allowed to take up to five fish per day between April and November along a six-mile stretch of the river which is easily accessible; that stretch will be stocked with 18,000 half-pound fish during the fishing season. Southern Pacific—which has been arguing for months that the river has recovered sufficiently to support extensive stocking and fishing—criticized FGC's action as insufficient; some environmentalists and angling advocates criticized it as premature and unnecessarily threatening to native wild trout populations which are struggling to recover; and local business and tourism entrepreneurs welcomed it as some relief to the area's beleaguered economy.

At FGC's March meeting, Commission President Albert C. Taucher announced his resignation as FGC President; however, Taucher indicated he would remain a member of the Commission until his second six-year term expires on January 15, 1995. Commission Vice-President Frank Boren was chosen to succeed Taucher as FGC President, and Commissioner Gus Owen was elected as Vice-President.

FUTURE MEETINGS

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

Forest Products Industry: Keith Chambers, 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.

MAJOR PROJECTS

Board to Ease Protections for Northern Spotted Owl Habitat. Four years after it imposed stringent regulations protecting the old-growth forest habitat of the northern spotted owl (NSO), the Board—in conjunction with the federal government—has begun rulemaking proceedings to ease those protections.

On July 23, 1990, the U.S. Fish and Wildlife Service (USFWS) listed the NSO as threatened under the federal Endangered Species Act (ESA). As required by federal and state law, the Board immediately adopted regulations to prevent the take of the NSO due to CDF-permitted timber management activities on state and private lands in California. The Board is required to ensure that no take of NSO occurs due to the harvesting of the old-growth habitat of the NSO under a THP approved by CDF or the Board; USFWS regulations define the term "take" very broadly, to include any activity (or an attempt to engage in such activity) which harms or harasses the listed species or its habitat (although this definition has been called into question in a recent federal case—*see* LITIGATION). The Board's rules directly protect the NSO primarily by requiring biological surveys to detect the presence of the owl within the boundaries of a proposed THP; if the NSO is detected, timber harvesting is restricted. *[10:4 CRLR 157]* In addition, various other provisions of the Board's Forest Practice Rules provide protection for owl habitat and populations, including rules regarding watercourse and lake protection zones (WLPZ), cumulative effects assessment, the "sensitive species" listing process, and protection for wildlife "species of special concern."

In December 1993, the federal government announced its intent to develop special rules under section 4(d) of the ESA to deal with restrictions on timber harvesting on private and state lands in Washington, Oregon, and northern California. According to the Board, one of the goals of the special rules is to acknowledge California's efforts to protect the NSO. Under the proposal, USFWS proposes to lift the existing federal prohibitions against incidental take of the NSO in California. Timber harvest activities conducted in accordance with the Board's FPR would be freed from complying with separate federal procedures. The Board and other California agencies have submitted comments on USFWS' proposal, and the federal agency is in the process of finalizing its regulatory changes at this writing.

In preparation for these rule changes, the Board conducted two rulemaking proceedings throughout the spring and early summer in connection with the NSO.

• ***Three-Zone Rule for Protection of the NSO.*** On March 18, the Board published notice of its intent 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), Title 14 of the CCR, its existing NSO protection regulations, and adopt new section 919.8, Title 14 of the CCR. These proposed regulatory changes are based on suggestions made by the Resources Agency and the Department of Fish and Game (DFG) in a document entitled *Proposal for Northern Spotted Owl Habitat Conservation Rules for Private Forestlands in California*, which was discussed at the Board's March 2 meeting.

Under the Board's current NSO rules, every THP, nonindustrial timber management plan (NTMP), conversion permit, spotted owl resource plan, or major amendment thereof must contain protec-

tion 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. Zone One is a high-owl-density, high-potential habitat, mostly private ownership coastal forest (essentially the California Coastal Province). Zone Two is high-owl-density, high-potential habitat, mostly public ownership mixed evergreen forest (essentially the California Klamath Province). Zone Three is low-owl-density, low-potential habitat, mixed ownership forest (essentially the California Cascades Province).

These regulatory changes are proposed to protect NSO habitat and general wildlife habitat elements consistent with the terrestrial distribution pattern of owls and the occurrence of high-quality habitat potential as described by DFG and summarized above in Zones One, Two, and Three. In Zone One, 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 other words, the existing rules' emphasis on individual take determinations and pre-harvest surveys is replaced with an emphasis on implementation of habitat conservation strategies over ownership-wide or planning watershed areas. According to the Board, Zone One is regulated in this manner with detailed standards and guidelines because it is an area of high-owl-density, high-potential habitat, and mostly private ownership zones.

