



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-



tures, and vegetation before and after harvest. The silvicultural method must be identified and the planned disposition of any Pacific Yew within the stand to be cut must be identified. The CTHP must also specify the type of yarding, road construction, and equipment to be used, and identify any special mitigation measures beyond the standard rules to protect watercourses and unique areas within the area of timber operations.

Under the original language, the RPF must certify that the CTHP area has been personally inspected and the potential for significant adverse effects has been evaluated and that the operation, if the rules are followed, will not be expected to have a significant adverse effect on the environment. The RPF must also complete and certify to an "environmental checklist" of certain facts, including the amount of timberland in late successional forest stands; the effect on threatened or endangered species, resident or migratory fish, or wildlife; water quality; domestic water supply; erosion or siltation of watercourses; aesthetics; noise levels; air quality; archeological, cultural, or historical sites; conflicts with recreational, educational, religious, or scientific use; traffic; fire hazard; insect and disease threat; and the exposure to geologic hazards.

Finally, a "finding of significance" must be made by the RPF. When significant impacts are found, the RPF must discuss his/her findings in writing in the checklist, and must provide additional information to address the impact. The CDF Director may not approve the CTHP until the information has been provided by the RPF. The language also appears to authorize the CDF Director to demand additional information from the RPF, and requires the CDF Director to cause a pre-harvest inspection to be conducted when the CDF review team raises questions about the CTHP contents or potential impacts or winter operations are proposed.

At the October 4 hearing, representatives of environmental groups (including the Planning and Conservation League and the Sierra Club) expressed opposition to the CTHP proposal on grounds it does not require enough information or public notice of the CTHP to enable the public to meaningfully participate in the process. Representatives of the timber industry, including those from the California Foresters Association, the Forest Landowners of California, and the California Licensed Foresters Association, spoke in support of the proposal.

At a subsequent hearing on November 9, a CDF representative noted the Department's initial opposition to the proposal,

because the CTHP format would not enable CDF to build a sufficient record to justify a decision on a THP; other audience members responded that the proposed rule permits the CDF Director to request additional information and if that information is not forthcoming, the Director can reject the CTHP and require a full THP. Jim Steele of the Department of Fish and Game (DFG) reported that DFG does not believe the CTHP process will work, because the CTHP essentially shifts the "burden of proof" to CDF.

In response to the comments made at public hearings on October 4, November 9 and December 6, the Board released a modified version of the proposal on December 21 for consideration at its January 10 meeting. The December 21 version of the CTHP proposal includes the following changes from the original language: (1) the rule is amended to clarify that if site preparation is used in the plan, then a Site Preparation Addendum is required, and if artificial regeneration is prescribed for any purpose in the plan, then a regeneration plan is required; (2) the canopy retention requirements were modified to require that at least 55% of the stocking plots established under a stocking sampling survey of the harvest area shall retain a minimum of 40% canopy cover composed of trees that are 11 inches DBH or greater; (3) section 1051.5(e) is clarified to state that a CTHP will be processed in accordance with the Board's standard rules, including the provision for public notice; and (4) the RPF must certify that he/she has personally inspected the THP area and must specify his/her responsibilities related to the plan.

At the Board's January 10 meeting, a CDF representative reported that the Department now supports the CTHP proposal; CDF had surveyed a number of THPs and found that the CTHP could have been used in about 20%–30% of the sampled plans. However, Gaylon Lee of the Water Resources Control Board stated WRCB's concerns that the CTHP authorizes the CDF Director to approve a THP that degrades beneficial uses of water if not significant. Lee noted that both state and federal law prohibit any degradation to beneficial uses of water. Several other witnesses and DFG representative Jim Steele agreed, commenting that the CTHP proposal as drafted may be unlawful because it purports to permit a greater degree of adverse environmental impact than does the California Environmental Quality Act (CEQA) or the Forest Practice Act. Despite these comments, and with assurance from its legal counsel that the Office of Administrative Law (OAL) would re-

ject the regulation if it is unclear or unlawful, the Board approved the proposed regulatory language by a vote of 7–1. At this writing, staff is preparing the rulemaking file for submission to OAL.

