BOARD OF FORESTRY

Executive Officer: Dean Cromwell
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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: 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 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:

Legislature Kills Governor's "Grand Accord." On February 6, the legislature defeated Governor Wilson's timber reform package. Termed the "Grand Accord," the package had materialized in the form of four bills (AB 641, AB 714, SB 854, and SB 300), all of which had to pass in order to become law. *[12:1 CRLR 24, 173]* The bills were stopped on the Assembly floor by an unlikely grouping of pro-timber industry Republicans and pro-Sierra Club Democrats. (*See supra* reports on SIERRA CLUB and PLANNING AND CONSERVATION LEAGUE for related discussion.)

SB 300 (McCorquodale) would have added two representatives from nonprofit conservation organizations to the nine-member Board of Forestry, specified conflict of interest rules for the Board, imposed a timber yield tax surcharge, and established rules for watercourse and lake protection zones. It fell short of the 41 votes needed for passage. SB 854 (Keene) would have required that THPs include long-term timber management plans. This bill, too, fell short of the required 41 votes. AB 714 (Sher) would have prohibited clearcutting of more than 30 contiguous acres, prevented each ownership from harvesting more than 70% of its ancient forests, and required all harvests in ancient forests to protect the significant natural resource values associated with ancient forests. AB 714 passed both the Assembly and the Senate, but the Assembly refused to concur in the Senate's amendments. AB 641 (Hauser) would require the Board to designate watersheds and establish maximum harvest limits in a planning watershed. AB 641 narrowly passed the Assembly with 43 votes and was sent to the Governor. Because it cannot become law by itself, it was returned to the Senate where it could potentially become a vehicle for resurrection of the Grand Accord late in the session. At this writing, however, it has not moved nor been amended.

Court Strikes Down Emergency Rules. When the Grand Accord legislation was halted in February, environmentalist supporters of the legislation expressed concern that it would influence judicial decisions in a raft of lawsuits challenging the validity of emergency forestry rules adopted in dramatic fashion by the Board of Forestry in October 1991. *[12:1 CRLR 169–73]* The rules promulgated by the Board last fall closely tracked the provisions of the Grand Accord. Timber interests filed *Maillard Ranch v. California State Board of Forestry*, No. 939-592, and *Wetsel-Oviatt Lumber Co. v. California State Board of Forestry*, No. 939-852, in San Francisco Superior Court, and *Arcata Redwood Co. v. California State Board of Forestry*, No. 524-723, in Sacramento County Superior Court. In all cases, the timber companies sought to enjoin the Board from enforcing the emergency rules, on grounds they exceeded the Board's authority under existing law. On February 18, Judge Joe S. Gray of the Sacramento County Superior Court, enjoined the Board from enforcing the emergency regulations and directed it to process THPs under previously existing rules. The court found only that the facts cited in the Board's statement of emergency and in the record did not constitute an emergency within the provisions of Government Code section 11346.1. Judge Gray concluded that "the 'environmental crisis' which spurred the Board to action is based on speculation, concerns and suspicions, not evidence." Board Chair Terry Gorton predicted that "this means an avalanche of logging plans will be submitted by those companies who opposed any forestry reform and at whose hand these emergency rules fell."

Observers pointed out that the emergency rules would have expired on March 24 in any case, and the Board of Forestry was already scheduled to meet on March 4 to consider permanent regulations. Environmentalists expressed fear that the court's ruling, combined with the legislature's action on the Grand Accord, would alleviate the pressure on the Board to make the emergency rules permanent. At this writing, those fears appear to have materialized; the Board has postponed further consideration of the permanent rules until August.

