



At its January meeting in Los Angeles, the Commission gave final approval to a controversial project allowing the City of Port Hueneme to build a 146-space recreational vehicle (RV) resort on a city-owned beach area. The Commission's 10-1 vote came 24 hours after the newly-elected City Council passed a resolution asking the Commission to nullify the previous Council's decision to proceed with the resort; the lame duck prior City Council had acted to approve the project when the Commission granted the City preliminary approval at its November meeting in San Diego. The project, which has been in the planning stage for five years, was backed by previous city councilmembers who argued that the project would bring needed revenue to the City. As a condition of preliminary approval, the Commission required City officials to move RV spaces further away from sensitive coastal wetlands areas; the City agreed to this change, and resubmitted the project for final approval at the January meeting. In the meantime, the proposed RV resort had generated substantial local opposition from local residents who were concerned that the project would spoil the nature of their community or harm the area's natural habitat. The November 1994 political campaign for City Council was a heated one, with 14 candidates lining up for or against the project; the three RV park supporters who chose not to run were replaced by one supporter and two opponents, and the new City Council (which took office in early December) voted to ask the Commission to cancel the plan. Following the Commission's decision to disregard the new Council's request and approve the project, the League for Coastal Protection, a nonprofit environmental organization, announced plans to file a lawsuit against the Commission, contending that allowing an RV park at the Port Hueneme beach would destroy a sensitive habitat area.

■ FUTURE MEETINGS

February 7-10 in Santa Barbara.
 March 7-10 in San Diego.
 April 11-14 in San Rafael.
 May 9-12 in Huntington Beach.

FISH AND GAME COMMISSION

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The Fish and Game Commission (FGC), created in section 20 of Article IV of the California Constitution, is the policy-making board of the Department of Fish

and Game (DFG). The five-member body promulgates policies and regulations consistent with the powers and obligations conferred by state legislation in Fish and Game Code section 101 *et seq.* Each member is appointed by the Governor to a six-year term. Whereas the original charter of FGC was to "provide for reasonably structured taking of California's fish and game," FGC is now responsible for determining hunting and fishing season dates and regulations, setting license fees for fish and game taking, listing endangered and threatened species, granting permits to conduct otherwise prohibited activities (e.g., scientific taking of protected species for research), and acquiring and maintaining lands needed for habitat conservation. FGC's regulations are codified in Division 1, Title 14 of the California Code of Regulations (CCR).

Created in 1951 pursuant to Fish and Game Code section 700 *et seq.*, DFG manages California's fish and wildlife resources (both animal and plant) under the direction of FGC. As part of the state Resources Agency, DFG regulates recreational activities such as sport fishing, hunting, guide services, and hunting club operations. The Department also controls commercial fishing, fish processing, trapping, mining, and gamebird breeding.

In addition, DFG serves an informational function. The Department procures and evaluates biological data to monitor the health of wildlife populations and habitats. The Department uses this information to formulate proposed legislation as well as the regulations which are presented to the Fish and Game Commission.

As part of the management of wildlife resources, DFG maintains fish hatcheries for recreational fishing, sustains game and waterfowl populations, and protects land and water habitats. DFG manages over 570,000 acres of land, 5,000 lakes and reservoirs, 30,000 miles of streams and rivers, and 1,300 miles of coastline. Over 648 species and subspecies of birds and mammals and 175 species and subspecies of fish, amphibians, and reptiles are under DFG's protection.

The Department's revenues come from several sources, the largest of which is the sale of hunting and fishing licenses and commercial fishing privilege taxes. Federal taxes on fish and game equipment, court fines on fish and game law violators, state contributions, and public donations provide the remaining funds. Some of the state revenues come from the Environmental Protection Program through the sale of personalized automobile license plates.

DFG contains an independent Wildlife Conservation Board which has separate

funding and authority. Only some of its activities relate to the Department. It is primarily concerned with the creation of recreation areas in order to restore, protect and preserve wildlife.

At this writing, the Commission is functioning with one vacancy. The Governor has yet to fill the position of Commissioner Albert C. Taucher, who passed away in July 1994 after an 11-year tenure on the Commission (*see below*). [14:4 CRLR 171]

■ MAJOR PROJECTS

Commission Accepts Southern Seep Salamander as Candidate Species. At its November 4 meeting in Monterey, FGC accepted for consideration a petition to list the southern seep (or torrent) salamander as a threatened species under the California Endangered Species Act (CESA); on December 2, the Commission formally published notice of its listing of the salamander as a candidate species and triggered DFG's yearlong study of the species under Fish and Game Code section 2074.6.

