



REGULATORY AGENCY ACTION

decide whether to pursue the requested amendments on February 9.

LEGISLATION:

SB 1216 (Rosenthal), as amended May 23, would enact the Energy Security and Clean Fuels Act of 1992, which would authorize, for purposes of financing a specified energy security and clean fuels program, the issuance of bonds in the amount of \$100 million. This two-year bill is pending in the Senate Appropriations Committee.

AB 920 (Hayden), as amended September 11, would require CEC, if funds are appropriated, to develop and deliver to the appropriate policy committees of the legislature by May 1, 1994, a plan to reduce greenhouse gas emissions. This two-year bill is pending in the Senate Appropriations Committee.

AB 1064 (Sher), as amended July 1, would require CEC to include in its biennial report recommendations relative to practicable and cost-effective conservation and energy efficiency improvements for investor-owned and publicly-owned utilities. It would also require CEC, in conjunction with the PUC and investor-owned and municipal utilities, to establish a comprehensive demand-side data monitoring and evaluation system to provide detailed and reliable statistics on actual energy savings from all classes of demand-side management programs. This two-year bill is pending in the Senate Committee on Energy and Public Utilities.

AB 1586 (Moore), as amended May 30, would require CEC, on or before January 1, 1993, to certify home energy conservation rating systems and procedures that calculate energy and utility bill savings to be expected from conservation measures. This two-year bill is pending in the Senate Committee on Energy and Public Utilities.

SB 1203 (Committee on Energy and Public Utilities) would abolish CEC and create the California Energy Resources Board, and authorize the Board to succeed to all powers, authority, responsibilities, and programs of CEC. This two-year bill is pending in the Senate Committee on Energy and Public Utilities.

SB 1204 (Committee on Energy and Public Utilities) would return, effective January 1, 1993, CEC's authority to certify new powerplant sites and facilities to cities and counties for projects utilizing non-nuclear energy. Cities and counties would be authorized to refer an application for such certification to CEC. This two-year bill is pending in the Senate Committee on Energy and Public Utilities.

SB 1205 (Committee on Energy and Public Utilities), as amended September 13, would require CEC, on or before December 31, 1994, to determine whether any appliances that are currently not subject to a CEC standard should be regulated and, for any such appliance, to adopt standards in accordance with prescribed procedures. This two-year bill is pending in the Senate inactive file.

SB 1207 (Committee on Energy and Public Utilities) would amend existing law which requires CEC to adopt, by June 30, 1992, home energy rating and labeling guidelines that may be used by homeowners to make cost-effective decisions regarding the energy efficiency of their homes. The bill would require CEC to adopt a single, consistent method for rating the energy efficiency of both new and existing homes by January 1, 1993. This two-year bill is pending in the Assembly Natural Resources Committee.

SB 1208 (Committee on Energy and Public Utilities), as amended September 13, would require CEC, as part of its biennial report, to establish priority technologies for research, development, and demonstration; establish specific performance goals for these priority technologies; and develop research, development, and demonstration programs which pursue these technologies. This two-year bill is pending on the Assembly floor.

AB 2130 (Brown), as amended May 7, would direct CEC to prescribe, by regulation, standards for minimum levels of operating efficiency, maximum energy consumption, or efficiency design requirements, based on a reasonable use pattern, for appliances whose use, as determined by CEC, requires a significant amount of energy on a statewide basis; and require CEC, by January 1, 1993, to adopt energy conservation measures that are cost-effective and feasible for privately-owned residential buildings. This two-year bill is pending in the Assembly Ways and Means Committee.

LITIGATION:

In *CEC v. Department of Water and Power, City of Los Angeles*, No. B-055524, CEC sought review of a Los Angeles County Superior Court decision that the Los Angeles Department of Water and Power's Harbor Generating Project is not subject to CEC's jurisdiction. The superior court held the Repowering Project is not subject to CEC's jurisdiction as it cannot be considered a "modification of an existing facility" under Public Resources Code section

25123 or a "construction of any facility" under section 25110. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 159; Vol. 11, No. 1 (Winter 1991) p. 140; and Vol. 10, No. 4 (Fall 1990) pp. 167-68 for detailed background information on this case.) On December 31, the Second District Court of Appeal affirmed the trial court's holding, finding that CEC has neither construction nor modification authority over the Repowering Project and CEC improperly sought to assert its jurisdiction over the Project. CEC filed a petition for rehearing with the appellate court; the court was expected to rule on it by January 30. If its petition is denied, CEC is expected to file a petition for review with the California Supreme Court.

