

A Case Study in California Legislative Advocacy



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I. Introduction

The purpose of this article is to provide readers with a case study of successful legislative advocacy in the California Legislature involving a controversial measure. The particular bill discussed in this case study was chosen because of the numerous facets of the legislation that provide valuable insights into navigating the legislative process and it allows us to examine how different influences can impact pending legislation.

The bill that is the focus of this case study is Assembly Bill 1492, which was enacted into law during the 2012 Legislative Session¹. The measure's author was the Committee on Budget². Its primary purpose was to create the Timber Regulation and Forest Restoration Fund (TRFRF) Program. The major elements of the TRFRF Program, as contained in AB 1492³, include the following:

- Provide a funding stream via a one-percent assessment on lumber and engineered wood products sold at the retail level.
- Seek transparency in and efficiency improvements to the State's timber harvesting regulation programs.
- Provide for development of ecological performance measures.
- Establish a forest restoration grant program.

- Require regular program reporting to the Legislature.

What ultimately became AB 1492⁴ represented an important bill to the timber industry in California, as well as to the State of California, as discussed in this case study.

II. Bill's Provisions

As described for the 40 Senators who were voting on AB 1492 in the Senate Floor Analysis provided to them, the bill contained the following law changes:

- Allows a timber harvesting plan approved after July 31, 2012 to be in effect for a period of not more than five years with extensions authorized for a two-year period.⁵
- Establishes the Timber Regulation and Forest Restoration Fund in the State Treasury and imposes a new assessment on lumber products and engineered wood products at a rate of one percent of gross receipts from the sale of those products.
- Allows a civil action by a public agency to recover damages caused in a fire but limits the measure of damages for injuries to timber, trees, or underwood negligently caused by fire to the actual damages suffered.⁶

Funds are required to be available upon appropriation for administrative costs and for purposes relating to the regulatory activities of the Department of Forestry and Fire Protection, and other state and local agencies involved in the management of forest lands. Funds may be made available for management of forest lands, the cost of managing forest resource programs in the state, and for certain grants to state and local public agencies for fire protection, fire suppression and restoration activities.

Retailers may be reimbursed for costs to set up collection systems. The fee may be itemized on receipts. In addition, the bill requires the Secretary of the Natural Resources Agency annually to submit a report to the Joint Legislative Budget Committee on the activities of all state departments, agencies and boards relating to forest and timberland regulation.

Governor Brown described the bill, often referred to as “The Forestry Reform Package” as including three key pieces “which aim to make California grown lumber more competitive with out-of-state producers. First, the bill clarifies existing California fire liability law for fires that spread onto federally owned lands in a way that brings predictability and insurability to all landowners within proximity to any federally owned lands in CA. Secondly; it extends the life of Timber Harvest Plans to a maximum total permit life of up to 7 years. Lastly, AB 1492 implements a new 1% assessment on lumber to be collected at retail, which was necessary to ensure that all lumber sold in California bears its fair share of state regulatory costs. The lumber fee will make the playing field for California lumber producers more level with producers in nearby neighboring states. The new lumber assessment will amount to on average less than 50 cents per transaction to consumers buying lumber at big box retailers in the state.”

III. Arguments for and Against the Bill

Writing in support of the bill, the California Association of Professional Scientists stated, "A functional and credible Timber Harvest Review Program requires meaningful participation from each of the reviewed team agencies. While all of the agencies face budget constraints that limit participation, the situation at DFG is particularly shocking. Repeated cuts to DFG's Timber Harvest Review Program have reduced staffing from over 50 PYs in 2006-07 to less than 10 PYs in the current fiscal year. These cuts have left DFG without the capacity to protect our wildlife resources in vast areas of the state. The proposal shifts the costs of reviewing logging plans from the General Fund to the end user. Such an assessment would be exceedingly minor for any one consumer, but cumulatively, it provides enough resources to adequately and sustainably fund a multi-agency Timber Harvest Review Program. In the end, AB 1492 will offer better stewardship of our states valuable forest resources and result in a healthier and cleaner environment."