**Board Implements AB 49.** At its October meeting the Board adopted emergency amendments to section 1038, Title 14 of the CCR, to implement AB 49 (Sher) (Chapter 746, Statutes of 1994). [14:4 CRLR 182] AB 49 exempts from several requirements of the FPA (specifically, the THP preparation and submission requirements of PRC section 4581 and the completion and stocking report requirements of PRC sections 4585 and 4587) the cutting or removal of trees to reduce fire hazards, and requires the Board to adopt regulations—initially as emergency regulations—to obtain compliance with that provision. To implement AB 49, the Board added subsection (d) to section 1038, to exempt the cutting or removal of trees as specified in PRC section 4584(j).

On October 20, OAL approved the Board's emergency amendment to section 1038; the amendment is effective for 120 days.

**Classification of Coho Salmon as a Sensitive Species Stalled.** Over one year ago, DFG petitioned the Board of Forestry to list the coho salmon as a sensitive species under section 919.12 (939.12, 959.12), Title 14 of the CCR. Recognizing the serious decline in the coho population since the 1940s, the Fish and Game Commission (FGC) has listed the coho salmon as a candidate for threatened species status under the California Endangered Species Act (CESA) in all creeks south of San Francisco. Following public hearings and discussions at its April, June, July, September, November, and January meetings, however, the Board has failed to reach a decision on the issue.

In its petition, DFG noted that "[c]oho salmon require year-round cool high quality water, an abundance of shade, heavy riparian canopy, deep pools, cover in the form of large, stable, woody debris and undercut banks, and an unembedded gravel/rubble substrate," and that timber harvesting practices allowed by the Board of Forestry have caused heavy stream sedimentation, loss of dense overstory shade canopy and subsequent increase in water temperature, and loss of large woody debris. A "sensitive species" classification by the Board would entitle the species to additional protections from the impacts of timber harvesting in these areas. [14:4 CRLR 179; 14:2&3 CRLR 186, 195]

Following September and October meetings of its Ecosystem Management Committee, the Board scrapped several



earlier versions of the proposed sensitive species listing and protective measures designed to assist the coho, and directed staff to publish two optional versions of the regulations for discussion at the Board's November 8 meeting. On October 24, staff released the options, as follows:

• Option 1 would prohibit the CDF Director from approving THPs, non-industrial timber management plans (NTMPs), or sustained yield plans (SYPs) that result in additional net adverse impacts from timber operations on habitat factors that are limiting coho salmon populations, and conditions that impede coho recovery. Where coho salmon are present in a proposed plan area, the plan submitter must identify the habitat factors in the plan area that are limiting coho salmon reproduction, recruitment, or survival (including sediment deposition, water flow, water temperature, presence or absence of large woody debris, and nutrients); the potential negative impacts from timber operations on limiting habitat factors; and measures that will be used to prevent a negative net change in limiting habitat factors that could result from timber operations. In some instances, Option 1 would require additional measures, including mapping and monitoring of the proposed timber harvest. The proposed rule would apply throughout the current and historical range of coho salmon in California where recovery is feasible.

• Option 2, developed at the October meeting of the Ecosystem Management Committee, would give the CDF Director more discretion in approving THPs, NTMPs, and SYPs. Option 2 would require that each plan include a checklist evaluation of its potential impacts on coho salmon. The evaluation is not required if the plan will have no net adverse impact on the habitat factors identified in the proposal (including those listed above), or if the plan is conducted in accordance with a habitat conservation plan addressing coho salmon approved by the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (USFWS), or DFG.

