



mountain quail, and varieties of partridges from that definition and would include blue grouse in that definition.

Existing law requires a person who takes a deer to punch out the date of the kill on the license tag, attach part of the tag to the deer, keep it attached until fifteen days after the open season, and send the other part of the tag immediately to DFG after it has been countersigned. This bill would instead require the person to clearly indicate the date of the kill in the manner specified by DFG, attach one part to the deer, countersigned as specified, keep it attached until fifteen days after the open season, and immediately send the other part of the tag to DFG. [A. W&M]

SB 658 (Deddeh). Existing law requires that, after a petition is accepted by FGC for consideration of a species for listing as a threatened species or as an endangered species, the status of the candidate species on the petition be reviewed by DFG. Existing law requires DFG to provide a written report to FGC, and the Commission is required to schedule the petition for final consideration. As amended May 19, this bill would, until January 1, 1998, require FGC to direct DFG to conduct a collaborative phase during a species candidacy period upon request of a directly affected party, as described. That phase would require a working group, as described, to review specified items relating to the candidate species. The bill would, until January 1, 1998, require DFG to commence the preparation of, and make progress toward completion of, a recovery plan of specified content for the species proposed for listing during the period of candidacy and before final action by FGC. [S. Appr]

AB 778 (Harvey). Existing law requires that every person over the age of 16 years obtain a fishing license in order to take fish in this state for any purpose other than profit. For certain fish, a license stamp is also required. As introduced February 24, this bill would limit that requirement to persons over the age of 16 and under the age of 70. The bill would also exempt persons 70 years of age or more from any license tag or stamp otherwise required to take fish, reptiles, or amphibia. The bill would require a person who is 70 years of age or more to show proof of age to a peace officer on demand when taking fish, reptiles, or amphibia. [A. W&M]

■ LITIGATION

On October 13 in *Natural Resources Defense Council v. Patterson*, No. 88-1658LKK (E.D. Cal.), U.S. District Court Judge Lawrence Karlton denied the Bureau of Reclamation's motion to dismiss a

five-year-old action brought by NRDC and other environmental organizations, clearing the way for further proceedings in the matter. The suit seeks to compel the federal government, as owner of the Central Valley Project and the Friant Dam on the San Joaquin River, to comply with provisions of the California Fish and Game Code requiring dam owners to maintain fish populations below a dam "in good condition." When the Friant Dam was completed in 1942, nearly all of the San Joaquin River's flow was diverted down two canals for agricultural use, decimating the River's population of spring-run chinook salmon. NRDC brought the lawsuit when the government attempted to renew the long-term water diversion contracts in the late 1980s. In its motion to dismiss the matter, the government argued that the issues raised in the lawsuit were rendered moot and preempted by Congress' passage of the Central Valley Project Improvement Act in 1992. [13:1 CRLR 108-09] Judge Karlton disagreed, holding that the relevant state and federal laws are compatible: "The goals of both statutes are similar...[E]ach seek to protect, restore and enhance fish, wildlife and associated habitats in the Central Valley." NRDC now intends to ask Judge Karlton to order the Bureau to release aqueduct water into the San Joaquin River for fish and wildlife.

■ RECENT MEETINGS

At its December meeting, FGC again received testimony on DFG's controversial May 1993 decision to eradicate over 300 feral ducks found in Venice canals, as well as 200 more ducks in Chula Vista and at the Franklin Reservoir in the Santa Monica Mountains. The ducks were killed in an effort to halt the spread of viral enteritis, a disease commonly fatal to ducks; DFG hoped to stop the spread of this disease to migratory waterfowl that use the Pacific flyway. The Pacific flyway is used by more than three million migratory waterfowl, and is the source of the migratory waterfowl that are hunted in California.

Dr. Gary Pearson, formerly a veterinarian with the U.S. Fish and Wildlife Service and now in private practice in North Dakota, told the Commission that killing exposed resident ducks is not the way to protect migratory ducks. Dr. Pearson stated that migratory waterfowl have almost certainly been exposed to the disease and have likely built up an immunity to it. According to Dr. Pearson, killing exposed ducks simply replaces birds which may have developed an immunity to the disease with vulnerable newcomers.

FGC took no action in response to this testimony, but promised to study the papers presented by those in opposition to the current eradication policy.