In Zone Two, relief from the current NSO regulations is recommended, as this is a zone of large amounts of public lands protection and high owl densities. The Board believes this zone does not require the same functional habitat maintenance approach as Zone One. In Zone Three, 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. Similarly, habitat maintenance is not required here given low owl density and low-potential habitat. But, since the ownership is mixed and private landowners may encounter some owl nesting sites, it is necessary to maintain the current rules to prevent incidental take harm to nesting pairs.

In all zones, all other FPRs—including those which indirectly confer NSO protection (*e.g.*, rules regarding sensitive species, WLPZs, and cumulative assessment) —continue to remain in effect. The Board's proposal would also amend other existing rules which indirectly protect the NSO to incorporate the functional wildlife habitat definition into planning and implementation of the rules. According to the Board, this is designed to give better guidance for THP development and analysis. The Board's WLPZ rules are strengthened to further provide useful habitat area and its snag retention rule requires better justification for snag removal.

At its April 6 meeting, the Board held an initial public hearing on these proposed regulatory changes. DFG representatives expressed concern about the costs these rule changes would impose on the small landowner, and the California Foresters Association (CFA) noted problems with the habitat conservation measures required in Zone One. The Board directed staff to convene a workshop on the rules for April 29, and continued the public hearing to its May meeting.

On May 4, the Board continued the public hearing on the proposed NSO regulatory changes. Again, CFA representative Gil Murray testified that the Zone One requirements will be expensive to coastal private landowners; he expressed concern that the Board is expanding the NSO rules to protect general wildlife concerns rather than maintaining a focus on the owl. Following limited public testimony, the Board continued the public hearing to its June meeting. Should the Board decide to adopt these regulatory changes, their implementation would be contingent upon USFWS' lifting of the federal incidental take requirements through successful amendment to its rules under the federal ESA.

• ***Biologist Consultation Contracts.*** At its February 2 meeting, the Board held a public hearing on its proposal to amend 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 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. Since implementation of these rules, CDF's policy has been to contract, where necessary, with outside biologists to fulfill the consultation requirement. These biologists are "state-employed" and paid for by CDF. This policy results from the need to ensure a sufficient quantity of biologists to provide consultation, and the fact that there is an insufficient number of DFG and CDF biologists to ensure availability for consultation on all THPs requiring their services. Recently, due to statewide budget constraints, it is increasingly cost-prohibitive for CDF to continue to pay for outside consultation. CDF is seeking the flexibility to designate independent biological consultants, under the supervision of DFG and USFWS, where state-employed biologists are unavailable.

The regulatory changes considered on February 2 provide this flexibility by permitting the CDF Director to consult with a "designated biologist" who "shall be employed by the State or be specially designated by the Department as an independent consultant." This means the Director may utilize the expertise of either a state-employed biologist or one specifically designated as an independent consultant. THP submitters may, as needed, pay for consultation services by a state-designated independent biologist (landowners may not always have to pay). Following the public hearing on February 2, the Board unanimously adopted the changes as proposed.

However, the Resources Agency subsequently expressed concern about the regulatory changes. Thus, on April 18, the Board released modified language of the changes for a 15-day comment period; at its May 4 meeting, the Board held a public hearing on the revised language. At the May 4 meeting, the Board again revised the language of the proposed regulatory changes, and released it for another 15-day comment period on May 16. The May 16 amended language implements 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.

At this writing, the 15-day comment period is scheduled to end on June 7, and the Board is scheduled to consider this revised language at its June 8 meeting in Eureka.

Classification of Coho Salmon as a Sensitive Species. On April 7, the Fish and Game Commission (FGC) listed the coho salmon as a candidate for threatened species status under the California Endangered Species Act (CESA); the listing designates the species as a candidate for threatened status in all creeks south of San Francisco. (*See* agency report on FGC for related discussion.) Simultaneously, 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, which would entitle the species to additional protections from the impacts of timber harvesting in these areas.