Continuing Changes in Proposed Permanent Rules. During the spring, the Board held several public hearings on proposed permanent rules to replace its October 1991 emergency rules which were invalidated in February (*see supra*). *[12:1 CRLR 169–73]* The flurry of 15-day notices of modified language throughout the spring is indicative of the complexity of the issues, as well as the immense volume of public comment on the various rule packages. The Board approved one regulatory package at its January meeting, but postponed further action on three other packages of proposed permanent rules until its August 4–5 meeting. At its April meeting, the Board adopted a resolution stating that all regulatory proposals then under review would be processed within

four months. Following is a summary description of the rule changes approved in January, and the modified rule packages which will be considered in August:

–THP Sufficiency Under the Forest Practice Act. In January, the Board adopted amendments to sections 895.1, 897, and 898.1, Title 14 of the CCR. These amendments provide additional guidance to the CDF Director in determining whether a THP conforms to the intent of the FPA, and to provide information on economic impacts for use in decisionmaking on THPs. *[12:1 CRLR 170]* For example, the amendment to section 897(b) instructs the Director to look beyond the specific individual impacts and boundaries of a proposed THP toward consideration of a larger "landscape" approach, and sets forth several principles to guide the Director's decisionmaking. The amendment to section 898.1 adds new subsection (h), which allows the Director to request information to assist in the determination of whether the public benefits of a THP outweigh any unavoidable significant adverse impacts. The Office of Administrative Law (OAL) approved these regulatory changes on April 2.

–Silvicultural Methods with a Sustained Yield Objective. The Board's attempt to define the critical term "maximum sustained production of high-quality timber products" in PRC section 4513 and its accompanying specification of appropriate silvicultural methods which achieve compliance with that definition underwent public hearings in January, February, and March. *[12:1 CRLR 170–71]* As a result of these hearings and subsequent Board discussions, the Board's "sustained yield"/silvicultural methods regulatory package contemplates the amendment of sections 895.1, 898.2, 912, 932, 952, 912.7, 932.7, 952.7, 913, 933, 953, 913.1, 933.1, 953.1, 913.2, 933.2, 953.2, 913.3, 933.3, 953.3, 913.4, 933.4, 953.4, 913.6, 933.6, 953.6, and 1034(m), the renumbering of section 953.5 to 953.11 and 953.10 to 953.8, and the adoption of new sections 953.5, 913.10, 933.10, and 953.10, Title 14 of the CCR.

In August, the Board will consider four options as the definition of the term "maximum sustained production of high-quality timber products," and may adopt one or a combination of the four. Option #1 provides the ability to use management regimes to restore, maintain, or enhance the biological and economic productive potential of an ownership. The regimes must provide for optimum yield of timber products after reductions caused by other required measures are considered; growth and harvest to be balanced over time by ownership; maintenance of good stand vigor; and adequate site occupancy by the managed species. The projected inventory resulting from harvesting over time must sustain the average annual yield achieved during the last decade of the planning period.

Option #2 reflects the objective that landowners make regular progress toward achieving the wood production potential of the ownership and harvest trees when they are near biological maturity as found in natural stands. The estimation of biological maturity is achieved by setting a standard by site class equal to the growth predicted at the culmination of mean annual increment or at 100 years of age, whichever occurs first. Accepted yield tables for the different forest types in California are provided for clarity. Regular progress is achieved by setting average size requirements for the oldest trees for even-age and uneven-age management. In even-age systems, there is also a requirement that the oldest age class occupy at least 10% of the area managed for timber production. In uneven-aged management, the largest class size must occupy at least 10% of the basal area managed for timber production. The projected inventory resulting from harvesting over time must sustain the average annual yield achieved during the last decade of the planning period.

Option #3 is the same as Option #2 but does not define regular progress within the body of the definition including the age class requirements for even-aged or the size class requirements for uneven-aged management.

Option #4 is the same as Option #1 but lists the resources protected that limit optimum yield. It specifies that maximum sustained production is obtained through the implementation of the methods, treatments, and prescriptions in the rules but that the standards established do not permit delays in obtaining maximum sustained yield.

The silvicultural rules also impose limits on clearcutting (defined in the rules as involving "the removal of a stand in one harvest") and other methods of even-age management. One limitation involves the concept of setting standards for the timing of re-entry after harvest (four optional versions of this limitation are presented in the Board's proposed rules); another involves size limits on even-age harvests (three optional versions of this limitation are presented). The rules also address appropriate silvicultural methods in uneven-aged management, and require the CDF Director to disapprove a THP if the management methods called for therein do not meet the goal of maximum sustained production of high-quality timber products.