In its action, the Commission accepted a petition filed by John Gaffin of the Environmental Protection Information Center (EPIC) on May 11, 1994. In his petition, Gaffin contended that the primary habitat of the seep salamander is headwaters in mature and old-growth forests in northern California timberlands. According to Gaffin, "this species is found only within the conifer-dominated forest habitats of northwestern California and western Oregon." Gaffin noted several studies indicating that the vast majority of virgin and old-growth forests in the Pacific Northwest have been harvested by the timber industry, and contended that "the ability of this species to withstand and recover from radical alterations of the late seral stage habitats with which it is associated is minimal." Additionally, the petition stated that unless it can be established that the seep salamander can survive current levels of habitat alteration, or the Forest Practice Act is modified to protect the riparian habitat on which the survival of the salamander depends, the species should be designated as threatened.

Following a review of the petition by DFG as required by section 2073, the Department presented its recommendation that the Commission list the species as a candidate at FGC's October 7 meeting. At that meeting, Gaffin supplemented his petition with scientific biological information and the testimony of a field biologist who studied the salamander. Also present at the hearing were representatives of several timber companies, including Louisiana-Pacific and the parent company of



Pacific Lumber Company, who opposed the petition. Although the timber industry's field surveys in support of its position had not been conducted in accordance with accepted scientific methods, FGC found its testimony compelling and asked DFG representatives whether the new information would change the Department's recommendation. DFG stated that it could not analyze the oral and written information and make a recommendation by the end of the day, so FGC postponed action until its November 4 meeting.

On November 4, DFG stated that—after considering the information submitted by the various timber industry representatives—it maintained its original recommendation that the Commission should accept the petition for consideration, list the salamander as a candidate species, and draft an order under Fish and Game Code section 2084 to allow for the incidental take of the salamander.

During their discussion, several Commissioners expressed concern that the timber industry may be harmed if FGC accepted the petition. Additionally, Commissioner Thieriot questioned the evidentiary standard which FGC is required to apply when determining whether to accept a petition and designate a candidate species, in light of the Third District Court of Appeal's September 30 decision in *Natural Resources Defense Council v. California Fish and Game Commission* (see LITIGATION). Staff explained the holding: To list a species as a candidate, CESA does not require the Commission to find, at the preliminary stage, that the petitioned listing more probably than not will occur. FGC President Frank Boren reminded his colleagues that FGC has a duty to uphold the laws even if they do not agree with them.

DFG representative John Brode explained that the Department had thoroughly examined the survey information provided by the industry representatives. Additionally, he indicated that the studies produced by the industry representatives did not include information on the geographical landscape where their surveys took place or whether the areas surveyed contained suitable habitat. Brode emphasized DFG's finding that current timber harvesting practices have had negative impacts on the salamander, and recommended that the Commission declare the species a candidate and issue a special order under Fish and Game Code section 2084 to allow for incidental take. The take provision, which was drawn up through a joint effort including timber industry representatives and Mr. Gaffin, was based on existing Board of Forestry (BOF) regula-

tions which apply to properly classified streams and rivers, supplemented with monitoring to assure implementation of and compliance with the regulations by timber harvesters.

Following extensive discussion, the Commission accepted the petition and the Department's recommendation, and set a hearing on the proposed section 2084 take order for December 2. DFG has one year to accumulate information on the salamander and timber harvesting operations; investigate the condition of the species, including habitat, range, and population trends; determine whether the timber industry has followed BOF rules; and determine whether those rules provide sufficient protection.

On December 2, FGC adopted the proposed incidental take order with non-substantive modifications.

Urgency Changes to Sport Fishing Regulations. On September 16, FGC published notice of its intent to make urgency changes to its sport fishing regulations located at sections 2.08, 5.15, 5.82, 7.50, and 28.20, Title 14 of the CCR. The amendments include the following:

- The changes to sections 2.08, 5.15, and 5.82 allow the take of catfish, bullheads, and sunfish from Barrett Lake in San Diego County, while protecting largemouth bass. The amendments provide that all artificial lures must have barbless hooks; only artificial lures with barbless hooks may be used when fishing for black bass; and crayfish, waterdogs, and finfish may not be used as live bait at any time.

- Amended section 5.82 reduces the catfish daily bag limit in three Los Angeles County lakes from ten to five fish, in order to extend the harvest period each season.