■ FUTURE MEETINGS

April 28 in Sacramento.
May 9-10 in Yreka.
June 16-17 in Bridgeport.
August 4-5 in San Luis Obispo.
August 25-26 in South Lake Tahoe.
October 6-7 in Palm Springs.
November 3-4 in Monterey.
December 1-2 in Eureka.

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: Franklin L. "Woody" Barnes, James W. Culver, Robert C. Heald, Bonnie Neely, and Richard Rogers.

Forest Products Industry: Thomas C. Nelson, Tharon O'Dell, and Joseph Russ IV.

Range Livestock Industry: Robert J. Kerstiens (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 October, Governor Wilson appointed Richard B. Rogers, chair of Pacific Earth Resources, to a public member position on the Board. He also reappointed Board Chair Robert J. Kersteins to another term.

MAJOR PROJECTS

Proposed Permanent Rules. Last July, the Office of Administrative Law (OAL) rejected the Board's permanent adoption of three major rulemaking packages which have occupied almost all of its time since the fall of 1991. [13:4 CRLR 184; 13:1 CRLR 122-23; 12:4 CRLR 211-12] One reason for OAL's rejection was that the Board had not properly circulated the final language for public comment; thus, on August 19, the Board circulated the final version of the proposed rules for a 15-day public comment period, and scheduled consideration of the rules for its September and October meetings. Since then, the Board has taken the following actions on the proposed rules:

• **Silvicultural Methods with a Sustained Yield Objective.** The Board's proposed adoption of sections 1091.1-1091.14 and amendments to sections 895.1-953.11 (nonconsecutive), Title 14 of the CCR, would set new standards pertaining to evenage and unevenage silviculture prescriptions, establish a definition of the goal of maximum sustained production (MSP), and set up a regulatory procedure for optional filing by timberland owners of long-term sustained yield plans (SYPs). At its October meeting, the Board decided to adopt the rules circulated on August 19, to become effective on March 1, 1994, and directed staff to republish the rules for a 45-day public comment period. On November 19, the regulations were republished as instructed by the Board; the Board held an initial public

hearing on the proposed rules at its December 7 meeting. At this writing, a final Board hearing on the new silviculture and sustained yield rules is scheduled for January 4 in Sacramento. Additionally, the Board instructed staff to schedule additional hearings as needed to resolve the difficult issue of the rules' retroactivity and possible exemptions for landowners who have already submitted THPs and completed the required analysis under existing rules at the time the new rules become effective (*see below*).

• **Sensitive Watersheds.** Following the August 19 recirculation of the final version of its proposed adoption of sections 916.8 (936.8, 956.8), 916.9 (936.9, 956.9), 916.10 (936.10, 956.10), and 1032.10, Title 14 of the CCR, the Board approved the rules at its September meeting. If approved by OAL, the new rules would create a public process to assess watersheds and identify those which warrant classification as "sensitive" to further timber operations, establish requirements for the protection of domestic supplies, and require those submitting THPs to provide notice to downstream landowners and others. The Board plans to resubmit this rulemaking file to OAL when a final decision is made on the silvicultural/sustained yield rules.

• **Old-Growth Forest, Late-Seral Stage Forest, and Wildlife Protection Regulations.** Following the August 19 recirculation of the final version of its proposed adoption of sections 919.16(a) (939.16(a), 959.16(a)), and its amendment of section 895.1, Title 14 of the CCR, the Board approved the rules at its September meeting. If approved by OAL, the rules would establish additional reporting and mitigation requirements for timber harvesting in late succession forest stands and provide protection for wildlife residing in these stands. The Board plans to resubmit this rulemaking file to OAL when a final decision is made on the silvicultural/sustained yield rules.

• **Board to Adopt Exemption to Application of New Regulations.** During public hearings on the Board's new silvicultural and late succession stand regulations (*see above*), many timberland owners expressed concern about PRC section 4583, which requires THPs to conform to all standards and rules which are in effect at the time the THP becomes effective. The section also generally requires that ongoing timber operations conform to any changes or modifications of standards and rules (except for changes or modifications to stocking standards) made thereafter. However, the statute grants an exception to the latter requirement of retroactive ap-

plication where the THP submitter has incurred "substantial liabilities" for timber operations in good faith and in reliance upon standards in effect at the time the plan become effective, and adherence to the new rules would cause "unreasonable additional expense."