Writing in opposition to the measure, the Retail Industry Leaders Association stated, "The proposed one percent tax on consumers who purchase lumber or wood products in California is one that has the potential to further cripple an industry that has shown slight signs of recovery following an economic downturn unprecedented in its length and especially acute for the housing industry. Furthermore, retailers and their customers should not have to shoulder the burden of funding regulatory activities related to the Timber Harvest Plan review. This initiative does not benefit the retail or construction industries, but rather serves as an alternative to a direct fee or tax on landowners who apply for timber harvesting permits."

IV. Fiscal Considerations

Under state law prior to the enactment of AB 1492, California companies paid multiple regulatory fees when harvesting timber, giving out-of-state companies a major, competitive advantage. As a result, 70 percent of California's lumber was being imported into this state for sale. AB 1492 eliminates regulatory fees and imposes a one percent assessment on lumber sales to level the playing field with out-of-state timber companies.

Essentially, the timber industry was attempting to move the financial burden of burdensome regulations and have those purchasing wood products pay a minor assessment instead. The state was spending roughly \$30 million annually to fund the review and regulation of Timber Harvesting Plans. If timber companies were not going to pay for these state costs, then it would fall to the state's General Fund or upon consumers.

Interestingly, the Senate Budget & Fiscal Review Committee determined that the bill did not have any fiscal consequences.⁷ In theory, the legislation did not have a fiscal impact to the State because it was merely imposing the state costs upon another party to pay. However, the fiscal impact of the legislation was debated quite extensively because of who would be paying.

V. Timber Lobbying Plan Harvesting Efforts

Prior legislation had expired on January 1, 2012 that allowed for timber companies who held three-year THPs to obtain two, 2-year extensions, which would allow a total of seven years for the life of a THP.⁸ The timber industry wanted the same seven-year life for their THPs due to the length of time and costs borne to get THPs approved. Ultimately, AB 1492 amended the law to provide a five-year THP with one two-year extension for a total of seven years.

VI. Lumber Assessment Lobbying Efforts

There were two significantly controversial provisions of AB 1492: the proposed 1% lumber assessment and the wildfire liability damages. Due to General Fund reductions by the previous Administration to the budget of the California Department of Fish & Game (DFG)⁹, the THP review budget was significantly reduced. For example, there was a \$1.5 million, line-item veto in 2010, which claimed to have compromised the interagency review process that is required by the California Environmental Quality Act (CEQA).

Both the State of California and the timber industry were genuinely concerned that environmental groups would likely sue DFG disputing that the THP could be considered the “functional equivalent” of an environmental impact report (EIR) and that such a legal challenge could result in a THP being de-certified, which would have significant consequences for forest activities in the state.¹⁰

According to the DFG, about \$30 million annually would be needed to cover the personnel and other costs required to have a fully functional THP review process. In order to obtain this funding stream, AB 1492 imposed a 1% assessment on the purchase of lumber products in this state to ensure that DFG could conduct a full review of THPs, as well as eliminate the THP permit fees then paid by those companies who submit THPs to the state for approval, and also pay for administration costs and fund some forest restoration projects in California.

One of the biggest complaints from the retailers who opposed AB 1492 centered on the fact that some wood products would be subject to the 1% assessment while others would not be. And some opponents to the bill even argued that “an unelected bureaucrat at the Board of Forestry and Fire Protection will have the authority to unilaterally add or remove products annually from the list of taxable items.”¹¹

The argument made by proponents of AB 1492 was that California timber producers are at a competitive disadvantage to those in Oregon, Washington, and Canada because of California’s high environmental fees, which are a major impediment to doing business and creating jobs in the state. Because the political reality was that the costs of compliance and regulation could not be lowered in an environmentally-friendly Legislature, the next best option would be to spread those costs and not force them to be borne entirely by the regulated community.

