involved in this appeal.

(the PWA Report), which predates the settlement, and the testimony of a hydrologist, William Conroy. Both Conroy and the PWA Report identify rainfall levels as the most likely cause of recent major changes in landslide rates. However, Conroy agrees that "timber harvest can increase landslide rates" and the PWA Report acknowledges that "[b]oth road construction and harvesting have been linked to increased sediment production and yield in the North Fork [of the] Elk River." Conroy's testimony does not explain why landslide figures contained in the PWA Report show a statistically significant correlation between the *location* of landslides depositing sediment in the North Fork of the Elk River during 1994-1997 and those areas harvested by Pacific Lumber in that same period. Those figures support the Regional Water Board's conclusion in Order No. 98-100 that "[a]lthough large storm events are a significant factor in causing the [sediment] discharges, the storm events have a much greater effect on recently harvested areas than on older harvested areas." Conroy's testimony and the PWA Report are consistent with the notion that while major storms can trigger landslides, timber harvesting makes slopes much more susceptible to landslides when such storms hit. Thus, the weight of the evidence indicates that timber harvesting under THP 520 will increase the likelihood of sediment discharge, and that the State Water Board was entitled to issue a monitoring order.

Pacific Lumber contends that the monitoring actually imposed is not justified by its cost because the monitoring design is flawed. The State Water Board order requires two new monitoring stations, one immediately upstream of the THP 520 regions and the other immediately downstream, down from five in the original Regional Water Board order, and significantly reduces the extent of monitoring and analysis to be done. In support of its argument, Pacific Lumber identifies only testimony criticizing the vacated Regional Water Board order. It points to no evidence undermining the simplified monitoring approach adopted in the final State Water Board order. Nor does Pacific Lumber identify the cost of this simplified monitoring or offer any basis to conclude that the cost would exceed any benefits. Consequently, Pacific Lumber has not carried its

burden of establishing that the State Water Board order is unsupported by the weight of the evidence.

DISPOSITION

The writ of mandate is reversed.

GEMELLO, J.

We concur.

STEVENS, ACTING P. J.

SIMONS, J.

Trial court:	Humboldt County Superior Court
Trial judge:	Hon. J. Michael Brown

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