FUTURE MEETINGS:

CEC meets every other Wednesday in Sacramento.

DEPARTMENT OF FISH AND GAME

Director: *Boyd H. Gibbons*
(916) 653-7664

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

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

The Fish and Game Commission (FGC), created in section 20 of Article IV of the California Constitution, is the policymaking board of DFG. The five-member body promulgates policies and regulations consistent with the powers and obligations conferred by state legislation in Fish and Game Code section 101 *et seq.* These regulations concern the taking and possession of birds, mammals, amphibians, reptiles, and fish. Each member is appointed to a six-year term. FGC's regulations are codified in Division 1, Title 14 of the California Code of Regulations (CCR).



As part of the management of wild-
life resources, DFG maintains fish
hatcheries for recreational fishing, sus-
tains game and waterfowl populations,
and protects land and water habitats.
DFG manages 506,062 acres of land,
5,000 lakes and reservoirs, 30,000 miles
of streams and rivers, and 1,300 miles
of coastline. Over 648 species and sub-
species of birds and mammals and 175
species and subspecies of fish, amphib-
ians, and reptiles are under DFG's
protection.

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

DFG contains an independent Wild-
life Conservation Board which has sep-
arate funding and authority. Only some
of its activities relate to the Department.
It is primarily concerned with the cre-
ation of recreation areas in order to re-
store, protect and preserve wildlife.

On December 11, Governor Wilson
appointed Boyd H. Gibbons as DFG's
new director. Gibbons is an attorney
and was formerly senior editor of
National Geographic magazine. Addi-
tionally, Gibbons served as senior re-
search associate of Resources for the
Future, a nonprofit agency committed
to research of natural resources, and
was Secretary of the Council on Envi-
ronmental Quality during the Nixon ad-
ministration. Gibbons will receive
\$92,052 annually as director. His tenure
begins on January 1, subject to Senate
confirmation.

Gibbons replaces Pete Bontadelli, a
Deukmejian appointee. Governor Wil-
son appointed Bontadelli to head the
Office of Oil Spill Prevention and Re-
sponse within DFG.

On December 3, Governor Wilson
appointed Gus Owen to fill the last va-
cancy on the five-member FGC. Owen,
58, has an extensive background in land
development and acquisition. He is a
founder of Nelow Development Co.,
which built 1,500 apartments, and owns
Owen Properties, Inc., a developer of
office buildings and industrial parks.
Owen is known for his extensive Re-
publican political affiliations.

MAJOR PROJECTS:

**Commission Lists Marbled Murrelet
as Endangered.** On December 6, FGC

held a public hearing on DFG's pro-
posal to amend section 670.5, Title 14
of the CCR, to list the marbled murrelet
as an endangered species under the Cal-
ifornia Endangered Species Act (CESA).
(See CRLR Vol. 11, No. 4 (Fall 1991)
pp. 182 and 188 and Vol. 11, No. 3
(Summer 1991) pp. 171-72 for back-
ground information.) Employees and
supporters of Pacific Lumber Company
(PALCO), which claims to own land on
which one of three remaining Califor-
nia marbled murrelet populations exist,
filled the meeting. A number of wit-
nesses testified that the listing of the
marbled murrelet is unwarranted due to
the economic consequences of protec-
tion and new biological data. A PALCO
biologist stated that 23 marbled murrelet
nests have now been recorded, and ar-
gued that the murrelet is therefore not
endangered.

Commissioner Taucher attempted to
pass a motion to list, subject to a stipu-
lation that FGC could later reverse its
decision. The motion failed. Commis-
sioner Owen, who had been sworn in
the previous day, moved that the deci-
sion be postponed until FGC's Febru-
ary meeting. This motion also failed.
Finally, upon a motion by Commissioner
Boren, the marbled murrelet was listed
as an endangered species.