In its petition, DFG listed the following detailed reasons for its recommendation: (1) 31%–86% of streams in north coast counties no longer support their coho populations; (2) DFG and most fishery experts believe coho populations have experienced a dramatic and significant decline in the past 40 years; (3) long-term decline of coho salmon populations parallels the deterioration of freshwater habitat caused by human disturbances; logging conducted pursuant to the FPR induced damage to many coastal streams used by coho salmon and many of them have not fully recovered; this has been exacerbated by the construction of dams and competition from hatchery stocks; (4) oceanic and climatic conditions have been highly unfavorable for coho salmon; (5) ocean harvesting may have contributed to the continued decline and retarded recovery of coho salmon; and (6) critical habitat elements for coho salmon occur in coastal streams, larger river systems, and their tributaries in heavily timbered watersheds; these habitat elements are susceptible to the effects of timber harvesting and have been adversely impacted in most streams historically supporting coho populations.

Thus, on April 22, the Board published notice of its intent to amend section 919.12 (939.12, 959.12) to add the coho salmon to its list of sensitive species, and to discuss a range of alternatives for coho salmon mitigation measures which the Board will consider if it decides to list the species as sensitive. In its notice of proposed rulemaking, the Board listed three general mitigation alternatives which it may consider should it list the coho salmon as sensitive, including the following: (1) DFG consultation—this approach, which was recommended by DFG in its petition, would require the Board to consult with DFG on the proper application of the FPR with respect to timber harvesting restrictions in coho salmon areas; (2) a "decision matrix development" process to develop an expert-driven systematic decisionmaking procedure that links coho salmon habitat relationships from literature and professional knowledge; the intent is to provide a science-based, flexible strategy for linking local conditions and management proposals with appropriate habitat protection and mitigation measures; and (3) the development of fixed habitat protection standards, which would involve identifying specific management standards that are uniformly applied, usually over large areas.

At this writing, the Board is scheduled to hold a public hearing on its proposal to list the coho salmon as a sensitive species on June 8.

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*:

• ***Silvicultural Methods with a Sustained Yield Objective.*** On January 7, OAL finally approved the Board's October 1993 adoption of sections 1091.1–1091.14 and amendments to sections 895.1–953.11 (nonconsecutive), Title 14 of the CCR, which set new standards pertaining to evenage and unevenage silviculture prescriptions, establish a definition of the goal of maximum sustained production of high-quality timber products (MSP), and set up a regulatory procedure for optional filing by timberland owners of long-term sustained yield plans (SYPs). *[14:1 CRLR 151; 13:4 CRLR 184; 13:1 CRLR 122–23]* As approved by OAL, the new rules—which are known as the "October package"—were to become effective on March 1.

At its January meeting, the Board held a public hearing to consider proposed amendments to the "October package." Among other things, the amendments modify the provisions describing the regeneration methods which are to follow evenage ("clearcut") and unevenage timber harvesting, and amend the key sections which define MSP. Following the public hearing, the Board adopted the amendments.

At the Board's February 2 meeting, Executive Officer Dean Cromwell reported that the "January package" of amendments to the "October package" had been submitted to OAL for review and approval. However, Resources Agency representative Terry Gorton (who formerly chaired the Board) asked the Board to withdraw the "January package" from OAL and further amend it. She also requested that the Board adopt emergency amendments to delay the effective date of the new silvicultural rules until May 1. On this issue, environmentalists testified in opposition to any delay in the effective date of the new rules, noting that the Board has already spent three years trying to adopt these rules. CDF and industry members testified in support of the delay, noting the confusion which will result if the "October package" becomes effective on March 1 and the "January package" then amends it several months later. Following a hearing, the Board agreed to delay the effective date of the silvicultural rules until May 1; OAL approved the regulatory change on February 17.

At its March 1 hearing, the Board held a public hearing on the revisions to the "January package" suggested by Gorton, and adopted them. Among other things, these amendments completely rewrite previous section 913.10 (933.10, 953.10), which previously defined MSP but now sets goals in the areas of restoration, enhancement, and maintenance of "timberland productivity" and encourages it "where feasible," and adds new section 913.11 (933.11, 953.11) to define the ways in which MSP will be deemed to have been achieved in a THP, SYP, or NTMP. OAL approved these amendments on May 16, and they became effective on that day.

At least three lawsuits challenging the adequacy of these rules in satisfying the Board's statutory obligation under the FPA are pending in San Francisco Superior Court (*see* LITIGATION).

• ***Sensitive Watersheds.*** On January 7, OAL also approved the Board's 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, which create a public process to assess watersheds and identify and classify 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. *[14:1 CRLR 151; 13:4 CRLR 184; 13:1 CRLR 122–23]* These rules became effective on March 1.