- Amendments to section 750.(b)(63) modify Eel River sport fishing regulations to reduce the take of salmon and steelhead trout by closing some areas from April to May, and imposing a strict bag limit of no more than one adult trout or salmon greater than 22 inches everywhere and at any time consumptive fishing is allowed.

- The changes to section 28.20 lengthen the season for taking Pacific halibut from May 1 through September 30.

FGC adopted the proposed changes at its November 4 meeting, and the Office of Administrative Law (OAL) approved them on December 12.

FGC Imposes Interim Moratorium on Spiny Lobster Permits. At its October 7 meeting, the Commission held a public hearing on DFG's proposal to amend section 122, Title 14 of the CCR, to limit the take of spiny lobster. Existing section permits DFG to issue a limitless number of permits for the commercial harvest of

spiny lobster in specified ocean waters; according to DFG, the pressure of unlimited fishing power has negatively impacted the spiny lobster resource and fishery. Fish and Game Code section 8259 authorizes the Commission to limit the number of these permits. Thus, DFG presented FGC with three options, all of which would impose "interim moratoria to prevent a large-scale increase in the number of permits issued...while the Department completes an environmental document and formal limited entry program for the spiny lobster fishery." FGC adopted the Department's recommended option, which would cease the issuance of permits for the 1994-95 season beginning on the effective date of the new regulations, and provide that permits for the 1995-96 season would be issued only to those persons who possessed a 1994-95 permit. OAL approved FGC's amendment on November 1.

Commission Designates New Ecological Reserves. At its October 7 meeting, the Commission adopted modified language of proposed amendments to section 630, Title 14 of the CCR. Section 630 currently lists 87 habitat areas as state ecological reserves and sets forth rules which protect the biological values while permitting compatible public use (including hunting) of the areas. The amendments would designate the following ten areas as California state ecological reserves: Dales Lake in Tehama County; San Felipe Creek in Imperial County; Indian Joe Springs in Inyo County; River Springs Lake in Mono County; Coal Canyon and Laguna Laurel in Orange County; Estelle Mountain, Santa Rosa Plateau, and Sycamore Canyon in Riverside County; and Plasted Creek in San Diego County.

Due to public comment about safety issues received at a public hearing on August 5, FGC modified the language of its proposed amendments regarding Coal Canyon Ecological Reserve to restrict hunting to upland game species only and prohibit the use of rifles or pistols on the reserve. FGC adopted the modified language and submitted the rulemaking file on the proposed changes to OAL, where it is pending at this writing.

FGC Proposes Amendments to Swordfish Permit Procedures. On January 13, FGC published notice of its intent to amend section 107, Title 14 of the CCR, to eliminate unnecessary restrictions and clarify the regulations regarding broadbill swordfish take.

Section 107 currently requires commercial fishers who take swordfish with hook and line or with harpoons to have a swordfish permit issued in Long Beach or San Diego. However, current licensing proce-



dures allow fishers to purchase permits by mail or by telephone, so that requirement is obsolete; FGC proposes to eliminate it. Existing law prohibits a swordfish permittee from transferring to another vessel because the crew would be prevented from fishing if the permittee leaves; according to the Commission, this prohibition has proven to be unnecessary and FGC proposes to eliminate it. Current regulations allow permittees to hire pilots to fly as spotters to help locate swordfish and require, among other things, the identification of the aircraft and the names and commercial fishing license numbers of the pilots to be listed on the swordfish permit; permittees are currently required to notify DFG in writing 48 hours prior to fishing of any changes or additions of pilots and/or aircraft. FGC believes this requirement hampers fishers and has proven to be unnecessary; the proposed changes would eliminate it. Existing statutes require the aircraft to have a commercial vessel registration, but FGC's existing regulations do not require it. The Commission's proposed amendments would include this requirement to conform the regulations with the statute.

At this writing, FGC is scheduled to hold a public hearing on these proposed regulatory changes at its March 3 meeting in Ukiah.

Update on Other Regulatory Changes.

The following is a status update on other regulatory changes proposed and/or adopted by FGC in recent months, and reported in detail in previous issues of the *Reporter*:

• **1994-95 Commercial Herring Season Regulations.** On November 3, OAL approved FGC's amendments to sections 163 and 164, Title 14 of the CCR, which establish fishing quotas by area and gear type, establish herring egg quotas, and make other changes for the 1994-95 commercial herring season. [14:4 CRLR 171]

• **1994-95 Migratory Waterfowl Hunting Regulations.** Following its August 26 adoption of the 1994-95 migratory waterfowl hunting regulations [14:4 CRLR 171-72], FGC submitted them to OAL for review and sought expedited approval of its amendments to section 502, Title 14 of the CCR, which generally establishes the season dates and bag limits for the state's various hunting zones; OAL approved the amendments to section 502 on October 7 and the season began on October 8. On December 23, OAL approved FGC's amendments to sections 507 and 507.1, Title 14 of the CCR, which provide for the use of steel shot and other federally approved non-toxic shot for hunting waterfowl.