–Sensitive Watersheds. The Board's proposed regulations to be used in evaluating a THP which may affect a sensitive watershed or domestic water supplies have been the subject of three sets of changes since the beginning of the year—on January 16, February 7, and March 17. These regulatory changes now contemplate the amendment of section 895.1 and the adoption of new sections 916.8, 936.8, 956.8, 916.9, 936.9, 956.9, and 1032.10, Title 14 of the CCR. *[12:1 CRLR 171–72]*

As modified, the regulations call for establishment of a process whereby the Board, at a public hearing, shall designate or declassify planning watersheds or subwatersheds as "sensitive" to further timber operations. A "sensitive" finding is based upon substantial evidence that conditions within the watershed exist such that further timber operations create a reasonable potential for a significant adverse cumulative effect upon sensitive resources within the watershed. The proposed rules provide guidance to the CDF Director for assessing THPs within the large context of sensitive watershed areas.

Two options are proposed for this process. Under Option #1, the proposed public hearing process includes a nomination process and a screening process for the nominations. A designation as "sensitive" results in identification of the specific resources which are sensitive to further timber operations (*e.g.*, the quality and beneficial uses of water, fish and wildlife habitat) and identification of specific mitigation measures necessary for protection of the resources. The Board's acceptance of a recommendation by the screening committee for designation of watersheds as sensitive would have the effect of a regulation, and would be treated as such through the commencement of rulemaking proceedings under the Administrative Procedure Act. The Board may also accept recommendations for offsite and onsite mitigation measures submitted with the nominations as guidelines or regulations to be processed in accordance with the APA.

Under Option #2, the Board designates nominated watersheds as "sensitive" at a public hearing and will subsequently consider the need for regulatory mitigations or guidelines. Under this option, a finding of "sensitive" by the Board results in the identification of specific resources which are sensitive to further timber operations and may result in the identification of

specific mitigation measures where necessary for protection of the resources. Where a watershed is designated as "sensitive," the CDF Director shall require THP submitters to include all feasible mitigation measures necessary to avoid or reduce impacts below the level of significance.

Thus, under both options, the proposed rules provide a regulatory mechanism for sensitive watershed designation and declassification. A result of designation is the ultimate requirement of mitigation to avoid or reduce significant adverse cumulative impacts to sensitive resources within watersheds. Under Option #1, mitigation requirements may become regulations. Under Option #2, the CDF Director requires from each THP submitter mitigation measures which are feasible and necessary to avoid or reduce impacts.

Aside from the sensitive watershed language options, the proposed rules address the protection of domestic water supplies from adverse impact from timber operations, including notification to landowners to ensure the CDF Director is aware of domestic water supplies downstream from timber operations.

–Old-growth Forest, Late-seral Forest, and Wildlife Protection Regulations. In January, February, and March, the Board held public hearings on its proposed regulations designed to protect late-seral and old-growth forests and the wildlife whose survival depends on adequate protection of those resources. *[12:1 CRLR 171]* The Board's regulatory proposal calls for amendments to section 895.1 and the adoption of sections 919.9, 939.9, and 959.9, Title 14 of the CCR. Whereas previous rules and versions of this rule package focused on protecting an individual wildlife species within a late-seral or old-growth forest rather than on a landscape or ecosystem basis, the Board's latest proposal refocuses on protection of late-seral stage and old-growth forest components within ownerships and across the forest landscape, and associated wildlife protection.

The proposed rules provide further guidance to the CDF Director in reviewing THPs for assessment and mitigation of the impacts of timber operations on late-seral and old-growth forest stances and associated wildlife and plant species. The proposed rules define and require retention, where necessary, of important late-seral and old-growth forest elements including large live trees, large snags, multiple layers in the canopy, and large logs on land and in streams which are important wildlife habitat values. The intrinsic ecological value of old-growth forest stands, aside from wildlife habitat value, is recognized and protected. The proposed rules also require, where necessary, the provision of landscape features such as connection of one habitat area to another (connectivity).