• ***Old-Growth Forest, Late-Seral Stage Forest, and Wildlife Protection Regulations.*** On January 7, OAL approved the Board's adoption of section 919.16(a) (939.16(a), 959.16(a)), and its

amendment of section 895.1, Title 14 of the CCR, which establish additional reporting and mitigation requirements for timber harvesting in late succession forest stands and provide protection for wildlife residing in these stands. *[14:1 CRLR 151; 13:4 CRLR 184; 13:1 CRLR 122–23]* These rules became effective on March 1.

• ***"Substantial Liabilities" Exemption to Application of New Regulations***. During last fall's 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 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 application 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," and defines both terms. *[14:1 CRLR 151]*

The Board originally scheduled a hearing on this proposal for its December 1993 meeting, but postponed it until January 5 and then postponed it again until March 2. On March 2, the Board decided to wait until its much-amended silvicultural rules have been finalized (*see above*) before taking action on regulations containing exemptions from those rules, and postponed all action until July.

• ***Board Modifies Proposed "Exempt Conversion" Rules***. At its March, April, and May meetings, the Board held public hearings on its proposed amendments to sections 1038 and 1104.1, Title 14 of the CCR, which have been the subject of subcommittee work following three revisions and four public hearings last fall. 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. *[14:1 CRLR 151–52; 13:4 CRLR 184–85]*

At both its April and May hearings, the Board modified the language of the proposed rules. As modified in May, the Board's regulatory package would now amend sections 895.1 and 1104.1. Revised section 1104.1 would establish a "conversion exemption" (meaning that the conversion of timberland to non-timber uses is exempt from the conversion permit and THP requirements) for less than three acres in one contiguous ownership, provided that the timber operations conducted pursuant to the exemption comply with all other applicable provisions of the FPA, the FPR, and currently effective provisions of county general plans, zoning ordinances, and any implementing ordinances. Further, this conversion exemption may only be used once per contiguous land ownership.

To effectuate the exempt conversion, a RPF must submit a Notice of Conversion Exemption Timber Operations (NOCETO) which contains specified information to CDF; among other things, the NOCETO must state that this is a one-time conversion to non-timberland use and that there is *bona fide* intent to convert the property, and must specify the new non-timberland use after conversion. All timber operations under an exempt conversion must be completed within one year of acceptance by the CDF Director, and all conversion activities must be complete within two years of acceptance by the CDF Director. The RPF must visit the site and flag the boundary of the conversion exemption timber operation, any WLPZs, and equipment limitation zones. The revised language also provides for notice to neighbors of the property to be converted, and prohibits timber operations under an exempt conversion during the winter period, within a WLPZ (unless specifically approved by local permit), on sites containing rare, threatened, or endangered species or "species of special concern," and on significant historical or archeological sites. The Board's revised amendments to section 895.1 clarify the definitions of diseased and dying trees which may be removed under section 1038(b).

At this writing, the Board is scheduled to consider this revised language at its June meeting.

• ***Certified Rangeland Manager Specialty***. At its January 5 meeting, the Board held a public hearing on the December 15, 1993 modified language of new section 1651 and amendments to sections 1600, 1602, and 1650, Title 14 of the CCR, which 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). *[14:1 CRLR 152; 13:4 CRLR 185; 13:2&3 CRLR 195]* Following the hearing, the Board adopted the modified language; OAL approved the regulatory revisions on April 28.

LEGISLATION

SB 1667 (Mello). Under the FPA, no person may conduct timber operations on timberland unless the person has submitted a THP to CDF and received approval of that plan from the CDF Director. The Act authorizes the board of supervisors of certain counties, not later than ten days after approval of a THP by the Director, to appeal that approval to the Board of Forestry. The Act requires the Board to grant a hearing if it makes a determination that the appeal raises substantial issues with respect to the environment or public safety and to hold a public hearing within thirty days of filing of the appeal, or a longer period mutually agreed upon by the Board, the county, and the THP submitter. The Board is authorized, by regulation, to delegate that determination to the chairperson of the Board. As amended April 19, this bill would instead require that the Board hold a public hearing on the appeal granted pursuant to those provisions at its next regularly scheduled meeting, or at a subsequent meeting that is mutually agreed upon by the Board, the county, and the THP submitter. The bill would delete the authority to delegate the determination to the chairperson of the Board. *[A. NatRes]*