• Fallow Deer Farming Regulations.

At its August 26 meeting, FGC held a public hearing on its proposal to add section 676 and amend sections 671 and 671.1, Title 14 of the CCR; collectively, these sections would provide for the importation of fallow deer only for deer farming purposes, authorize fallow deer farms to sell meat and parts thereof to persons within and outside California, and specify the conditions under which live animals may be sold. Among other things, the regulations would require a fallow deer farming permit rather than a detrimental species permit or a domesticated game breeders license; require an annual inspection at a fee of \$50; require disease testing on all fallow deer imported into California and all animals on fully certified deer farms; specify that a fallow deer farmer wishing to import fallow deer into California must first obtain an importation permit; specify two levels of certification (full and partial) for permittees to maintain disease testing standards for their herds; set forth specific facility and maintenance requirements designed to minimize the possibility of fallow deer escaping to the wild or of native cervids jumping into and out of deer farms; and specify that any person holding a fallow deer farming permit shall allow DFG employees to enter his/her premises upon request for an inspection. [14:4 CRLR 172]

At the hearing, several witnesses expressed concern about the manner in which these animals are slaughtered. Thus, on September 29, FGC released a modified version of the proposed regulations; the modified version includes a note stating that animals must be humanely slaughtered in compliance with Penal Code section 597, which prohibits cruelty to animals. FGC included the note to provide clarity and ensure consistency with existing law, because the original regulatory language failed to specify restrictions on methods for slaughtering fallow deer.

At its October 7 meeting, FGC adopted the modified language; OAL approved the regulatory changes on December 7.

■ LEGISLATION

AB 137 (Olberg). The California Endangered Species Act currently provides for the listing of endangered species and threatened species by FGC and provides procedures by which DFG may recommend to the Commission, and by which interested persons may petition the Commission, to list or delist any species that meets the specified criteria. As introduced January 13, this bill would provide that after January 1, 1996, a species may not be added to the list of endangered or

threatened species except by statute enacted by the legislature. The bill would delete a provision of existing law that permits FGC to add a species to the lists by emergency regulation. Among other things, the bill would also provide that no environmental impact report (EIR) is required to remove a species from the endangered or threatened species lists unless an EIR was prepared when the species was listed; FGC shall appoint a panel of scientific experts knowledgeable about the species to review DFG's report to FGC on the petition; and FGC shall annually prepare and submit to the Governor and legislature a list of species the FGC recommends be added to the endangered or threatened species lists. The bill would define "interested person" and "interested party," for purposes of the provisions, to mean a person who is able to demonstrate personal and immediate harm from a government action or inaction affecting the environment. [A. WP&W]

AB 87 (Cortese), AB 117 (Knowles), and SB 28 (Leslie) would each effect a change in the California Wildlife Protection Act of 1990, which was enacted by the voters as Proposition 117 on June 5, 1990. Among other things, the Act made the mountain lion a specially protected mammal that may not be taken, injured, possessed, transported, imported, or sold. Violation of that prohibition is currently a misdemeanor unless it is shown that, in taking or injuring a mountain lion, an individual was acting in self-defense or in the defense of others. The Act authorizes DFG to remove or take, or authorize an appropriate local agency with public safety responsibility to remove or take, any mountain lion when it is perceived to be an imminent threat to public health or safety, or pursuant to a permit issued to a person by DFG when the person's livestock or property is being destroyed or damaged by a mountain lion. The Act also prohibits the legislature from changing the special protection status of that mammal except by a 4/5 vote of the membership of both houses, and even then the change must be consistent with the purposes of the Act. The Act is intended to protect mountain lions, but the increasing mountain lion population and two fatalities caused by mountain lion attacks in 1994 have caused a reaction against it in the form of new legislation that would amend or repeal the Act in order to deal with the perceived problem. [14:2&3 CRLR 189-90]