At a public hearing on November 8, the Board entertained considerable testimony and discussion of the proposed options. Predictably, most of the timber industry representatives favored Option 2, while environmentalists favored Option 1. The Committee suggested that the Board simply list the coho as a sensitive species and come up with precise protective measures and standards later. Planning and Conservation League representative Terry Terhaar stated that listing the coho as sensitive would be a hollow gesture unless it is

accompanied with a specific protection rule; she urged the Board to take a new approach before the coho is lost.

Following the November hearing, the Board directed staff to release another modified version of the options. On December 23, staff released four new options for a 15-day comment period and discussion at the Board's January meeting:

• Option 1 is identical to Option 1 in the October 24 version.

• Option 2 is identical to Option 2 in the October 24 version.

• Option 3 would list the coho as a sensitive species without protection standards. Pursuant to current regulations, the Board would have up to one year to adopt protection standards, and a new 45-day notice would be required.

• Option 4 is a modification of Option 1; it would prohibit the CDF Director from approving THPs, NTMPs, or SYPs that would result in "significant" net adverse impacts (as opposed to "additional" net adverse impacts) on coho habitat, and eliminate the requirement that each plan identify coho habitat factors, the potential negative impact from foresting practices, and measures that will be used to prevent a negative net change in the habitat.

On January 10—one year and six days after DFG first filed its petition, the Board again held a public hearing on the proposed rulemaking to provide protection to the dwindling coho salmon. Environmentalists warned that NMFS is reconsidering the listing of the coho as an endangered species under the federal Endangered Species Act, and urged California to be proactive rather than reactive in this matter. However, timber industry and fishing interests urged the Board to wait for NMFS and/or to consider other options.

Board member Thomas Nelson changed the direction of the hearing by challenging the assertion of DFG's petition that additional action is needed to protect the coho. Nelson focused on language in the petition which acknowledged that "in some streams, existing FPRs are probably providing adequate protection for critical coho salmon habitat elements." He explained that—to his understanding—this wording indicated that the Board's existing rules are sufficient, and only "in some sensitive streams, this level of protection has not been adequate," thus requiring site-specific identification and protection.

DFG representative Jim Steele responded that the necessary site-specific investigation would require an immense resource expenditure. For that reason, DFG recommended that the Board adopt a general rule that would provide a minimum level of protection at all sites for the coho.

In the end, the Board decided to postpone any rulemaking decision regarding the coho salmon until DFG's petition could be reexamined.

**Board Rejects Local Rules for Mendocino County.** At its October 4 meeting, the Board held another public hearing on proposed amendments to section 912 and the addition of section 923 *et seq.*, Title 14 of the CCR, proposed local forest practice rules for Mendocino County which were drafted by Mendocino County's Forest Advisory Committee and approved by the County Board of Supervisors in May 1994. PRC section 4516.5 authorizes individual counties to recommend county-specific regulations for the content of THPs and the conduct of timber harvesting operations to accommodate local needs, and requires the Board to adopt rules consistent with a county's proposal within 180 days of recommendation if it finds that the proposal is consistent with the intent and purpose of the FPA and is necessary to protect the needs and conditions of the county.

Concerned about the rapid depletion of its natural forest resources which will result in reduced future harvest and economic loss for the county, the Board of Supervisors petitioned the Board to adopt local rules which would—among other things—restrict harvest volume to 2% of inventory ("2POI") per year, or 20% of standing inventory over a ten-year period, within the county; establish a four-year transition timeframe for graduated implementation towards the 2POI volume control standard; set prescriptive limitations for clearcutting and group regeneration harvesting; define set stocking restrictions on timber harvest operations under evenage, unevenage, group regeneration, and sanitation-salvage methods; and require each timberland ownership subject to the local rules to submit Harvest Assessment Data (HAD) to the CDF Director as part of each THP submitted. [14:4 CRLR 179-80]

As an alternative to the Board of Supervisors' proposal for local rules, CDF suggested at the Board's October meeting that the Board consider creating a special subdistrict in lieu of adopting county rules. According to CDF, the Board of Supervisors' petition and testimony submitted to the Board on the proposal to adopt local rules indicates that the County has made a strong case regarding its concerns about inventory levels and harvesting on large ownerships, but has not been able to make a similar case for smaller ownerships. CDF's alternative would address this concern.