SB 1776 (Dills), as amended April 14, would require the Secretary of the Resources Agency to negotiate with federal agencies, local agencies, or private persons to acquire, and to develop appropriate management strategies for the Headwaters Forest, and require, on or before January 1, 1996, the Secretary to report to the Governor and the legislature on efforts to acquire the Headwaters Forest and on those arrangements and strategies. The

bill would require the Board, on or before January 1, 1997 and in conjunction with FGC, to submit a report to the Governor and the legislature on the implementation of the late successional forest rules of the Board (*see* MAJOR PROJECTS). The bill would be repealed on January 1, 1998. *[S. Appr]*

The following is a status update on bills reported in detail in CRLR Vol. 14, No. 1 (Winter 1994) at pages 152–53:

SB 122 (McCorquodale), as amended July 12, 1993, 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, 1993, 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. 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, 1993, 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). Existing law requires CDF to perform various fire protection duties. An item of the Budget Act of 1993 appropriates $20 million from the general fund to CDF for its support and makes those funds specifically available for emergency fire suppression and detection costs and related emergency revegetation costs. As amended January 5, this bill would appropriate $33 million from the general fund to CDF for those specified purposes for expenditure in the 1993–94 fiscal year in augmentation of that item. The bill would authorize the Director of Finance to withhold authorization for expenditure until preliminary estimates of potential deficiencies are verified or reimbursed by the federal emergency management agency. *[S. NR&W]*

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, 1993, 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) 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]*

SB 1062 (Thompson). The FPA sets forth resource conservation standards for timber operations that define minimum acceptable timber stocking; requires the Board to conduct investigations of soil characteristics and erosion rates and of the instruments, techniques, and procedures available for use in monitoring soil loss, and publish the information obtained from the investigations by January 1, 1976; and requires the Board, by May 1, 1985, to adopt regulations regarding notice of intent to harvest timber. As amended March 24, this bill would delete obsolete provisions with regard to stocking; delete the dates by which the results of the investigations were to be published and the regulations were to be adopted; and make various technical changes in those provisions. *[A. NatRes]*

The following bills died in committee: **SB 824 (Hayden)**, which would have—among other things—required the Board to adopt any THP mitigation measures that are proposed by DFG or a regional water quality control board unless CDF demonstrates that its own proposed mitigation measures would result in greater protection for water and wildlife resources; and **SB 891 (Leslie)**, which would have authorized a THP submitter to address issues of sustained timber production and wildlife and watershed impacts by preparing a SYP for a management unit.

LITIGATION

Following OAL's January 7 approval of the Board's silvicultural/MSP rules (*see* MAJOR PROJECTS), the Board and the timber industry submitted a proposed order dismissing one of plaintiff's major claims in ***Redwood Coast Watershed Alliance v. California State Board of Forestry***, No. 932123 (San Francisco Superior Court) to Judge Stuart Pollak. In that case filed in May 1991, RCWA—through environmental attorney Sharon Duggan—alleged that the Board and CDF have violated PRC sections 4512, 4513, and 4516 because they had adopted no meaningful minimum silvicultural standards, no sustained yield rules, and no standards for industrial lands since the passage of the FPA in 1973. RCWA also alleged that the THP process administered by CDF and the Board is not functionally equivalent to the environmental impact report process required by the California Environmental Quality Act (CEQA). *[12:4 CRLR 214; 12:1 CRLR 176]* The filing and pendency of this lawsuit—coupled with threatened ballot initiatives by environmental groups to severely restrict timbercutting and legislative moves to overhaul the Board and statutorily set timbercutting standards—prompted the Wilson administration to order the Board, in October 1991, to adopt regulations implementing the Forest Practice Act. *[11:4 CRLR 188–93; 11:3 CRLR 176]* Early on in the case, Judge Pollak separated the two issues and stayed them pending the Board's adoption of regulations which might moot the case.

Because OAL approved the Board's regulations in January, Judge Pollak signed the

order dismissing RCWA's challenge to the absence of timber harvesting standards on February 14. However, one week later, he set aside the dismissal—partly because defendants' counsel had not served plaintiff's counsel with the proposed order to give plaintiff an opportunity to object, and also because the Board immediately commenced rulemaking proceedings to amend the newly adopted silvicultural/MSP regulations (*see* MAJOR PROJECTS). Thus, both issues presented in this important lawsuit are still alive.