• **AB 87 (Cortese),** as introduced January 4, would amend the California Wildlife Protection Act of 1990 and require DFG to develop a statewide policy and



procedure to facilitate the removal or taking of mountain lions perceived to be an imminent threat to public health or safety. The bill would require that the policy and procedures consider certain factors including the proximity of mountain lions to private residences and public facilities, the presence or absence of menacing behavior by individual mountain lions, and the frequency of appearances of mountain lions in both public and private areas. The bill would also require DFG to make information available to inform members of the public on the means and methods of reducing the potential for adverse interaction with mountain lions. AB 87 would further require DFG to establish a procedure whereby personnel will be available at all times to receive reports of injuries from mountain lions or depredation to persons or property; to designate employees to be available at all times to authorize the taking of mountain lions perceived to be an imminent threat to public health and safety; and to maintain a file of all reports of mountain lion incidents, as specified, which would be available to public safety employees and the public. [A. WP&W]

• **AB 117 (Knowles)**, as introduced January 11, would repeal the California Wildlife Protection Act of 1990 and restore the law relating to the taking of mountain lions to that existing before the Act was enacted. Under the bill, mountain lions could be taken as game mammals under license tags issued by DFG for a fee of \$1. The bill would also provide that any owner or tenant of land or property that is being damaged or destroyed or is in immediate danger of being damaged or destroyed by a mountain lion may take that mountain lion at any time and in any manner except by means of poison or traps; such taking of a mountain lion shall be reported in writing within 30 days to DFG. AB 117 would take effect upon approval of the voters in a future election. [A. WP&W]

• **SB 28 (Leslie)**, as introduced December 8, would authorize the legislature to amend or repeal any provision of the California Wildlife Protection Act of 1990 by a majority vote of the membership of both houses of the legislature, rather than the 4/5 vote of both houses that is required under existing law; amendment or repeal of appropriations, transfers, or allocations of funds pursuant to the Act would require a 2/3 vote of both houses. Existing law authorizes FGC to adopt regulations that supersede statutory provisions but exempts the regulation of mountain lions from that provision of law. This bill would remove that exemption and require the Commission to regulate mountain lions in accordance with certain specified provisions of existing law, and require DFG to

regulate and manage those mammals in the same manner as it regulates and manages mammals that are not rare, endangered, or threatened. SB 28 would take effect upon approval of the voters and provides that it be submitted to the voters at the March 26, 1996 direct primary election. [S. NR&W]

• **SB 39 (Thompson)**. Statutory provisions were repealed on January 1, 1995, which prohibited the use of set lines, vertical fishing lines, or troll lines to take fish other than salmon or California halibut for commercial purposes in Fish and Game Districts 7 and 10 within one mile of the mainland shore from sunset on Friday to sunset on the following Sunday or from sunset on the day before a legal holiday until sunset on that holiday. A "set line" is a fishing line that is anchored to the bottom on each end and is not free to drift with the tide or current; a "vertical fishing line" is defined as a fishing line anchored to the ocean bottom at one end and attached at the other end on the surface to a fishing vessel or buoy. This bill, as introduced on December 15, would reenact those provisions and make them effective until January 1, 1998, at which time the provisions would be repealed unless another statute is enacted to delete or extend that date. [S. NR&W]

• **AB 76 (Morrow)**. Existing law authorizes persons operating a commercial fishing vessel registered in this state to land fish taken in a far offshore fishery, as defined, when those fish may be lawfully imported into this state from a foreign nation or from another state. Existing law also prohibits the operator of any vessel operating under that authorization from fishing in or landing fish from any waters within the 200-mile fishery conservation zone during any trip for which the operator has received clearance by United States Customs for departure for the high seas. As introduced on December 22, this bill would redefine "far offshore fishery" to mean a fishery that lies outside the United States' 200-mile "exclusive economic" zone, as defined by federal law, rather than the 200-mile "fishery conservation" zone. This bill would authorize the landing in this state of fish taken in a far offshore fishery which may be lawfully imported by persons operating a commercial fishing vessel registered in this state who took the fish in the far offshore fishery. The bill would also delete the requirement for clearance and declaration of the location of the catch on reentry to the United States Customs; instead, it would require the operator to file a declaration with DFG before departure and to complete and submit the return portion of the declaration to the

Department within 12 hours of arrival at a port in this state.