**Federal Government Acts on Delta
Smelt.** The Delta smelt, a two- to three-
inch fish that lives only in the Sacra-
mento-San Joaquin River Delta, has
been the subject of much study—and
waffling—by FGC since 1989. Since
designating the smelt a candidate for
listing as a threatened or endangered
species in August 1989, FGC has failed
to act. In August 1990, the Commis-
sion refused to list the smelt on grounds
of lack of information, and DFG has
been studying the situation since then.
(See CRLR Vol. 11, No. 1 (Winter 1991)
p. 126; Vol. 10, No. 4 (Fall 1990) p.
154; and Vol. 10, Nos. 2 & 3 (Spring/
Summer 1990) p. 1 for background
information.)

On September 27, the U.S. Fish and
Wildlife Service (USFWS) proposed the
listing of the Delta smelt as a threatened
species under the federal Endangered
Species Act. Federal officials cited data
showing that the number of smelt has
fallen to 280,000, a 90% reduction over
the past twenty years. Water interests
deny USFWS' low numbers by point-
ing to DFG's estimate of as many as
600,000 smelt. However, DFG's smelt
figure also reflects a 90% decline from
an earlier population of six million.

The Sacramento-San Joaquin River
Delta is the focal point of massive inte-
grated water channelling and storage

systems that provide water to more than
twenty million Californians and mil-
lions of acres of agriculture. Both the
federal Central Valley Project and the
State Water Project acquire their water
by diverting it from the Delta by means
of huge water pumps. These diversions
alter and diminish the fish's habitat and
"entrain" young smelt in reversed flows
of Delta and San Joaquin River waters,
carrying them upstream away from their
habitat and into water project intakes.
One estimate projects the smelt listing
could result in major water shortages
costing the state economy \$12 billion.
However, under both the federal and
state endangered species acts, only bio-
logical—not economic—factors may be
considered. Ecologists consider the
Delta smelt an "indicator" species whose
true significance goes far beyond its
individual existence. The decline of this
single species may represent the dimi-
nishing ecological health of the entire
Delta system.

The USFWS proposal triggers a one-
year period of consideration before the
final decision is made. After notice is
published in the *Federal Register*, the
public will be afforded a 120-day pe-
riod for comment.

**Salmon Population Trends in Sacra-
mento River.** At FGC's December 6
meeting in Sacramento, Redding resi-
dent Shel Meyer presented testimony
and data regarding the plummeting
population of all four runs of salmon
(fall, late fall, winter, and spring) in the
Sacramento River. The total salmon
population is now estimated at 40,000-
50,000, down from over 300,000 in
1969. Meyer estimated that there are
15,000 fewer fish this year than last
year, and that there will be 10,000 fewer
fish in the 1992 season.

Meyer has previously requested that
measures be taken to restrict ocean fish-
ing of salmon. The Pacific Fishery Man-
agement Council, which has federal ju-
risdiction over the ocean fishery, asserted
in a November 6 reply to Meyer that the
1991 season was modified in order to
avoid jeopardizing salmon survival.

After twenty minutes of discussion,
FGC concluded by requesting a
progress report from DFG on its ef-
forts to help the salmon. (See *infra*
LITIGATION for related discussion;
see also CRLR Vol. 11, No. 4 (Fall
1991) p. 182 for DFG's 1991 annual
report on the endangered winter-run
chinook salmon.)

DFG Closes 1991 Black Bear Hunt.
On December 23, DFG announced the
closure of the 1991 black bear hunting
season. Under section 365, Title 14 of
the CCR, the black bear hunt ends when



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1,250 bears have been taken. DFG monitors black bear take by tabulating the number of bears reported by successful hunters when bear hunting tags are redeemed. Each year, DFG issues no more than 15,000 tags pursuant to section 367, Title 14 of the CCR. However, FGC adopted maximum harvest limits to prevent excessive taking of black bears. As a result of the quota, the 1991 black bear hunting season ended six days prior to the end of the scheduled general hunting season.

DFG's "Vision for the Future." On November 13, DFG released its draft document called *A Vision for the Future*. Spurred by a January 1990 Little Hoover Commission report which was harshly critical of DFG/FGC (see CRLR Vol. 10, No. 1 (Winter 1990) pp. 38-41 for background information), and at the request of then-Director Pete Bontadelli, DFG created an Organization Committee in October 1990 to outline the direction and future of DFG.