In addition, this lumber assessment was intended to ensure that all lumber sold in California, regardless of where it was harvested, would pay the same costs of regulation and compliance, rather than impose the entire cost just on California landowners.

As the reader might imagine, the idea of consumers would now have to pay for those environmental costs, rather than the timber companies, caused a backlash among different segments of legislators, although it was primarily Republican members who did not want to be seen as voting for a tax anyways, let alone a new tax that would be borne by individual consumers at their local wood products stores, such as Home Depot.

The California Retailers Association was not publicly opposed to the bill, but noted for legislators that the new lumber assessment would cause their members financial hardship because they would have to reprogram their cash registers to collect the new assessment. While there was not an official quote, some opponents claimed that it would cost on average \$4500 per business location to perform this government-mandated reprogramming of computer systems.

What resulted in the regulatory environment the following year was that the State Board of Equalization (SBE) utilized the provision of AB 1492 to allow retailers to obtain some cost reimbursement. The SBE voted to limit reimbursement to \$250 per location. Ironically, the SBE also requested \$1 million for its own costs of upgrading computer systems to process the tax.

Proponents of the legislation argued, "For the first time in more than a decade a significant piece of forest legislation has been proposed that enjoys both industry and environmental community support. Moreover, the legislation, AB1492, would provide critical relief for all private landowners from excessive claims made by the federal government for wildfires".¹² Opponents, on the other hand, made the point that AB 1492 "was a tradeoff, where loosening regulations on the timber industry was used to convince the industry to support the tax which would be borne by consumers".¹³

VII. Fire Liability Lobbying Efforts

Regarding the wildfire liability damages portion of the ultimate bill language, it had to be negotiated for several months before it was finalized. Essentially, California law allowed for the doubling or tripling of damages for "wrongful injuries to timber, trees, or underwood upon the land of another." The problem arose because the federal government began using this law to enhance damages related to wildfires, arguing that private landowners should be liable for hundreds of millions of dollars in damages, including a substantial amount attributed to "double damages."

To make matters worse, the federal government sought intangible environmental damages in a manner analogous to emotional distress damages and these damages were to be determined in the absence of a formula dictating the proper amount of an award. Because of the potential of huge financial liability, the US Attorney wanted the law unchanged, while the timber industry needed the law modified. The industry argued that the award of damages should be reasonable and quantifiable.¹⁴

The Sacramento-based U.S. Attorney's Office and even Obama Administration officials lobbied state legislative leaders to limit the bill's wildfire liability damages provisions after winning a string of record awards in cases against timber companies for past fires. There were even rumors of phone calls to Governor Brown

and legislative leaders from the White House to preclude this area of the law from being amended. With such immense pressure, it was clearly the most difficult portion of the bill to be resolved.

VIII. Unique Aspects of the Bill

Another reason for choosing this particular bill for the case study is due to its many unique aspects, such as that the bill included numerous players at the local, state and federal levels, and the bill involved the executive, legislative and judicial branches of government. For example, in the executive branch of state government, the development of the bill included the Governor and his staff, the Department of Finance, two state agencies (CalEPA and Resources), and nearly half a dozen state departments.¹⁵

In the legislative branch of state government, the bill's development included the entire legislature, their personal office staff, as well as several policy and fiscal committees (and the budget subcommittees as well). In the judicial branch, the bill's development included court decisions and ongoing litigation involving the U.S. Attorney.

Finally, in the private sector, the bill's development featured a split in the business community between timber interests and retailers, the timber industry's customers, who were on opposite sides of the measure and the policy debate. This created some interesting dynamics during the legislative process and consternation for many legislators who did not appreciate competing interests within the California business community.

Another unique aspect is that the bill had a policy committee as its author, rather than an individual legislator. Normally, a bill is introduced by the late February deadline and a single legislator (in most cases) authors the bill. In this case, the contents of the bill did not appear until much later in the legislative process. No individual legislator wanted to be the bill's author, so it was the Budget Committee who was the bill's official author. A budget trailer bill was used, which is usually utilized to adopt statutory changes to implement provisions of the state's main budget bill.¹⁶ In fact, it was supposed to be part of the June budget deal, but did not get passed until August, essentially at the end of the Legislative Session.