In addition, AB 76 would provide that the Pacific sardine season is from August 1 to July 31, inclusive, and would establish a 12,000-ton-per-season quota, unless DFG produces an estimate, as defined, to calculate a quota. Further, DFG would be required to consider in-season adjustments to the quota at the request of the commercial fishing industry. The bill would also repeal existing law which permits 250 tons of sardines to be taken, possessed, and landed for dead bait purposes from March 1 to February 28. Existing law requires any person who operates or assists in operating any trap to take finfish or who possesses or transports finfish on a vessel when a trap is aboard to have a general trap permit issued by DFG; this bill would, among other things, require persons who take finfish with traps for commercial purposes to obtain a finfish trap permit at a fee of \$110. [A. WP&W]

• **AB 77 (Morrow)**. Existing law does not specify an official state marine fish. As introduced on December 22, this bill would declare the garibaldi as California's official state marine fish. Existing law also prohibits the taking of garibaldi under a marine aquaria collector's permit from February 1 to October 31, inclusive. This bill would prohibit the taking or possession of garibaldi for commercial purposes until February 1, 2002, and thereafter, would again permit that taking only under a marine aquaria collector's permit from October 31 to February 1, inclusive. [A. WP&W]

• **SB 55 (Kopp)**. Existing law prohibits the importation into this state of those wild animals specified on a list published from time to time by the state Department of Health Services without a permit issued by that department. Existing law also prohibits the importation, transportation, possession, or release into this state of wild animals without a permit issued by DFG. As a result, domestic ferrets may not currently be owned as pets. As introduced on December 22, this bill would allow domestic ferrets to be owned as pets without a permit as long as the owner of a ferret maintains and can produce documentation showing that the ferret has been vaccinated against rabies with a vaccine approved for use in ferrets by the U.S. Department of Agriculture and administered in accordance with the recommendations of the vaccine manufacturer. [S. NR&W]

■ LITIGATION

In *Natural Resources Defense Council v. California Fish and Game Commission*, 28 Cal. App. 4th 1104 (Sept. 30, 1994), the Third District Court of Appeal interpreted Fish and Game Code section



2074.2, one provision of the California Endangered Species Act, Fish and Game Code section 2050 *et seq.* Section 2074.2 guides FGC in determining whether to list a species as a candidate for "endangered" or "threatened" classification, and requires the Commission to find "that the petition [requesting endangered or threatened listing] provides sufficient information to indicate that the petitioned action may be warranted...." The specific issue in the case concerns the evidentiary standard embodied in the phrase "sufficient information to indicate that the petitioned action may be warranted."

The instant dispute arose in early 1991, when NRDC and ornithologist Jonathan Atwood petitioned FGC to list the California gnatcatcher as endangered. Under section 2074.2, DFG reviewed the petition, concluded that it contained "sufficient information to indicate that the petitioned action may be warranted," and recommended that FGC accept the petition and list the gnatcatcher as a candidate for endangered classification under section 2073.5. Following several public hearings, the Commission rejected the petition by a 3-1 vote at its August 1991 meeting. One month after its decision, FGC adopted findings in support of it. [11:4 CRLR 181-82]

NRDC immediately filed suit against FGC in Sacramento County Superior Court; the Building Industry Association of Southern California (BIA) and several other development interests intervened on behalf of the Commission. In August 1992, Sacramento County Superior Court Judge William R. Ridgeway issued a decision in favor of NRDC, and remanded the matter to the Commission to reconsider the petition. Rejecting both sides' proffered evidentiary standards, Judge Ridgeway held that "the commission could not permissibly reject a petition [under section 2074.2] which presented substantial evidence indicating a need for listing, *i.e.*, such relevant and credible evidence which, considered with other evidence before the commission, a reasonable mind might accept as adequate to support a conclusion that listing was necessary." [12:4 CRLR 202-03, 209] Both the Commission and the intervenors appealed.

In its decision, the Third District engaged in a detailed review of the two-step statutory process set forth in CESA. [10:2&3 CRLR 1] In the first step, FGC determines whether a species is a candidate for listing by determining whether the petition, when considered with DFG's written report required under section 2073.5 and comments received during a public hearing under sections 2074 and 2078, provides sufficient information to indicate that endangered or threatened listing "may be warranted."

Once that hurdle is cleared, the petition is "accepted for consideration," the species is listed as a candidate under section 2074.2(a)(2), the Department engages in a yearlong scientific review of the species and reports to the Commission, and the Commission determines whether listing of the candidate as an endangered or threatened species "is [or] is not warranted" under section 2075.5. The court also noted that, under CESA, candidate species may be entitled to some of the protections of the Act; for example, if proper notice is given by DFG under section 2074.4, CESA's prohibitions against importation, exportation, possession, purchase, sale, and taking of a listed species also apply to candidate species.

Preliminarily, the Third District noted that the section 2074.2 determination is a quasi-adjudicatory decision—one which "contemplates the Commission weighing the evidence for and against candidate listing and deciding essentially a question of fact in the process." For this reason, the court rejected the evidentiary standard proposed by NRDC and the trial court, which the Third District characterized as a "substantial evidence" standard which does not contemplate a weighing of evidence and discretion to determine a fact.