DFG's proposal would create a two-part Mendocino Subdistrict covering all of



Mendocino County; one part would consist of lands in the current Coast Forest District, and the other would consist of lands in the current Northern Forest District. The Subdistrict Rule would not apply to ownerships under 10,000 acres in size; it would also not apply to ownerships over 10,000 acres in size with total average gross conifer inventories of 20,000 board-feet per acre or more in the Coast Forest District component of the Subdistrict and of 15,000 board-feet per acre or more in the Northern Forest District component of the Subdistrict.

CDF also prefers the Subdistrict alternative due to cost considerations. CDF testified that adoption of local rules for Mendocino County, as originally proposed, would impose extra unfunded costs on CDF's operations; these costs are largely related to public hearing costs that CDF projected will occur. When local rules under PRC section 4516.5 exist, the relevant county board of supervisors may compel the Board to hold a hearing on proposed THP approvals, and CDF projects a substantial number of hearings. In contrast with the public hearing associated with THP approvals in counties with local rules, subdistrict rules do not have associated hearings. Hence, CDF proposed a subdistrict partly as a means to avoid or offset costs.

Following discussion at its October meeting, the Board decided to publish CDF's proposal for a 45-day comment period, as an alternative to the proposed local rules. Accordingly, on October 21, the Board published notice of its intent to amend section 912 and adopt new sections 907.12, 913.12 [933.12], 913.13 [933.13], 913.14 [933.14], 913.15 [933.15], 913.16 [933.16], 913.17 [933.17], 913.18 [933.18], 913.19 [933.19], 913.20 [933.20], and 913.21 [933.21], Title 14 of the CCR, to establish the two-part Mendocino Subdistrict. The proposed regulations are limited to large ownerships as described above. Ownerships of this type are given two options to increase their timber inventories over time. One option is that they may not harvest more than 2% of total gross conifer volume of the ownership in any year; a four-year transition period of higher harvest percentages of inventory is provided. The other option is that these ownerships may rely on existing Board rules and a SYP to achieve specified increases in total gross conifer inventory volumes over the next ten years. The Board scheduled a December 5 public hearing on both the proposed local rules and CDF's alternative.

On December 5, representatives of Mendocino County urged the Board to adopt the local rules it had proposed, ar-

guing that Mendocino lands are less productive than elsewhere and that Mendocino County rules need to be stronger than state rules. Terry Gorton, former Board Chair and now Assistant to the Secretary of Resources, advocated the subdistrict proposal but questioned whether large landowners in Mendocino County have developed SYPs; she suggested that the Board send a letter to major landowners asking if they plan to submit a SYP by September 1995. Following considerable testimony both in support of and opposition to the proposed local rules, the Board rejected them by a vote of 8-1. Thereafter, the Board agreed to postpone consideration of CDF's Subdistrict proposal until its January meeting, and in the meantime to send a letter to timberland owners in Mendocino County with 10,000 or more acres in their ownership asking whether they would be willing to submit a SYP for review before September 1, 1995. That motion carried by a vote of 8-1.

At the Board's January meeting, CDF Director Richard Wilson argued that the Board's current Forest Practice Rules, at least as interpreted by CDF, provide the assurance sought by Mendocino County—that the forest inventory on large industrial ownerships will increase over time and that these lands will stay productive and continue to supply jobs and economic security for its citizens. In other words, Mendocino County wants the FPA's primary goal of maximum sustained production (MSP) enforced. Wilson noted that this is not merely a Mendocino County issue but one which requires statewide clarification, and proposed amendments to sections 913.11 and 1091.1, Title 14 of the CCR, to set forth two alternatives for achieving MSP in a THP or SYP. Following discussion, the Board decided to delay consideration of the proposed Subdistrict rules until September, with interim hearings on the issue scheduled for its March and June meetings. The Board also directed staff to prepare CDF's MSP regulatory changes for publication and a 45-day public comment period.