First, the Committee concluded that DFG requires a more effective system for anticipating and responding to change if it is to carry out its mission. The recommended remedy is adoption of a comprehensive, formal planning system, to include both strategic (long-range) and operational (short-range) planning.

Somewhat more concretely, the Committee outlined vision and mission statements. The vision statement asserts that DFG seeks to be proactive, to base decisions on biological data within an ecosystem, and to maintain both external and internal free-flowing communication. DFG's articulated mission is to manage California's plant and wildlife resources and their habitat for their intrinsic ecological values and for their use and enjoyment by the public.

Upon recommendation of the Committee, the Director appointed two additional committees, the Strategic Planning Committee and the Vision Implementation Committee. The Strategic Planning Committee was to have issued DFG's first strategic plan by November 1991; at this writing, the plan has not surfaced. The Vision Implementation Committee is to serve as the "nuts and bolts" committee offering guidance to Department employees through the next decade. The Committee further recommended a structural reorganization of the Department once a strategic plan is drafted.

Other Committee recommendations include the following:

- implement a comprehensive management system to develop strategic and operational plans for DFG programs to

foster proactivity in meeting the needs of wildlife resources and those who enjoy them;

- establish a task force to examine alternative sources of funding, spending priorities, and needs as they relate to the strategic plan;

- examine internal verbal and written communication processes to ascertain problems and necessary solutions;

- with the aid of a professional consultant, develop an external communication plan to identify public support groups and improve public relations communications;

- develop and implement species plans and land and aquatic management plans, and prioritize these activities to include aggressive land and habitat acquisition;

- implement the field training biologist program that was previously designed; and

- base the Department's organizational structure on the following criteria: clear employee role definition, strategic plan implementation at all organizational levels, clear and consistent policies for accountability, self-directed and interdisciplinary work teams to implement plans and allocate work, proactive processes to facilitate communication, an open environment to provide timely information, and evaluation of programs to prevent duplication and promote efficiency.

Finally, the Committee set forth short- and long-term goals, including the issuance of strategic and operational plans in late 1991, and reevaluation of these plans in 1993.

It remains to be seen whether DFG's review and reform efforts redress the concrete criticisms of the Little Hoover Commission. Among other things, the Commission cited DFG's unsystematic and inconsistent acquisition and maintenance of state refuge lands; lack of cost estimates for maintenance of acquired lands before acquisition; lack of a comprehensive management information system, which has resulted in an inability to satisfy legislative requests for information, an incomplete and inadequate system for tracking the licensed taking of fish and game, and an insufficient system of monitoring the illegal taking of fish by commercial interests that could threaten the viability of fish populations; and a general inability to provide the required level of monitoring, enforcement, and timely expertise and research consistent with its mandate.

Proposed Rulemaking. Late last fall, FGC initiated several rulemaking proceedings, including the following:

- On December 20, FGC announced its intent to amend section 120.3, Title 14 of the CCR, to require any boat incidentally taking sea cucumbers while shrimp fishing to also possess a sea cucumber permit. The Commission was scheduled to hold a public hearing on this proposed regulatory change on February 7 in Sacramento.

- Also on December 20, the Commission announced its intent to amend sections 185, 185.5, 200.12, and 200.31, and repeal section 690, Title 14 of the CCR, to provide for the captive propagation of certain reptiles for commercial purposes. Among other things, the proposed regulations would authorize the captive propagation and sale of domesticated stocks of native reptiles and amphibians, specifically common kingsnakes, gopher snakes, and rosy boas. Renewable captive propagation permits will be required pursuant to these regulations, which were scheduled for a January 10 hearing in Palm Springs.

- On November 22, FGC announced its intent to amend section 190, Title 14 of the CCR, to provide for the revocation or suspension of the commercial passenger fishing vessel license or permit of any person who fails to keep and submit required fishing activity records. Currently, regulatory section 746 provides that a person must be convicted or at least cited by a court in order for FGC to take this action. The Commission's amendment would eliminate the conviction/citation requirement and allow DFG to administratively revoke or suspend a license or permit for failure to keep and submit required fishing activity records. The Commission was scheduled to hold a public hearing on this proposed change at its January 10 meeting.