Moreover, the bill required a 2/3 majority vote for passage as an urgency clause¹⁷ even though it required the same vote due to it being a tax increase as well. Essentially, the urgency clause "masked" the tax increase designation. In other words, without the urgency clause, the bill would have still required a 2/3 majority vote for passage because it amounted to a tax increase. In either case, a super majority vote was required and several Democrats and almost all Republicans were skeptical of voting in favor of a tax increase, especially during an election year.

IX. Political Dynamics

There were also unique political dynamics regarding the consideration and adoption of AB 1492 during the 2012 Legislative Session. This is because Democrats at that time did not have enough legislators from the Democrat Party to have a super

majority in either house. As a result, several Republicans were required to vote aye in the Assembly and Senate in order for the bill to pass by the super-majority vote threshold.

As political and legislative observers could imagine, this was a very difficult threshold to achieve because of the new 1% fee or tax that was being imposed upon members of the general public whenever they would purchase lumber products, such as fence posts, boards of lumber used for building homes, etc.

To make matters even more interesting, and challenging, AB 1492 was the last bill acted upon that year at the end of the 2-year Legislative Session. The bill was “on call” (pending a final vote) in the Assembly because it lacked sufficient votes for passage for a short period of time. Moreover, the bill actually failed passage, but was then granted reconsideration; and, it finally passed in the early morning hours of the following day.

The passage of AB 1492 was also made difficult because three separate timber-related issues were combined into one bill. These three issues had different constituencies in support and opposition to them. As a result, the bill required extensive negotiations on two of the bill’s provisions: fire liability and lumber assessment.

Passage of the bill was in doubt in both houses as it quickly made its way through the process during the closing weeks of the Legislative Session. In fact, the bill passed with the bare minimum of votes required on both Floors of the Assembly and Senate. To demonstrate how quickly the bill traveled through the legislative process, the following is a timeline for consideration of the bill:

August 7 - First substantive amendments were made to the bill ¹⁸ ;

August 15 – The bill passed out of the Senate Budget Committee 11-0 with Democrats voting aye and Republicans abstaining;

August 31 – The bill passed the Senate by a vote of 27-9, which was the bare minimum required.

September 1 - The bill was considered by the Assembly for a vote to concur in the Senate’s amendments, which occurred at nearly midnight and the bill initially failed passage by a vote of 52-21 (two votes short of passage); thereafter, there was an immediate motion to reconsider the bill’s rejection, which was granted by a vote of 52-19 (with 41 votes being required for this particular motion); shortly after that procedural motion, the bill passed by a vote of 54-20 on the Assembly Floor. Note that there had not been a policy or fiscal committee hearing in the Assembly. ¹⁹

September 11 – The bill was signed by the Governor and became law with immediate effect.

X. Coalition

It took a remarkable coalition to get AB 1492 passed by the California Legislature. There were strategy disputes even among the timber industry because of the

different provisions ultimately contained in the bill. Most of the major business groups stayed out of the debate because their memberships were split between timber companies in support and retailers opposed. As such, the bill's provisions caused different interest groups to be on either side of the bill as follows:

- On extending the life of a THP, Republicans were in favor along with timber companies, but Democrats were opposed along with environmental groups.
- On creating the 1% fee on consumer purchases of wood products, Democrats and timber companies were in favor of the provision, but Republicans and retailers were opposed to it.²⁰
- On the fire liability provisions, Republicans and timber companies were in support of this provisions, but Democrats, the United States Attorney for the Eastern District of California, and environmental groups were opposed to these protections.

The only listed supporter of the bill in the analysis was the California Association of Professional Scientists. Ultimately, however, AB 1492 passed the Legislature with bipartisan support and strong backing from the California Forestry Association, Associated California Loggers, California Building Industries Association, Pacific Forest Trust, California Association of Professional Scientists, California Farm Bureau Federation and dozens of local county supervisors, environmental organizations, labor groups and other trade associations.