**Other Board Rulemaking.** The following is a status update on other rulemaking proceedings conducted by the Board in recent months and covered in detail in previous issues of the *Reporter*:

• **Three-Zone Rule for Protection of the NSO.** At this writing, the Board has taken no further action on its proposal to amend sections 895, 898.2(d), 919, 919.1 (939.1, 959.1), 919.4 (939.4, 959.4), 912 (932, 952), 912.9 (932.9, 952.9), 913.6 (933.6, 953.6), 914 (934, 954), 915 (935, 955), 916.3 (936.3, 956.3), 916.4 (936.4, 956.4), and adopt section 919.8, Title 14

of the CCR, its existing regulations to protect the northern spotted owl (NSO), which was listed as threatened by the federal government in July 1990. [10:4 CRLR 157]

Under the Board's current NSO rules, every THP, NTMP, conversion permit, spotted owl resource plan, or major amendment thereof must contain protection measures for the NSO if they are found in the timber operations area. Usually, this includes owl surveys and protection measures developed to protect the nest site or activity area and foraging area around the nest site. Under the current no-take rules, NSOs are protected where they occur by assuring the continued presence of suitable habitat within a set radius of the owl pair site.

The Board's proposed regulatory changes would implement a three-zone rule for protection of the NSO. According to the Board, the present distribution of NSOs, ownership protection, and habitat potential can be roughly divided into three zones. In Zone One (high-owl-density, high-potential habitat, mostly private ownership coastal forest), the proposed rules—specifically new section 919.8—would change the emphasis to maintaining and producing functional habitat rather than protecting nesting owls from take under the current NSO rules. The proposed section sets forth specified habitat conservation strategies and states that, if any of them are met in a THP, take is considered incidental to timber operations and pre-harvest NSO surveys are not required. In Zone Two (high-owl-density, high-potential habitat, mostly public ownership mixed evergreen forest), relief from the current NSO regulation is recommended, as this is a zone of large amounts of public lands protection and high owl densities. In Zone Three (low-owl-density, low-potential habitat, mixed ownership forests), no rule changes are proposed as this is a zone of low owl density and low potential habitat and current NSO rules will remain in effect. [14:4 CRLR 180-81; 14:2&3 CRLR 193-94]

The Board must take some action on this regulatory proposal prior to March 18, or its notice will expire and the rulemaking proceeding must be recommenced.

• **Biologist Consultation Contracts.** At its July 7 meeting, the Board adopted a revised version of its proposed amendments to sections 919.9 and 939.9, Title 14 of the CCR, two provisions of the Board's existing NSO protection rules. These sections require the CDF Director, when considering a THP which proposes to use the procedures in sections 919.9(a), (b), or (c) [939.9(a), (b), or (c)], to consult with a biologist to determine whether the proposed THP will



result in the take of an individual northern spotted owl prior to approving the plan.

Under the existing rules, the Director must consult with a state-employed biologist designated by CDF and acceptable to DFG and to USFWS. The Board's July 7 amendments, which are intended to establish a process for CDF designation of privately-funded independent consultant biologists who would be available to fulfill the field consultation requirements under the Board's NSO rules, would implement the following procedures: The CDF Director shall consult with a "state-employed designated biologist" acceptable to DFG or USFWS. Where necessary, the designated biologist shall make written observations and recommendations regarding whether the retained habitat configuration and protection measures proposed in the THP will prevent a take of the owl. In order to recognize consultants who specialize in NSO protection, a biologist may be specially designated by CDF to act as an independent consultant. The independent consultant must be accepted by DFG or USFWS; to do so, the consultant must demonstrate sufficient knowledge and education to recognize and analyze data from field conditions and present information which helps determine harm or harassment of the NSO. [14:4 CRLR 181; 14:2&3 CRLR 194-95]

On November 14, OAL disapproved the Board's amendments for failure to comply with the clarity requirement of Government Code section 11349.1 and because the Board failed to adequately respond to all comments received, submitted an incomplete rulemaking record, and failed to follow technical requirements of the Administrative Procedure Act.