Update on Other Regulatory Changes. Following is a status update on other regulatory changes proposed and/or adopted by DFG/FGC in recent months:

- At its August 30 meeting, FGC adopted its 1991-92 mammal trapping regulations, section 465.5, Title 14 of the CCR. The regulations were filed with the Office of Administrative Law (OAL) on September 27 and approved on October 31. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 182-83 for background information.)

- At its August 30 meeting, FGC adopted its 1991-92 waterfowl hunting regulations in Division 1, Part 2, Chapter 7, Title 14 of the CCR. These regulations were approved by OAL on October 10. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 183 for background information.)



-At its August 30 meeting, FGC amended section 27.65, Title 14 of the CCR, to permit commercial fishers to fillet halibut while on board their vessels at sea. OAL approved this regulatory change on October 16. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 185 for background information.)

-Financial Responsibility Regulations for Office of Oil Spill Prevention and Response (OSPR). On November 13 in Sausalito and on November 15 in Long Beach, OSPR held hearings on the proposed permanent adoption of the emergency financial responsibility regulations it adopted last summer. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 184-85 for background information.) The public comment period was scheduled to end on February 14. OAL reapproved the emergency regulations on December 13.

-Importation, Transportation, and Possession of Wild Animals. At its October 4 meeting in Redding, FGC adopted proposed regulatory changes to sections 671-671.5, Title 14 of the CCR, which set forth minimum standards for humane care and treatment of wild animals and establish guidelines and qualifications for the issuance of permits to import, transport, and possess wild animals. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 183 for background information.) On November 19, the Commission submitted the proposed changes to OAL. In the face of rejection, FGC voluntarily withdrew the regulations on December 19. FGC hoped to revise and resubmit these proposed changes in January; if approved, they will go into immediate effect.

LEGISLATION:

AB 641 (Hauser), as amended September 9, would require DFG to recommend mitigation measures to timber harvesting plans, if necessary, to protect fish and wildlife resources. This two-year bill is pending in the Senate inactive file. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 189 for related discussion.)

SB 495 (Johnston), as amended April 22, would exempt a project found by the lead or certified regulatory agency to be *de minimis* in its effect on the environment from payment of the AB 3158 filing fee (see CRLR Vol. 11, No. 4 (Fall 1991) p. 185 for background information on AB 3158). This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 2030 (Allen) would require AB 3158 filing fees to be proportional to the cost incurred by DFG in reviewing

environmental documents for projects which have a significant impact on trust resources of the Department; the bill would also delete the requirement that a fee be paid for projects for which a negative declaration is prepared. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

SB 796 (Rogers) would provide that AB 3158 filing fees are to be calculated in an amount necessary to defray the cost to DFG of providing the particular service, and would also prohibit the inclusion of any surcharge or amount intended to permit DFG to establish a reserve. This two-year bill is pending in the Senate Committee on Natural Resources and Wildlife.

SB 463 (McCorquodale), as amended September 3, would authorize DFG, until January 1, 2010 and with the approval of FGC, to qualify mitigation bank sites, as defined, in the Sacramento-San Joaquin Valley, to provide incentives and financial assistance to create wetlands in areas where wetlands are filled, or where there are discharges into wetlands under specified federal permits. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 126 for background information on this issue.) Although this two-year bill has passed both the Assembly and Senate, it is pending in the Senate inactive file.

AB 751 (Hauser), as amended June 3, would declare it the policy of the state and DFG to permit and promote nonprofit salmon release and return operations operated by licensed commercial salmon fishers for the purpose of enhancing California's salmon populations and increasing the salmon harvest by commercial and recreational fishers. The bill would require DFG to cooperate with fishing organizations in the siting and establishment of those operations, and to regulate the operations as necessary to ensure the protection of natural spawning stocks of native salmon. This two-year bill is pending in the Senate Appropriations Committee.