On the other hand, the following were the bill's opponents as listed in the analysis:

California Republican Assembly

Home Depot

Howard Jarvis Taxpayers Association

Los Angeles Area Chamber of Commerce

Lowe's Company LTD

Lumber Association of California and Nevada

National Lumber and Building Material Dealers Association

Retail Industry Leaders Association

San Diego Gas and Electric Company

Valley Industry and Commerce Association

Several environmental groups expressed concerns about loosening time restrictions on timber harvest reviews, as well as narrowing liability provisions. Lumber retailers Home Depot and Lowe's were opposed, as were businesses that sell wood to home builders.

XI. Path to Enactment

The bill did not take the usual path to enactment. In other words, the substantive language did not get introduced by the regular deadline for introducing bills; and, it did not pass through the normal policy and fiscal committees. Instead, the provisions ultimately contained in AB 1492 were heard in the budget committees and not the policy or fiscal committees. Interestingly, the bill's provisions were not voted upon in any committees, but only on the Floors of the Senate and Assembly.

Because of the higher vote threshold required for the bill's passage and the odd groupings of proponents and opponents, every legislator in the Senate and Assembly was lobbied multiple times by the groups in support of and opposition to AB 1492. Moreover, the bill required extensive negotiations on the liability provisions and ultimately included the Senate Leader personally working on the bill language and making changes to the proposed statutory wording.

All of the official action began on the bill in mid-August and concluded just a few weeks later.²¹ As a result, AB 1492 did not follow the usual legislative process and did not abide by the normal timelines. That made for lots of behind-the-scenes lobbying before the language appeared in public bill form. Nonetheless, the issue was raised in the Governor's May Revise and the issues related to the three provisions were discussed in the budget subcommittees so there was opportunity for the bill's opponents and the public generally to express their opinions to elected officials about the proposals.

The bill's proponents thought they had sufficient votes in the Assembly due to prior commitments. As a result, they actually spent most of their time working on senators to ensure passage in the upper house. However, after the bill passed the last night of the Legislative Session on the Senate Floor, the bill's proponents were short 2 votes even though there were commitments from four Republicans to vote for the bill (along with all the Democrats). After feverish lobbying took place in favor and against the bill, including active lobbying by several members of the Governor's staff, they were able to secure the bare minimum of four votes to pass the bill off the Assembly Floor and get the measure to the Governor's Desk.

There had been discussions with the Governor's office about a bill signing ceremony for this important bill that was actively supported by the Governor, but a decision was made to not publicize AB 1492 any more than had already been done in the media. As a result, when the bill was signed by Governor Brown, it was merely included in a press release issued by the Governor's Office along with a host of other bills acted upon that day.

XII. Regulatory Activities

The other unique aspect of this bill is that it required a fair amount of regulatory action to be implemented, primarily related to the lumber assessment and what types of wood products would be subject to the 1% fee. As a result of the passage of AB 1492, the bill's proponents then had to turn to the regulatory agencies to immediately commence their work under their respective emergency rulemaking authority provided by the language in AB 1492.

Those rulemaking agencies were charged with implementing the new law and

included the State Board of Equalization, Department of Fire Prevention, Department of Conservation, and Department of Fish & Wildlife, who were all charged with adopting regulations and engaging in ongoing responsibilities to implement the law.

The Governor's press release²² called AB 1492 "the most significant piece of California forest legislation in decades." He described the bill as providing "reforms that will help to maintain and grow in-state lumber jobs while maintaining California's high environmental standards. Legislators from both sides of the aisle worked together on this bill because of its broad support and the policy benefits of encouraging more jobs and better forest management in California. The signing of the bill is proof that government is successfully working to create policies to move California forward."²³ The bill also received extensive news coverage.²⁴

XII. Conclusion

AB 1492 provides an example of a bill that traveled a unique pathway to enactment in the California Legislature and that had diverse aspects of a high-profile and heavily-lobbied bill. It is a good case study to appreciate how a significant piece of legislation could come together and ultimately result in passage.