RCWA is also participating in two pending cases challenging the adequacy of the Board's new regulations. In April 1993, RCWA filed ***Sierra Club and Redwood Coast Watershed Alliance v. California State Board of Forestry***, No. 951041 (San Francisco Superior Court), a petition for writ of mandate challenging the adequacy of the Board's original sets of rules as they were evolving in 1993. ***Redwood Coast Watershed Alliance v. Board of Forestry***, No. 960626 (San Francisco Superior Court), is RCWA's new petition for writ of mandate challenging the Board's amended silvicultural/MSP regulations adopted in March 1994 and approved by OAL on May 16 (*see* MAJOR PROJECTS). These two cases will probably be consolidated and set for hearing during the fall.

In ***Public Resources Protection Ass'n of California v. California Dep't of Forestry and Fire Protection (Louisiana-Pacific Corp., Real Party in Interest)***, 7 Cal. 4th 111 (Jan. 31, 1994), the California Supreme Court held that the First District Court of Appeal improperly stayed timber operations on a THP approved in 1988 because the THP failed to comply with emergency regulations adopted by the Board two years later to protect the federally-listed northern spotted owl.

In September 1988, Louisiana-Pacific Corporation (LP) submitted a THP to CDF to log 437 acres of second-growth redwood in Mendocino County; CDF approved the THP on October 29, 1988. Nine days later, the Public Resources Protection Association (PuRePAC) and several other environmental organizations filed a petition for writ of mandate setting aside CDF's approval; the trial court denied relief in September 1989. PuRePAC timely appealed and also filed a petition for writ of supersedeas seeking a stay of timber operations pending resolution of the appeal; the First District granted the petition and stayed timber operations under the THP.

On July 23, 1990, while this case was pending in the First District, the Board of Forestry adopted emergency rules to protect the northern spotted owl after the federal government listed the owl as threatened under the Endangered Species Act. *[10:4 CRLR 157]* The rules generally require the CDF Director to disapprove a THP if implementation of the plan would result in the taking of an individual northern spotted owl. Among other things, section 919.1 of the emergency rules provided that "*[e]very timber harvesting plan* located in the range of the northern spotted owl shall contain...[specified] information...[which] shall be used to determine whether or not the proposed activity would result in the 'take' of an individual northern spotted owl" (emphasis added). Those effective period of those rules expired on November 21, 1990, on which date the Board adopted a new set of emergency rules to protect the owl; in the second set of rules, the Board changed the language of section 919.1 to require the specified information from "*[e]very proposed timber harvesting plan*" (emphasis added). The second set of emergency rules expired on March 25, 1991, on which date the Board adopted a third set of emergency rules to protect the owl; in the third set of rules, the again Board changed the language of section 919.1 to require the specified information from "*[e]very proposed timber operation*" (emphasis added). The third set of emergency rules was made permanent on May 28, 1991.

On November 19, 1991, after briefing in this case had been completed, the First District sought letter briefs from the parties on the issue whether the Board's regulations to protect the northern spotted owl apply to LP's THP. In particular, the court noted PRC section 4583, which states that THPs must conform to the Board's rules in effect at the time the THP becomes effective, but that (with one specified exception) "all timber operations shall conform to any changes or modifications of [the Board's] standards and rules made thereafter unless prior to the adoption of such changes or modifications, substantial liabilities for timber operations have been incurred in good faith and in reliance upon the standards in effect at the time the plan became effective and the adherence to such new rules or modifications would cause unreasonable additional expense to the owner or operator." The First District concluded that the owl rules do apply to the THP, reversed the trial court's order denying PuRePAC's petition for writ of mandate, and remanded the case to the trial court with instructions to set aside CDF's approval of the THP until LP amends it to comply with the rules or demonstrates, under PRC section 4583, that it has incurred "substantial liabilities" and that compliance with the owl rules would cause "unreasonable additional expense."

On appeal, the California Supreme Court agreed that LP's THP must conform to the Board's third set of owl rules as promulgated on March 28, 1991 and made permanent on May 28, 1991. Section 919.1 of those rules required "[e]very proposed timber operation" in the range of the northern spotted owl to follow one of seven designated procedures designed for the protection of the owl. The Supreme Court found that, because LP had not "substantially" begun its timber operations on the THP by March 25, 1991, its timber operations were still "proposed" and thus subject to the requirements of section 919.1. However, the court stated that this conclusion does not require CDF to vacate its approval of the THP. Instead, LP must be permitted to select one of the seven alternatives, determine whether its selected alternative requires a formal plan amendment which must be approved by the CDF Director or simply written notice to the Director, and act accordingly. Thus, the Supreme Court vacated the First District's judgment and its stay of timber operations.