Thus, the Board published notice of its intent to adopt new section 899, Title 14 of the CCR. The new regulation creates a regulatory exemption from the new rules for THP submitters who are able to demonstrate that "substantial liabilities" have been incurred in good faith and in reliance on the rules previously in effect and that compliance with a new rule would cause "unreasonable additional expense." Section 899 defines the term "substantial liabilities" to include (but not be limited to) "obtaining an approved THP which prior to approval involved collection of wildlife surveys or other data requiring surveys for a season or more, or other significant investments in plan preparation exceeding a cost of \$5,000." The term "unreasonable additional expense" is defined to include (but not be limited to) (1) making an alteration in the approved plan that adds a cost of \$1,000 or 10% beyond that originally incurred in plan preparation, whichever is greater; (2) requiring additional information such as wildlife surveys that will take more than 30 days to complete or would make it impossible to harvest the plan in the current season (except when necessary to prevent take of a threatened or endangered species or to protect a domestic water supply); and (3) after commencement of timber operations, requiring changes that would add more than \$1,000 or 10% to the cost of such operations, whichever is greater.

The Board scheduled a hearing on this proposal for its December 8 meeting, but then postponed it until January 5.

• **Board Modifies Proposed "Exempt Conversion" Rules.** Following public hearings on September 7 and October 5, the Board published modified versions of its proposed amendments to sections 1038 and 1104.1, Title 14 of the CCR, on October 7, November 18, and December 13. Section 1104.1(a) currently provides for what is commonly called a "minor conversion" or an "exempt conversion." This section allows a landowner a single conversion of an area less than three acres to a non-timber-growing use of timberland, exempt from obtaining a THP and from the completion report requirement, the stocking report requirement, the timberland conversion permit requirement, and the stocking standards of the Forest Practice Act. Section 1038(c) exempts timber operations conducted on ownerships of



timberland of less than three acres in size from the THP, completion report, and stocking report requirements. Due to increasing abuse of these two exemptions (especially in the Southern Subdistrict), the Board seeks to tighten them. [13:4 CRLR 184-85] However, following a fourth public hearing in December, the Board published a December 13 notice announcing its decision to scrap the proposed amendments as drafted and form a subcommittee to further assess feasible alternatives for rule language to address the exemption issues on a statewide basis.

However, the Board also stated its intent to adopt emergency amendments to section 1104.1 to tighten the exempt conversion provisions for the Southern Subdistrict only, and published two options:

- Under Option 1, a single *bona fide* conversion to a non-timber-growing use of timberland of less than three acres, whether or not it is a portion of a larger land parcel, under one contiguous ownership, is exempt from the THP preparation and submission requirements, the completion report and stocking report requirements, and the stocking standards of the FPA, so long as no timber operations are conducted within a watercourse and lake protection zone, and the timber operations are conducted pursuant to a notice submitted to the CDF Director that provides specified information (including a certification by the timber owner that the conversion conforms to applicable county general plans and zoning ordinances, and a certification by the timberland owner that the section 1104.1 exemption has not been previously used for this contiguous ownership). Under subsection 1104.1(a)(5), timber operations under this section may not commence for ten working days from the date of the CDF Director's receipt of the exemption notice; within the ten-day period, the Director shall determine whether the exemption is complete and accurate. If the Director does not act within ten days, timber operations may commence.

- Under Option 2, subsection 1104.1(a)(5) is amended to prevent timber operations under this section from commencing within five working days from the date of the Director's determination, unless waived by the Director after consultation with other state and county agencies. Upon receipt of the exemption application, the Director shall determine whether the application is complete and accurate; the Director shall also request comments from local county staff on whether the application complies with County General Plan policies and/or zoning ordinances.

The Board reopened the public comment period on this language, applicable to the Southern Subdistrict only, until Jan-

uary 3, and scheduled a public hearing on the proposal for January 4 in Sacramento.