The court ultimately severed the phrase at issue, and separately interpreted the terms "sufficient information" and "may be warranted." Relying on the federal government's regulatory interpretation of a similar phrase in the federal Endangered Species Act, the court determined that the term "sufficient information" means "that amount of information, when considered with the Department's written report and the comments received, that would lead a reasonable person to conclude the petitioned action may be warranted."

As to the phrase "may be warranted," the court rejected NRDC's proffered "reasonable possibility" standard as "too low a threshold," primarily because "the CESA candidacy determination contemplates not only a study process but a substantive determination that a species is a candidate entitled to protection similar to that afforded to endangered and threatened species."

The Third District also rejected FGC's proposed "higher threshold" standard, under which FGC would approve candidacy only if it is "reasonably probable" that endangered (or threatened) listing will occur. Although FGC and the intervenors argued that this standard is appropriate because a determination favoring candidacy is akin to a preliminary injunction and—as such—the preliminary injunction standard should apply in making that de-

termination, the court rejected this argument. "[T]he major problem with this 'reasonably probable' standard is that its fundamental premise—that a determination favoring candidacy operates to preclude, during the candidate study process, all potential habitat development and land use—is erroneous." To support this conclusion, the court cited several statutory provisions which both grant FGC great discretion in determining whether to afford CESA's protections to candidate species and indicate the legislature's clear statement of intent that continued planning and development be permitted to occur during the candidate phase. "In light of all these measures, the intervenors exaggerate a candidate's ability to thwart the development process."

Emphasizing its finding that the state policy embodied in CESA is to conserve, protect, restore, and enhance endangered and threatened species and their habitat but to do so in a "reasonable" fashion, the court interpreted section 2074.2's phrase "may be warranted" to mean "substantial possibility that listing could occur"—"something more than the... 'reasonable possibility' [standard and] something less than the preliminary injunction standard of 'reasonably probable,' which, in the CESA candidate-listing process, would deem it 'more likely than not' that listing 'will' occur."

Thus, the court concluded that the section 2074.2 phrase "petition provides sufficient information to indicate that the petitioned action may be warranted" means "that amount of information, when considered in light of the Department's written report and the comments received, that would lead a reasonable person to conclude there is a substantial possibility the requested listing could occur."

The Third District remanded the matter to the Commission to make new findings in its section 2074.2 determination, using the evidentiary standard set forth by the court. On December 16, FGC announced that it would reconsider the NRDC/Atwood petition in light of the court's ruling. Pursuant to Fish and Game Code section 2073, FGC transmitted the petition to DFG for a review period of 90 days and announced that it would accept public comment on the petition through March 16, 1995.

FGC is appealing San Francisco Superior Court Judge Thomas J. Mellon's decision in *Mountain Lion Foundation, et al. v. California Fish and Game Commission, et al.*, No. 953860 (July 19, 1994), in which Judge Mellon invalidated the Commission's unprecedented delisting of the Mohave ground squirrel from the state's



threatened species list under CESA. Judge Mellon found that FGC's action to remove the squirrel from the CESA threatened list is a "project" under the California Environmental Quality Act (CEQA) such that an environmental impact report is required. [14:4 CRLR 177] At this writing, the case is being briefed.

On January 6, the U.S. Supreme Court unanimously granted the federal government's petition for certiorari seeking review of the D.C. Circuit Court of Appeals' decision in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (Mar. 11, 1994). In that case, the appellate court ruled that significant habitat degradation is not within the meaning of the term "harm" as used in and prohibited by the federal Endangered Species Act. [14:2&3 CRLR 192] The D.C. Circuit's decision conflicts directly with the Ninth Circuit's decision in *Palilla v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).

RECENT MEETINGS

At its October 6 meeting, the Commission dedicated the Taucher Unit of the San Jacinto Wildlife Area in memory of former Commissioner Albert C. Taucher, who passed away in July 1994. The Commission characterized Taucher as "a champion of hunters' rights" and noted that, in his position as FGC President, Taucher was instrumental in establishing the San Jacinto Wildlife Area and expanding hunting opportunities in the area. Following introductory remarks by current FGC President Frank Boren, former Commissioner Robert Bryant, former DFG Director and current Administrator of DFG's Office of Oil Spill Prevention and Response Pete Bontadelli, and DFG Regional Manager Fred Worthley also made remarks. Attending the dedication were Taucher's wife Willie, and his sons Curt and Hans and their families. Through a special program, San Jacinto Wildlife Area will be the first state wildlife area to utilize reclaimed water to enhance its wetlands.