AB 1 (Allen), as amended May 13, would codify Proposition 132, the Marine Resources Protection Act of 1990, in the Fish and Game Code. That initiative established the Marine Resources Protection Zone, and completely prohibits the use of gill and trammel nets in the Zone after January 1, 1994. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 172 (Felando), as amended April 29, would (among other things) require the one-time compensation payable to persons surrendering permits to use a

gill or trammel net to DFG pursuant to Proposition 132 to include the average annual ex vessel value of the fish (other than rockfish) landed by the permittee within the Marine Resources Protection Zone during the years 1983-87, inclusive. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 1364 (Cortese), as amended April 23, would prohibit any change in the point of diversion, place of use, or purpose of use to individually or cumulatively cause the flow in any stream, river, or watercourse to drop below that flow needed to protect biologically sustainable populations of fish and wildlife. This bill would require all determinations of fact and all recommendations made pursuant to its provisions to be made by DFG. The bill, however, would not apply to any stream, river, or watercourse unless the Director of Water Resources determines that the year will or may be a dry or critically dry year. This two-year bill is pending in the Assembly Ways and Means Committee.

AB 1557 (Wyman), as amended May 8, would require FGC to determine whether its regulations or regulatory actions—particularly those which result in the listing of a species as endangered or threatened under the California Endangered Species Act (CESA)—would result in a taking of private property subject to the provisions of the California Constitution or the United States Constitution governing eminent domain. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 353 (Hauser), as amended April 15, would require FGC to designate additional fish spawning or rearing waterways that it finds necessary to protect fishlife. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 355 (Hauser) would authorize DFG to order the party responsible for the deposit of any petroleum or petroleum product into the waters of this state to repair and restore all loss or impairment of fishlife, shellfish, and their habitat, and require DFG to adopt regulations to carry out the bill by June 30, 1992. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 1641 (Sher), as amended August 20, would enact the Fish, Wildlife, and Endangered Species Habitat Conservation and Enhancement Bond Act of 1991. This two-year bill is pending on the Assembly floor.

ACR 35 (Wyman), as amended June 3, would request DFG to seek funding



to conduct a review and evaluation to determine the status of the Mohave ground squirrel. This resolution is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 51 (Felando) would require DFG to conduct a study of existing marine resource management activities and impacts, make recommendations on activities to maintain and increase the abundance of these resources, and report the results of the study and its recommendations to the Governor and the legislature by January 1, 1993. This two-year bill is pending in the Assembly Committee on Water, Parks and Wildlife.

AB 72 (Cortese), which, as amended August 20, would enact the California Heritage Lands Bond Act of 1992, is pending on the Assembly floor.

AB 145 (Harvey) would increase from \$100 to \$250 the minimum fine for an initial violation of willful interference with the participation of any individual in the lawful activity of shooting, hunting, fishing, falconry, or trapping at the location where that activity is taking place, and increase the minimum fine for a subsequent violation to \$500. This two-year bill is pending in the Senate Judiciary Committee.

LITIGATION:

Last August, the federal government filed *United States of America v. Glenn-Colusa Irrigation District*, No. CV-S-91-1074 (U.S.D.C., E.D. Cal.), in an attempt to protect the endangered population of winter-run chinook salmon in the Sacramento River. The National Marine Fisheries Services (NMFS) listed the winter-run chinook as endangered in November 1990; FGC listed the species as endangered in May 1989 after allowing the population to dwindle to 600. The situation has worsened; during 1991, DFG estimated that only 191 winter-run salmon passed the Red Bluff Diversion Dam. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 182; Vol. 10, No. 4 (Fall 1990) pp. 154-55; and Vol. 9, No. 3 (Summer 1989) p. 108 for background information.)

Based upon the federal Endangered Species Act (ESA), the government's action for injunctive relief was aimed at Glenn-Colusa Irrigation District's (GCID) operation of a huge pumping facility which diverts 825,000 acre-feet of water from the Sacramento River to irrigate 1,200 farms and three national wildlife refuges. To prevent fish from being sucked into the pumps, GCID and DFG constructed a fish screen in 1972. The government alleged that, "[d]espite construction of the fish screen complex at the GCID pumping facility, design

and operational problems with the existing fish screens and diversion channel increase the likelihood of predation on the juvenile salmon by larger fish and allow juvenile salmon to be battered and pinned against the fish screens (impingement), or sucked through the screens (entrainment) and into the pumps and out into the irrigation ditches where they die." The government also alleged that the peak migrating season of the juvenile winter-run chinook salmon of August through October overlaps with maximum water diversions of 2,000 to 3,000 cubic feet per second between April 15 and September 15.