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*:

- **Certified Rangeland Manager Specialty.** On December 15, the Board published a modified version of proposed new section 1651 and amendments to sections 1600, 1602, and 1650, Title 14 of the CCR, which would establish a Certified Rangeland Manager Specialty Certification Program and outline the specific requirements of that specialty. The Board's new specialty certification is proposed to conform to a certification program sponsored by the private Society for Range Management (SRM). [13:4 CRLR 185; 13:2&3 CRLR 195] The modifications delete the definitions for the terms "forestland," "forested landscapes," "range," and "rangeland" because they are already defined in the Professional Foresters' Law or SRM's program, so the Board believes it is unnecessary to define them in regulation; replace the term "forestland" with "forested landscapes" throughout the rules; provide that any certification panel for a specialty shall be first certified by the Board or a subcommittee of the Board's Professional Foresters Examining Committee appointed by the Board and composed of professionals representing a broad spectrum of employment and expertise within that specialty; provide that a "certified rangeland manager" shall provide services only in those areas in which he/she has demonstrated competence; and clarify other terms.

At this writing, the Board is accepting public comment on the modified language until January 3, and has scheduled a January 4 public hearing on the proposal.

■ LEGISLATION

SB 824 (Hayden). Existing law requires CDF, upon receipt of a THP, to place the THP (or a true copy) in a file available for public inspection in the county in which timber operations are proposed under the plan, and to transmit a copy of the plan to the Department of Fish and Game (DFG), the appropriate California regional water quality control board (RWQCB), the county planning agency, and, if within its jurisdiction, the Tahoe Regional Planning Agency, and to invite, consider, and respond in writing to any comments received from those agencies. As amended April 12, this bill would require the Board to adopt any mitigation measures that are proposed by DFG or a RWQCB unless CDF demonstrates that its

own proposed mitigation measures would result in greater protection for water and wildlife resources.

Under the FPA, the Director of Fish and Game or the state Water Resources Control Board (WRCB) is authorized to file an appeal with the Board on the approval of a THP by the CDF Director under specified circumstances. This bill would authorize the appropriate RWQCB to so appeal, rather than WRCB, and make related changes.

Under the FPA, the Board is required to adopt Forest Practice Rules. This bill would require the Board to review recommendations for any rule changes that are submitted to it by DFG or a RWQCB at least twice each calendar year and to act on those recommendations within 120 days.

The California Environmental Quality Act (CEQA) authorizes a plan or other written documentation, prepared under a regulatory program of a state agency, board, or commission, to be submitted in lieu of an environmental impact report. The Act requires the regulatory program to be certified by the Secretary of the Resources Agency. The Board's THP program has been so certified by the Secretary. This bill would require the Board's THP program and other certified regulatory programs to be reviewed by the Secretary at least once every five years from the date of initial certification to determine whether the program continues to comply with applicable provisions of the Act. CEQA also requires a public agency to adopt a reporting or monitoring program for the changes to a project which it has adopted or made a condition of project approval in connection with the certification of an environmental impact report or the adoption of a negative declaration. This bill would require a public agency to also adopt the reporting or monitoring program when approving a project authorized under a certified regulatory program. [S. NR&W]

SB 1062 (Thompson). Under the FPA, a nonindustrial tree farmer may not own 2,500 or more acres of timberland. As introduced March 5, this bill would instead limit the definition of a nonindustrial tree farmer to an owner of timberland who harvests not more than an unspecified amount of board feet per year.

Existing law, until January 1, 1996, requires a nonindustrial timber management plan to include a description of the known locations of any stands of the species *Taxus brevifolia* (Pacific yew) larger than a specified size and requires that plans and nonindustrial timber harvest notices indicate the planned disposition or



use of any such trees to be cut or removed as a result of timber operations. This bill would extend the operation of those provisions until January 1, 1997. [S. NR&W]

SB 122 (McCorquodale), as amended July 12, would prohibit a member of the Board from soliciting or accepting campaign contributions for the benefit of his/her appointing authority (which, in this case, is the Governor), and from donating, soliciting, or accepting campaign contributions from persons under specified circumstances. SB 122 would also specify special conflict-of-interest rules for members of the Board of Forestry; it would prohibit a Board member from participating in any Board action or attempting to influence any decision involving the member or specified other people, and further prohibit a Board member from participating in a Board decision in which the member has a direct personal financial interest. The bill would also prohibit a Board member or any person, with specified exceptions, who intends to influence the decision of a Board member on a matter before the Board, from conducting an ex parte communication, as defined, unless the member notifies the person that a full disclosure of the ex parte communication will be entered into the Board's record. [A. W&M]