FUTURE MEETINGS

February 2-3 in Santa Barbara.

March 2-3 in Ukiah.

April 6-7 in Alturas.

May 10-12 in San Luis Obispo (with the Board of Forestry).

June 22-23 in Bishop.

August 3-4 in Santa Rosa.

August 24-25 in Long Beach.

October 5-6 in Redding.

November 2-3 in San Diego.

December 7-8 in Sacramento.

BOARD OF FORESTRY

Executive Officer:

Dean Cromwell

(916) 653-8007

The Board of Forestry is a nine-member Board appointed to administer the Z'berg-Nejedly Forest Practice Act (FPA) of 1973, Public Resources Code (PRC) section 4511 *et seq.* The Board, established in PRC section 730 *et seq.*, serves to protect California's timber resources and to promote responsible timber harvesting. The Board adopts the Forest Practice Rules (FPR), codified in Division 1.5, Title 14 of the California Code of Regulations (CCR), and provides the California Department of Forestry and Fire Protection (CDF) with policymaking guidance. Additionally, the Board oversees the administration of California's forest system and wildland fire protection system, sets minimum statewide fire safe standards, and reviews safety elements of county general plans. The Board's current members are:

Public: Nicole Clay, James W. Culver, Robert C. Heald, Bonnie Neely (Vice-Chair), and Richard Rogers.

Forest Products Industry: Thomas C. Nelson and Tharon O'Dell.

Range Livestock Industry: Robert J. Kersteins (Chair).

The FPA requires careful planning of every timber harvesting operation by a registered professional forester (RPF). Before logging operations begin, each logging company must retain an RPF to prepare a timber harvesting plan (THP). Each THP must describe the land upon which work is proposed, silvicultural methods to be applied, erosion controls to be used, and other environmental protections required by the Forest Practice Rules. All THPs must be inspected by a forester on the staff of the Department of Forestry and, where deemed necessary, by experts from the Department of Fish and Game, the regional water quality control boards, other state agencies, and/or local governments as appropriate.

For the purpose of promulgating Forest Practice Rules, the state is divided into three geographic districts—southern, northern, and coastal. In each of these districts, a District Technical Advisory Committee (DTAC) is appointed. The various DTACs consult with the Board in the establishment and revision of district forest practice rules. Each DTAC is in turn required to consult with and evaluate the recommendations of CDF, federal, state, and local agencies, educational institutions,

public interest organizations, and private individuals. DTAC members are appointed by the Board and receive no compensation for their service.

In early January, forest products industry member Keith Chambers announced his resignation from the Board. At this writing, Governor Wilson has not yet appointed a replacement.

MAJOR PROJECTS

Checklist THP Rules. At its October 4 meeting, the Board held the first of several public hearings on its proposal to adopt new section 1051.5, Title 14 of the CCR, which would implement a "Checklist Timber Harvest Plan" (CTHP) for those timber harvesting operations that, with incorporated mitigations, are not likely to result in significant adverse effects on the environment. According to the Board, the proposed rules are designed to lessen some of the informational requirements and related costs to landowners resulting from full THP preparation and impact analysis, while ensuring that significant adverse impacts on the environment are avoided.

Section 1051.5 would essentially establish a new class of THP for most areas of the state (with several specified exceptions). Under the originally-proposed language, (1) a CTHP must be prepared by a RPF, and must include an analysis and mitigation of potential adverse impacts; (2) timber operations conducted under a CTHP must comply with all planning and operational rules of the Board; exceptions, in-lieu or alternative practices or prescriptions may not be used; (3) stocking standards for the selected silvicultural systems must be met immediately at the conclusion of timber operations, and a stocking report must be submitted within six months of completion of timber operations; (4) the clearcutting method, seed tree step of the seed tree regeneration method, and shelterwood regeneration methods may not be used; (5) 50% of the logging area must contain 40% forest canopy cover of trees averaging eleven inches or greater diameter at breast height (DBH); and (6) logging slash must be lopped and scattered to less than 18 inches above the ground within two weeks of creation.

With regard to the CTHP itself, the name, address, phone number, and signature of the timberland owner, timber owner, plan submitter, RPF, and timber operator are required on the CTHP. The CTHP must also state the dates of commencement and completion of timber operations, legal description of the area, and a description of the site conditions including soils, topography, watercourses with protection mea-