The government noted that the U.S. Army Corps of Engineers issued GCID an interim dredging permit necessary for its pumping operation in 1988; one of the conditions upon which the permit was granted was GCID's agreement to conduct fish and hydrologic studies leading to the development of a long-term solution to the fish passage problems at its diversion facility. In November 1989, GCID published a report of its studies, identifying "Alternative B1" as the preferred option. Alternative B1 calls for construction of a new state-of-the-art fish screen complex at the GCID diversion channel by the end of 1993, estimated to cost approximately \$26 million. However, to date, GCID has failed to implement Alternative B1. When GCID sought to renew its dredging permit in December 1989, the Army Corps was required to consult with NMFS due to the proposed listing of the winter-run chinook as endangered under the ESA. In May 1991, NMFS issued a biological opinion to the Army Corps, concluding that approval of the dredging permit is likely to jeopardize the continued existence of the winter-run salmon in violation of the ESA. The biological opinion did specify that jeopardy to the winter-run salmon could be avoided if Alternative B1 were adopted.

During the summer of 1991, GCID, NMFS, the U.S. Fish and Wildlife Services, Bureau of Reclamation, and DFG attempted to negotiate interim measures that would provide an acceptable level of protection for the winter-run salmon for 1991. However, the talks broke down and GCID's refusal to agree to the implementation of Alternative B1 led to this lawsuit. The United States alleged that GCID will "take" winter-run salmon in violation of ESA if it is permitted to divert water from the Sacramento River, and requested a court order enjoining GCID from operating its water diversion facility unless and until it has implemented measures to avoid the incidental taking of winter-run chinook salmon.

In mid-August, U.S. District Judge David Levi ordered GCID to reduce the amount of water pumped from 1,700 to 1,100 cubic feet per second, and to monitor the loss of salmon in the diversion channel pending the court's ruling on the government's motion for a permanent injunction. Although this action was criticized in the agricultural community, it apparently had little effect because it came so late in the season; irrigation is not needed after crops are grown and is usually curtailed in September anyway.

Following the filing of the lawsuit, GCID filed a cross-complaint against DFG, alleging that DFG designed, constructed, and maintains the fish screen, and has agreed to replace it at state expense if it fails to function in an efficient manner.

On December 13, Judge Levi heard arguments on the government's motion for preliminary injunction. The United States sought an order requiring GCID to close its pump station from July 15 through November 30, unless the District implements acceptable protections for the endangered salmon. In spite of GCID's arguments that the closure of the pumping facility would threaten \$85 million in dairies and hay, alfalfa, pistachio, melon crops, Judge Levi made it clear to the District that the language of the ESA—which prohibits the taking of a species listed as endangered and defines the term "take" to include kill, harm, and trap (even if incidentally)—leaves him no alternative but to shut down the pumps if they result in the killing of outmigrating winter-run salmon fry. The court ultimately granted the government's motion—adding fuel to the fire of agricultural and water interests who keenly desire a major weakening of the Endangered Species Act, which is up for congressional reauthorization in 1992. (See *infra* report on NATIONAL AUDUBON SOCIETY for related discussion.)

In a salmon kill case brought by DFG under the California Endangered Species Act (CESA), *California Department of Fish and Game v. Anderson-Cottonwood Irrigation District*, No. 108224, the Shasta County Superior Court issued an October 3 temporary restraining order shutting down ACID's Bonneyview Water Diversion Facility, which diverts water from the Sacramento River to about 270 customers in a 2,500-acre area south of Redding. The court based its ruling on affidavits from DFG biologists who averred that ACID's pump facilities had killed 765 winter-run chinook salmon between August 16 and September 21. However, on Octo-



ber 21, the court lifted the TRO and denied DFG's motion for a preliminary injunction, on grounds that the term "take" as used in CESA is restricted to the context of hunting and fishing, and does not apply to pumping operations.

On behalf of DFG, the Attorney General's Office immediately appealed the decision to the Third District Court of Appeal, arguing that the superior court has approved the illegal take of an endangered species and that its order is frustrating massive state and federal endeavors to restore the species. The AG argues that the lower court's decision "has completely emasculated the California Endangered Species Act by a strained construction of the term 'take.' The Court is in complete error." At this writing, the case is pending in the Third District; ACID resumed pumping operations the day the TRO was lifted.