AB 49 (Sher), as amended August 31, would delete a January 1, 1994 sunset date on provisions of the FPA requiring, within one month after completion of work described in a THP, that a report be filed with CDF stating that all work has been completed; requiring, within six months of filing the work completion report, an inspection to be conducted and, if the work has been completed, the CDF Director must issue a report of work satisfactorily completed; requiring, within five years after the work completion report, a stocking report to be filed for those areas that meet stocking requirements; specifying that a THP is effective for three years unless extended for two one-year extensions pursuant to specified provisions of law; and permitting amendments to the original THP upon meeting certain requirements. [S. Inactive File]

SB 891 (Leslie), as introduced March 4, would authorize a THP submitter to address issues of sustained timber production and wildlife and watershed impacts by preparing a sustained yield plan (SYP) for a management unit. The SYP would be effective for ten years, with two one-year extensions permitted. The bill would provide that, to the extent that these issues are addressed in a SYP approved by the CDF Director, they need not be addressed in the THP. Among other things, SB 891 would

specify the contents of a SYP; require that a SYP be prepared by a RPF; permit CDF to conduct periodic confidential audits of an owner's inventory, growth, and harvest projections as related to the plan for sustained timber production; require the CDF Director to review and approve or reject the SYP, with that decision based on whether the SYP meets the requirements of the law and, in the case of watershed and wildlife issues, whether the SYP identifies potentially significant adverse impacts and adopts feasible measures to mitigate or avoid those effects; and permit the CDF Director to approve a SYP even when significant adverse impacts are not substantially mitigated, if its benefits outweigh its unavoidable adverse environmental effects. [S. NR&W]

SB 892 (Leslie). The Surface Mining and Reclamation Act of 1975 exempts certain activities from its provisions, including excavations and grading conducted for farming and other specified activities. As amended May 18, this bill would also exempt from the Act onsite excavations or grading for the exclusive purpose of obtaining materials for roadbed construction and maintenance conducted in connection with timber operations and watershed protection. [A. NatRes]

AB 325 (Sher). Under existing law, a timber yield tax is imposed on every timber owner who harvests timber, and certain other persons, at the rate of 6% of the total immediate harvest value of the timber or at an adjusted rate as prescribed. As introduced February 4, this bill would impose a timber yield tax surcharge at an unspecified rate on any person or entity who harvests timber or owns felled or downed timber, as specified, to be deposited in the Forest Practice Regulatory Fund, which the bill would create. [A. W&M]

AB 1185 (Cortese). Existing law provides for the registration of professional foresters by the state Board of Forestry, but permits a person to be registered as a certified specialist in one or more fields of forestry instead of being registered as a professional forester. As amended July 6, this bill would delete the provision authorizing certification as a specialist as an alternative to registration as a professional forester and would delete related provisions. The bill would prohibit the Board from licensing the activities of resource professionals (such as certified rangeland managers; see MAJOR PROJECTS) which it did not license prior to July 1, 1993.

Under existing law, RPF licenses expire on July 1 of each year. This bill would make the licenses valid for two years and would make related changes.

Under existing law, forestry refers, among other things, to the science which treats of wildland resources. This bill would redefine forestry for these purposes to refer to that science which treats of timberland resources and would revise related legislative declarations as to the purpose of the licensing requirements. [S. NR&W]

■ LITIGATION

In *Sierra Club, et al. v. Department of Forestry and Fire Protection (Pacific Lumber Company, Real Party in Interest)*, 21 Cal. App. 4th 603 (Dec. 29, 1993), the First District Court of Appeal affirmed the trial courts' invalidation of two THPs in a consolidated action, and rejected as not ripe for review Pacific Lumber Company's (PALCO) argument that the state's implementation of the Forest Practice Rules and the California Endangered Species Act constitutes an unconstitutional taking of private property without compensation.