On December 15, the Board released for a 15-day comment period modified language of its proposed amendments, which it stated is intended to respond to OAL's decision by clarifying the role of designated state biologists and independent consultants, and the agency requirements for approval of independent consultants.

With regard to state-employed vs. independent consultant biologists, the modified language provides that a designated independent consultant may fulfill the field consultation requirements of sections 919.9(a) [939.9(a)] of the Board's NSO rules. The THP submitter has discretion whether to utilize the services of a designated independent consultant biologist. All other requirements under the NSO rules must be fulfilled by state-employed biologists. The independent consultant will make written observations and recommendations whether the retained

habitat configuration and protection measures proposed in the THP will prevent a take of the owl. This evaluation is preliminary to, and separate from, the final "take" determination to be made under section 919.10 [939.10] by the CDF Director and state-employed biologists.

With regard to agency criteria for designation of an independent consultant, the modified language provides that designation requires acceptance either by DFG or USFWS. Acceptance requires demonstration, in the field, of sufficient knowledge and education to recognize and analyze data from field conditions and present information which helps determine harm or harassment of the NSO. The same educational and experience criteria utilized to designate state-employed biologists will be applied to designated independent consultant biologists.

At its January 10 meeting, the Board approved the modified language. At this writing, staff is preparing the rulemaking file on the proposed changes for resubmission to OAL.

• **Modified Timber Harvest Plan.** At its September 1994 meeting in South Lake Tahoe, the Board voted to readopt sections 1051, 1051.1, 1051.2, and 1052.3, Title 14 of the CCR, to reimplement the modified timber harvest plan (MTHP) for non-industrial owners. These regulations provide forestland owners with an entire ownership of 100 acres or less with a cost-effective alternative to filing a regular THP. Section 1051 sets forth the conditions and mitigation measures with which MTHP submitters must comply; section 1051.1 sets forth the required contents of the MTHP; section 1051.2 addresses the review of a MTHP by CDF; and section 1051.3, as modified, imposes a two-year sunset date on the MTHP program. [14:4 CRLR 180] At this writing, staff is still preparing the rulemaking file on these changes for submission to OAL.

## LITIGATION

In *Sierra Club and Redwood Coast Watershed Alliance v. California State Board of Forestry*, No. 951041 (San Francisco Superior Court) and *Redwood Coast Watershed Alliance v. Board of Forestry*, No. 960626 (San Francisco Superior Court), two environmental groups are challenging the adequacy of the Board's recently-adopted regulations which purport to define and implement the FPA's express statutory goal—the regulation of timbercutting so as to yield "maximum sustained production of high-quality timber products." These lawsuits are an offshoot of RCWA's earlier litigation which successfully challenged the Board's 18-

year failure to adopt any such rules, although directed to do so by the legislature. [14:4 CRLR 183-84] While that litigation was pending, the Board spent two years developing and adopting a package of MSP rules which were finally approved by OAL in January 1994 and are the subject of the challenge. [14:2&3 CRLR 195; 14:1 CRLR 1515; 13:4 CRLR 184] A November 4 hearing on these two writ cases was postponed until March 14, 1995.

On January 6, the U.S. Supreme Court unanimously granted the federal government's petition for certiorari to review 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 which 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. [14:4 CRLR 184; 14:2&3 CRLR 198-99] 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).

## FUTURE MEETINGS

February 7-8 in Sacramento.  
March 7-8 in Sacramento.  
April 4-5 in Sacramento.  
May 10-11 in San Luis Obispo (with the Fish and Game Commission).  
June 6-7 in Redding.  
July 11-12 in Ventura.