Once again, in developing these regulations, the Board will consider two options. Under Option #1, THP submitters must provide new information to enable the CDF Director to assess the potential effects of timber operations on resources associated with late-seral and old-growth forests, including (1) a map identifying the location of late-seral and old-growth forest stands; (2) a stand inventory indicating the pre-harvest and post-harvest acreage of late-seral and old-growth forest stands; (3) a description of the structural characteristics for each old-growth and late-seral stand larger than 20 acres; (4) a description of primary ecological processes of the stand important to animal and plant communities associated with old-growth forest stands that could be significantly affected by timber operations; (5) a list of wildlife and rare plants associated with the late-seral and old-growth forest stands; (6) a description of habitat elements that are important for wildlife and rare plant species; (7) a description of the management objectives for late-seral and old-growth forest stands and associated wildlife and rare plant species; and (8) an analysis of the impact of timber operations on the structural, habitat, and ecological factors listed in (3), (5), and (6) above. Where long-term potential significant adverse effects to wildlife or rare plants associated with late-seral and/or old-growth forest stands exist, an assessment of the significance of the potential impacts shall be provided and feasible mitigation measures to avoid or reduce impacts to insignificance shall be described.

Option #2 distinguishes between old-growth forests and ancient forests. Under Option #2, the THP must describe any potential significant impacts that timber operations will have on wildlife. Mitigation measures shall be proposed where necessary to avoid or reduce to relative insignificance any adverse significant impacts on wildlife. A new regulatory section would add minimum standards for retention and recruitment for late-seral stage forests. Another new section would require that timber operations in old-growth or ancient forests be conducted in a manner that ensures the stand will continue to retain a multi-layered canopy and produce habitat characteristics that are essential to the wildlife species for which these forests are essential habitat.

Small Landowners Protest Financial Impact of Emergency Regulations and Proposed Rules. The Board's February 5 meeting was attended by several non-industrial timber owners who claimed to be hard hit by the emergency regulations and feared the impact of the proposed permanent rules. For example, Gloria Barnwell and her family have owned 9,000 acres in Humboldt County for 108 years. Mrs. Barnwell testified that the Board's recent regulatory action has had a devastating effect on the ability of non-industrial landowners to survive. She made the following observations: "We are told to set aside 15% of our ownership for late-seral stage forest; 10% for wildlife habitat; 300 feet of prime timber growing land on each side of streams; and a 100-foot buffer zone on each side of the public road through our property. This adds up to more than 1,743 acres." Mrs. Barnwell valued the set-aside land loss at $1,098,600. She stated that this could mean $34,500 less in Humboldt County tax revenues, lost jobs for two or three workers, and $42,500 in lost THP processing fees for the Department of Fish and Game (DFG). Other non-industrial landowners also argued that their situation has been continuously overlooked or inadequately addressed in recent regulatory changes.

On April 28, the Board conducted a special workshop inviting public and agency comment and discussion regarding the creation of regulatory exemptions for small timberland owners. The Board subsequently published notice of its intent to adopt rules to provide regulatory relief aimed at non-industrial timberland owners of 60 acres or less or, optionally, of 10 acres or less. The intent of the relief provisions is to reduce costs to specified non-industrial landowners for the THP filing and review process, while ensuring that these landowners remain consistent with the protections of the FPA and the Forest Practice Rules.

The Board has proposed two separate alternatives for non-industrial landowner regulatory relief. Alternative I consists of the adoption of section 1153(c), Title 14 of the CCR, to provide for a Class 4 categorical exemption pursuant to PRC section 21082. A Class 4 categorical exemption under the California Environmental Quality Act (CEQA) is a minor private or public alteration in the condition of land, water, and/or vegetation which does not involve removal of scenic trees except for forestry and agricultural purposes. This exemption shall apply to small-acreage timber operations on ownerships of limited size. THPs under this exemption are exempt from certain

THP informational requirements and from the cumulative impacts assessment required under CEQA and the FPR. Under Alternative I, the CDF Director has the discretion to determine that all environmental conditions and mitigations which are prerequisite for the exemption are met before accepting the exemption.