In 1988, PALCO submitted two THPs for CDF approval, enabling PALCO to harvest timber in the Owl Creek and Salmon Creek areas in Humboldt County. In determining whether to approve the THPs, CDF consulted with the Department of Fish and Game (DFG), which proposed certain mitigation measures designed to reduce the adverse impacts on six declining species dependent upon old-growth forests for their continued survival. CDF approved the THPs without ordering implementation of the mitigation measures specified by DFG; DFG filed a formal nonconcurrence statement as to the Owl Creek THP. Litigation ensued on both THPs in separate cases; logging was barred through preliminary injunctions, and consideration of the merits of both cases was stalled by PALCO's filing of ultimately unsuccessful demurrers under PRC section 21167.4. [11:1 CRLR 130-31] Following trials before separate judges, both courts ruled that the THPs were invalid because CDF committed a prejudicial abuse of discretion in approving them without properly considering the mitigation measures proposed by DFG.

The First District affirmed on several grounds. First, the court noted that CDF conceded in a November 1991 filing in the trial court—at least as to the Owl Creek THP—that the Forest Practice Rules require it to withhold approval of any THP unless all feasible mitigation measures necessary to substantially lessen any potential significant environmental impacts, including impacts to sensitive species, have been included in the THP, and that it failed to comply with those rules. CDF



REGULATORY AGENCY ACTION

also "candidly informed the trial court that it now requires mitigation measures similar to those proposed by Fish and Game for all THPs in old-growth forests...." The court rejected PALCO's assertion that CDF's concession was "untimely," noting that the two THPs "were continuously the subject of timely legal challenge and, thus, never became final."

The court also found that CDF's rejection of DFG's mitigation measures was, at the time it approved the THPs, "contrary to applicable law and the Forestry Rules." In its initial decision rejecting DFG's mitigation measures, CDF stated that there was a "reasonable doubt" as to whether they would be efficacious and feasible, both technically and economically. The court found that CDF erred on two grounds: (1) its utilization of a criminal law "reasonable doubt" standard was improper, and (2) its conclusion that the mitigation measures were infeasible was not supported by substantial evidence in the record, whereas the need for DFG's proposed mitigation measures was "amply supported by evidence of substantial adverse impacts upon rare wildlife species....Forestry had no substantial evidence to the contrary, other than its expressions of doubt."

The First District observed that "the actual gravamen of [PALCO's] objections to such [mitigation] measures is put in terms of their economic feasibility, and the inroads [PALCO] contends they will make upon the profits from timber harvesting operations." However, the court found that PALCO's taking argument "is not properly joined and ripe for review here. We do not know what the economic effect of the mitigation measures to be imposed upon [PALCO] will be; nor do we have here a final administrative determination as to mitigation measures, so we may decide whether such regulatory decision deprives [PALCO] of all of the value of its property, thereby constituting a regulatory taking.... The administrative process is not final; the mitigation measures suggested by Fish and Game have not been finally adopted as a condition to issuance of the THPs. Until that is done, a determination of claimed economic loss and its effect on [PALCO's] lands is premature, bottomed on speculation unsupported by an adequate record....[PALCO] 'thus does not state a ripe claim for regulatory taking.'"

Instead of ending its decision with this finding, the court speculated about the result should these particular old-growth PALCO parcels be protected from logging. Citing traditional wildlife protection cases in which the federal and other state courts have upheld governmental actions which protect endangered species at some

cost to private landowners, the First District found that "the federal and state governments may regulate and protect rare species on private lands without, ipso facto, triggering an unconstitutional taking of private property on which such species are present."

However, the court also recognized the "surprising diversity of views" in the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992), a zoning/land use regulation case not complicated by the presence of declining species. [12:4 CRLR 21-22, 196-97] In that case, a 6-2 majority engrafted state nuisance law onto the taking issue, holding that a state may proscribe otherwise lawful development activity on private land without compensation only if it would constitute a public nuisance at common law, and remanding to the state courts for consideration of that issue. According to the First District, "[i]f indeed California were to promulgate laws or regulations which would forbid [PALCO] from logging all of its extensive acreage in the state, thereby effecting a total loss of all economical or productive use of the land, and if the logging of land would not have been subject to preexisting regulation by the state's laws of property or nuisance, then *Lucas* arguably indicates a taking has occurred." However, the court noted that "[o]ne problem in applying a *Lucas* analysis to the facts of this case, however, is that wildlife regulation of some sort has been historically a part of the preexisting law of property...; and thus, we are left with a circular argument." Citing *Sierra Club v. Coastal Commission*, 12 Cal. App. 4th 602 (1993), another First District wildlife regulation decision presenting a similar taking challenge and a similarly inadequate administrative record on the issue (and over which the California Supreme Court denied review) [13:2&3 CRLR 186], the First District expressed doubt whether "a different approach is warranted here." However, the court insisted that it is not entering an advisory opinion on the taking issue and reiterated that the basis for its holding was PALCO's failure to properly raise and substantiate its taking claim either administratively or in the trial court.