[1] Chapter 289 of the Statutes of 2012.

[2] This is unique because the vast majority of bills in the California Legislature are authored by an individual legislator, rather than a policy committee, which is the case with AB 1492.

[3] An act to add Section 13009.2 to the Health and Safety Code, and to amend Section 4590 of, to add Article 9.5 (commencing with Section 4629) to Chapter 8 of Part 2 of Division 4 of, and to repeal Section 4629.10 of, the Public Resources Code, relating to forest resource management, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[4] When AB 1492 passed the Assembly, the bill merely expressed the intent of the Legislature to enact statutory changes relating to the Budget Act of 2012.

[5] It was argued that, by extending the effective harvest period to five years with a two-year extension, the state will reduce regulatory burdens while maintaining critical environmental protections.

[6] California law allowed for the doubling or tripling of damages for "wrongful injuries to timber, trees, or underwood upon the land of another." It was argued that AB 1492 will reduce insurance and liability costs for California companies by preventing the federal government from obtaining potentially unlimited environmental penalties against timber companies for wildfire damage.

[7] "Fiscal Effect: This bill should not result in any changes to the budget act in related budget actions."

[8] The Natural Resources Agency has certified the THP as the "functional equivalent" of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA). THPs are required to undergo

interagency review involving agencies such as the Department of Forestry and Fire Protection (CAL FIRE), the Department of Fish and Game (DFG), Regional Water Quality Control Boards, and the Department of Conservation. See Assembly Floor Analysis, dated August 31, 2012.

[9] Note that the Department is now called the Department of Fish & Wildlife.

[10] The fee took effect on January 1, 2013.

[11] See, Runner, *Fox & Hounds Daily*.

[12] See Smith and Henderson, "AB 1492: Real Reform for Forestry," *Fox & Hounds Daily*, August 15, 2012.

[13] See Coupal, "Getting Burned by Dancing with the Devil," *Fox & Hounds Daily*, September 25, 2012.

[14] See discussion in the Assembly Floor Analysis of AB 1492, dated August 31, 2012: "Specifically, the proposal allows a public agency plaintiff to claim pecuniary damages (e.g., restoration and rehabilitation costs) and environmental damages (e.g., lost recreational value, damage to wildlife, and lost aesthetic value) that are quantifiable and not unreasonable. The prefire fair market value of the property is one factor to consider when determining the reasonableness of environmental damages. If environmental damages are sought, the public agency plaintiff will not be permitted to seek double or triple damages. The proposal does not limit a public agency's ability to collect its costs arising from a fire (e.g., fire suppression, rescue, and emergency medical services costs)."

[15] Including CalFire, Dept. of Conservation, Dept. of Fish & Game, regional water boards, and state water board.

[16] In fact, the bill started as a "spot bill" because it did not contain any proposed, substantive changes to state law.

[17] Because the bill contained an urgency clause, it would take effect immediately upon being signed into law by the Governor.

[18] With August 31 being the required deadline for the Legislative Session to adjourn pursuant to the California Constitution, Article IV, Section __.

[19] The bill was taken up on the Assembly Floor by a procedural motion called a "WORF," which means without reference to file because the bill was actually not on the *Assembly Daily File* for consideration

[20] The reason this funding source was needed is because there had been recent General Fund cuts, including a \$1.5 million line-item veto to DFG's THP budget in 2010, have compromised the interagency review process required by CEQA. As a result, some environmental groups have questioned whether a THP can be considered the functional equivalent of an EIR. If there is a legal challenge and the THP program is decertified, there will likely be devastating effects on forest management activities in the state.

[21] The bill received media coverage once the proposed statutory language come into print. Click [here](#).

[22] Posted on September 19, 2012, Governor Brown's press release was entitled "Forestry Reform Package Is a Lifeline for California's Timber Industry."

[23] Id.

[24] [here](#).

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