On March 18, the California Supreme Court denied Pacific Lumber Company's (PALCO) petition for review but depublished the First District Court of Appeal's decision 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). In that case, the First District affirmed the trial courts' invalidation of two THPs in a consolidated action, and rejected as not ripe for review PALCO's 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. *[14:1 CRLR 153–54]*

In a departure from what was thought to be settled law, the U.S. Court of Appeals for the District of Columbia Circuit issued a controversial 2–1 ruling in ***Sweet Home Chapter of Communities for a Great Oregon v. Babbitt***, 17 F.3d 1463 (Mar. 11, 1994), in which it found that significant habitat degradation is not among the activities prohibited by ESA. The decision was hailed by the timber industry, which is fighting for access to the old-growth forest habitat of the NSO in the Pacific Northwest.

The ESA makes it a crime for any person to "take" a species listed as endangered under the Act; and defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or col-

lect, or to attempt to engage in any such conduct." In 50 C.F.R. Part 17.3, USFWS further defined the term "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." In a lawsuit filed by a coalition of Oregon citizens and timber companies, the D.C. Circuit invalidated that portion of section 17.3, finding that the broad term "harm" may not be administratively defined to include habitat modification because of its inclusion with nine other verbs which all "contemplate the perpetrator's direct application of force against the animal taken." In so ruling, the D.C. Circuit reversed its own opinion issued less than one year earlier, 1 F.3d 1 (D.C. Cir. 1993), disagreed with the Ninth Circuit's published decision in *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), and rejected USFWS' arguments that its definition of "harm" is authorized by the ESA as originally enacted in 1973 and was ratified by Congress in its 1982 amendments to the Act.

In dissent, Chief Judge Abner Mikva chastised the majority for failing to apply the correct standard of review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), erroneously placing the burden of proving "reasonableness" on the agency, and "substitut[ing] its own favored reading of the Endangered Species Act for that of the agency." USFWS officials in California note that *Palila* is still applicable here; in mid-April, the Clinton administration announced plans to appeal the ruling.

RECENT MEETINGS

At its January 4 meeting, the Board held a joint planning session with four of the five members of FGC. The group discussed issues of mutual jurisdiction and interest, and decided to work together on two such projects—the coho salmon petition (*see above*) and issues related to wildfire and endangered species. Members of both boards agreed that communication between the two agencies is vital and directed staff to suggest a format for a continuing relationship between the Board and FGC.

At its February 2 meeting, the Board welcomed new members Nicole (Nikki) Clay and Keith Chambers, and honored outgoing Board members Franklin L. "Woody" Barnes and Joe Russ.

At its January, February, and March meetings, the Board noted and discussed an ongoing investigation into the THP process being conducted by the Little Hoover Commission (LHC). At this writing, LHC is expected to release a major report on its findings in June.

At its April meeting, the Board adopted a policy which sets forth procedures it will use in responding to requests for documents under the Public Records Act, Government Code section 6250 *et seq.* These procedures primarily focus on the protection of proprietary information pursuant to section 1091.4.5(b), Title 14 of the CCR, and set forth guidelines which THP submitters should follow when they submit THPs containing trade secrets. The Act requires specified governmental agencies to adopt formal policies for responding to PRA requests. Although the Board is exempt from this requirement, it is not exempt from the PRA, and staff sought Board approval of its existing procedures in this area.

FUTURE MEETINGS

June 7–8 in Eureka.
July 5–7 in Redding.
August 2–3 in Willits.

INDEPENDENTS

BOARD OF CHIROPRACTIC EXAMINERS

Executive Director:
Vivian R. Davis
(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 April, Governor Wilson appointed Sharon Ufberg, DC, of Emeryville and Jeffrey Steinhardt, DC, of San Diego to the Board; the new members replace R. Lloyd Friesen, DC, and Deborah Pate, DC, whose terms expired in February.

MAJOR PROJECTS

OAL Disapproves BCE's Unprofessional Conduct Regulation. In September 1993, BCE adopted—on an emergency basis—section 317(y), Title 16 of the CCR, which stated 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 provided 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. BCE adopted the rule at the suggestion of Assemblymember Burt Margolin, who was concerned about a series of advertisements and a news article