In *Albion River Watershed Protection Ass'n v. Department of Forestry and Fire Protection (Louisiana-Pacific Corporation, Real Party in Interest)*, 20 Cal. App. 4th 27 (Nov. 15, 1993), the First District Court of Appeal reversed the trial court's dismissal of Albion's petition for writ of mandate, thereby reinstating Albion's challenge to CDF's approval of a THP submitted by Louisiana-Pacific (L-P).

In the trial court, both CDF and L-P moved to strike Albion's petition on grounds that Albion had failed to request a hearing on the petition within 90 days of filing it, as required by PRC section 21167.4. Albion opposed the motions, arguing that section 21167.4 does not apply to judicial review of THPs. In 1990, the First District agreed with that position in *Sierra Club v. California Department of Forestry (Pacific Lumber Company, Real Party in Interest)* [11:1 CRLR 130-31]; however, the California Supreme Court subsequently depublished the *Sierra Club* decision, and the First District recently entered a contrary decision in *Dakin v. Department of Forestry and Fire Protection*, 17 Cal. App. 4th 681 (July 30, 1993). In *Dakin*, the First District found that the legislative policy underlying the 90-day rule—the expeditious resolution of challenges under the California Environmental Quality Act (CEQA)—is equally applicable in the THP context, and held that section 21167.4 does apply in judicial proceedings challenging THPs. However, because the applicability of that section had been the subject of some confusion (due largely to the First District's own *Sierra Club* decision), the court held that its new *Dakin* rule should apply prospectively only. Thus, in *Albion*, the court reinstated Albion's petition for writ of mandate (finding it had been filed "well before" the *Dakin* decision) and remanded it to Mendocino County Superior Court.

In *Environmental Protection Information Center (EPIC) v. State Board of Forestry (Pacific Lumber Company, Real Party in Interest)*, 20 Cal. App. 4th 27 (Nov. 15, 1993), the First District Court of Appeal affirmed the trial court's dismissal of EPIC's "supplemental petition for writ of mandate" challenging the reapproval of a THP. Three months after the filing of EPIC's petition for writ of mandate challenging the Board's approval of a PALCO THP to log 154 acres of old-growth forest inhabited by the marbled murrelet, the Board served a "notice of nonopposition" to the petition—partly on grounds that subsequent to the filing of the lawsuit, the Board had adopted emergency regulations to protect the murrelet and the species was being listed as threatened by the Fish and Game Commission. Thus, the court issued an alternative writ of mandate requiring the Board to set aside its approval; the Board did so, and filed a notice with the court reciting that it had fully complied with the order.

Thereafter, the Board reconsidered the THP and additional wildlife surveys and mitigation measures submitted by PALCO, and approved it in March 1992. [12:2&3



INDEPENDENTS

**BOARD OF
CHIROPRACTIC
EXAMINERS**

Executive Director:
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(916) 227-2790

In 1922, California voters approved an initiative which created the Board of Chiropractic Examiners (BCE). Today, the Board's enabling legislation is codified at Business and Professions Code section 1000 *et seq.*; BCE's regulations are located in Division 4, Title 16 of the California Code of Regulations (CCR). The Board licenses chiropractors and enforces professional standards. It also approves chiropractic schools, colleges, and continuing education courses.

The Board consists of seven members—five chiropractors and two public members. In October, Governor Wilson appointed Rosa-Mei Lee, Ph.D., of Mountain View, an acupuncturist, to fill a public member seat on BCE; Lee replaces former Board member Patricia Quibell of Redding.