Natural Resources Defense Council v. California Fish and Game Commission, No. 368042, is scheduled for hearing on May 8. On September 13, NRDC filed a petition for writ of mandate seeking to overturn FGC's refusal to list the California gnatcatcher as an endangered species, on the basis that the agency decision was arbitrary and capricious and an abuse of discretion. (See *supra* NATURAL RESOURCES DEFENSE COUNCIL; see also CRLR Vol. 11, No. 4 (Fall 1991) pp. 37 and 181 for background information.) The Building Industry Association of Southern California, the Transportation Corridor Agency of Orange County, and another Orange County toll road agency moved to intervene in the suit in defense of FGC's decision, while several conservation groups (including the Humane Society, Mamomet Bird Observatory, Sierra Club, California Native Plant Society, and the Mountain Lion Foundation) have submitted *amicus curiae* briefs in support of NRDC. On November 20, a Sacramento County Superior Court judge approved the intervention, which gives the three powerful organizations the right to appeal and to participate in any settlement negotiations that might take place.

Vietnamese Fisherman Association of America, et al., v. California Department of Fish and Game, et al., No. C910778-DLJ, is still pending in U.S. District Court for the Northern District of California. A status conference is scheduled for March 18, during which an attempt will be made to resolve the inconsistencies between the Proposition 132's gill-netting ban and the regulations of the federal Pacific Fishery Management Council, which allow gill-netting. (See CRLR Vol. 11,

No. 3 (Summer 1991) p. 171 and Vol. 11, No. 2 (Spring 1991) p. 158 for background information.)

RECENT MEETINGS:

At its August 29-30 meeting, DFG introduced its recommended 1992-93 ocean sport fishing regulations to FGC. The proposed major changes from last year's regulations include: permitting sport fishers to use unlimited size dip nets for bait collection instead of the current six-foot diameter maximum; allowing up to three daily bag limits of saltwater fish in possession on a multi-day fishing trip if a declaration is previously filed with DFG; and eliminating the facsimile mode of filing the declaration for multi-day fishing trips. Under current regulations, sharks and rays are exempt from the general sport fishing daily bag limit (ten fish of any one species), but DFG is proposing a daily bag limit of five and a minimum size of 36 inches on leopard sharks and a daily bag limit of two on shortfin mako sharks, thresher sharks, and blue sharks. DFG also proposes to open the Dungeness crab and spiny lobster season to sport fishers one week prior to the commercial season, to create a more equitable allocation of crabs and lobsters between sport and commercial fishers.

FGC held discussion hearings on the proposed ocean sport fishing regulations at its meetings on October 4 in Redding, November 1 in San Diego, and December 5 in Sacramento; FGC was scheduled to adopt the proposed rules at its January 9-10 meeting in Palm Springs.

FUTURE MEETINGS:

April 2-3 in Long Beach.
May 14-15 in Bakersfield.

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 section 4511 *et seq.*). The Board is established in Public Resources Code (PRC) section 730 *et seq.*; its regulations are codified in Division 1.5, Title 14 of the California Code of Regulations (CCR). The Board serves to protect California's timber resources and to promote responsible timber harvesting. Also, the Board writes forest practice rules and provides the Department of Forestry and Fire Protection (CDF) with policymaking guidance. Additionally, the Board oversees the administra-

tion 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: Terry Barlin Gorton (Chair), Franklin L. "Woody" Barnes (Vice-Chair), Robert J. Kerstiens, Elizabeth Penaat, and James W. Culver.

Forest Products Industry: Mike A. Anderson, Joseph Russ IV, and Thomas C. Nelson.

Range Livestock Industry: Jack Shannon.

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 the Department of Forestry, 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 Admits Failure. Beset by criticism from all sides and under orders from the Governor, on October 16 the Board of Forestry approved emergency regulations designed to rationalize and reform the THP approval process. The Office of Administrative Law (OAL) approved the emergency regulations on November 25. The sudden burst of emergency regulations followed a directive to the Board from Governor Wilson in his veto of AB 860 (Sher), the so-called "Sierra Accord." (See CRLR Vol. 11,