MAJOR PROJECTS

BCE Continues to Struggle with Unprofessional Conduct Regulations. BCE is continuing its efforts to define acts of unprofessional conduct, in light of concerns raised by—among others—Assemblymember Burt Margolin, Chair of the Assembly Health Committee, that chiropractors are inappropriately advertising that spinal manipulation may be substituted for vaccinations and used to treat infectious diseases. Margolin has introduced AB 2294, which would prohibit chiropractors from engaging in such activity (*see* LEGISLATION); however, because that bill will take effect only if it is passed by the legislature, signed by the Governor, and approved by the electorate, the Assembly Health Committee last year urged BCE to adopt emergency regulations addressing these issues pending passage and voter approval of AB 2294. [13:4 CRLR 188-89]

Accordingly, BCE adopted sections 317(w) and 317(x), Title 16 of the CCR, on an emergency basis on June 21, and section 317(y), Title 16 of the CCR, on an emergency basis on September 27. As originally adopted, section 317(w) pro-

hibits the offer, advertisement, or substitution of a spinal manipulation for a vaccination; and section 317(x) provides that it constitutes unprofessional conduct for a chiropractor to treat communicable diseases listed in Health and Safety Code section 3380. Section 317(y) provides that unprofessional conduct by a chiropractor includes treatment for infectious disease, defined as a disease caused by pathogenic microorganisms in the body; the section also provides that it shall not be interpreted to prohibit the treatment of neuromusculoskeletal or other conditions, diseases, or injuries within the scope of practice of a chiropractor in any patient with an infectious disease. Emergency regulations are only valid for 120 days. Because BCE did not forward a certificate of compliance to the Office of Administrative Law (OAL) within that time period, sections 317(w) and 317(x) were repealed on October 20 by operation of law. However, on November 8, BCE readopted section 317(w), again on an emergency basis; further, on December 23, BCE forwarded to OAL a certificate of compliance on the permanent adoption of section 317(w). BCE chose not to seek the permanent adoption of section 317(x) on the basis that the broad definition of the term "infectious diseases" in section 317(y) encompasses the term "communicable diseases" as used in section 317(x).

On October 22, BCE published notice of its intent to permanently adopt section 317(y), and scheduled a public hearing on the proposed language for December 9 in Sacramento. At the hearing, various chiropractors expressed their opposition to the proposed language on many grounds, and alleged that four Board members have "conflicts of interest" which render them ineligible to vote on the adoption of section 317(y). For example, at least two chiropractors claimed that BCE Chair Louis Newman, DC, should not vote on the matter because "there is a strong possibility that Dr. Newman is planning to sell his practice and leave the State of California" and that "he should not be voting on matters which affect the future of the chiropractic profession in California." Those same two chiropractors contended that Board members R. Lloyd Friesen, DC, and Lloyd Boland, DC, are ineligible to vote on the matter because of their affiliation with the California Chiropractic Association (CCA); the chiropractors allege

CRLR 244-45] In September 1992, EPIC filed a "supplemental petition for writ of mandate" in the same superior court proceeding in which the alternative writ had been previously issued and complied with. The "supplemental petition" was filed six months after the Board's decision to approve the THP, in violation of the 30-day limitation period for challenging a THP approval in PRC section 21080.5(g). Affirming the trial court, the First District rejected EPIC's attempt, finding that full compliance with the alternative writ divested the court of jurisdiction and, in any event, "[w]hether EPIC could file a 'supplemental petition' or was required to initiate a new proceeding, it had to file something within 30 days of the March 13, 1992 reapproval of the THP." As EPIC did neither, the court affirmed the dismissal of its petition.

Redwood Coast Watershed Alliance v. California State Board of Forestry, No. 932123 (San Francisco Superior Court), is still under submission. RCWA alleges that the Board and CDF's regulation of timber operations on private land violates certain provisions of CEQA, and that the THP process administered by CDF and the Board is not functionally equivalent to the environmental impact report process required by CEQA. [12:4 CRLR 214; 12:1 CRLR 176] As the Board has recently revamped its regulations to define the term "sustained yield" and provide for THP review in the context of that definition (*see* MAJOR PROJECTS), the court is waiting for the Board's implementation of those new rules.

FUTURE MEETINGS

May 3-4 in Riverside.
June 6-7 in Sacramento or Eureka.