Alternative II is a general exemption from specified THP requirements from small-acreage timber operations on ownerships of limited size. This exemption is not an exemption from CEQA, but is a declaration that current forest practice rules together with the limitations provided will not reasonably result in a significant individual or cumulative effect. Under Alternative II, the CDF Director has the discretion to deny general exemptions to plans which either do not meet the exemption criteria or which may create a reasonable potential for significant individual or cumulative impacts to specified resources and watersheds.

The Board was scheduled to hold a public hearing on these proposed regulations on July 7.

Permanent Regulations for the Protection of the Marbled Murrelet Adopted and Approved. On March 4, the Board adopted permanent rules to protect the marbled murrelet. With only 3.5% of essential habitat remaining, the threatened marbled murrelet has been under the protection of emergency regulations since June 1991. *[12:1 CRLR 172–73; 11:4 CRLR 188]* In December 1991, the Fish and Game Commission listed the murrelet as endangered under the state Endangered Species Act (ESA); the U.S. Fish and Wildlife Service (USFWS) was expected to make a determination under the federal ESA in June. In November 1991, leading murrelet experts gathered in Davis, to determine what new research has revealed about the habitat, behavior, and protection requirements of the murrelet. Based on the results of the conference and public comment, the Board made two sets of changes to the proposed permanent rule package, noticed on January 16 and February 13.

The package adopted on March 4 includes the following changes to the emergency rules. Section 895.1, Title 14 of the CCR, lists the marbled murrelet as a "sensitive species" pursuant to regulatory section 898.2(d) (Special Conditions Requiring Disapproval of Plans) rather than a "species of special concern." Section 929.13 (Marbled Murrelet Survey Requirements) contains language encouraging THP submitters to obtain CDF literature on the bird to improve survey results.

More substantively, section 919.14 (Marbled Murrelet Protection Measures) was amended to require that, where there is evidence of an active murrelet site or potential impact to the bird, the CDF Director shall consult with DFG as to whether a "take" or "jeopardy" of the marbled murrelet will result from a proposed THP before the Director may approve or disapprove the plan. In addition, if DFG determines jeopardy or a take will occur, the Director shall disapprove the THP unless it is accompanied by authorization under section 2091 of the Fish and Game Code (which allows DFG to authorize the taking of an endangered species for scientific, educational, or management purposes).

The Board added new section 1036.1 (Murrelet Protection Before Notice of Completion), to require that, where there is evidence that a THP area contains an active or potential impact to a murrelet, the THP submitter immediately request a conference with DFG or USFWS to determine appropriate protection measures. The Board also deleted sections 912 (Marbled Murrelet Habitat) and 919.13 (Marbled Murrelet Survey Requirements).

On May 19, OAL approved the Board's permanent regulations to protect the marbled murrelet.

Registered Professional Forester Examination Fees Raised. On March 4, the Board adopted an amendment to section 1605(b), Title 14 of the CCR, raising the application fee to take the registered professional forester (RPF) examination to $185. The application fee had been $15 since 1976. The Board's action was undertaken pursuant to AB 1903 (Hauser) (Chapter 748, Statutes of 1991), which required the Board to adopt regulations setting fees at a level that would generate revenues sufficient to support the RPF licensing program.

Status Update on Other Proposed Regulatory Actions. The following is a status update on other Board of Forestry regulatory proposals discussed in recent issues of the *Reporter*:

–Notice of Intent. The Board's amendments to regulatory subsections 1032.7(d) and (g), Title 14 of the CCR, regarding the contents of the Notice of Intent to Harvest Timber that must be submitted to the CDF Director by the RPF who has prepared a THP *[12:1 CRLR 173]*, were submitted to OAL in late April and approved on May 27.

–Written Response to Comments. The Board's amendments to section 1037.8, which require the CDF Director's written response to comments made during the THP approval process to be completed and released to the public when the THP is approved (instead of within ten days of the THP approval) *[12:1 CRLR 1973]*, were approved by OAL on April 29.

–Sensitive Species Petition Mechanism. On May 7, OAL disapproved the Board's proposed rule establishing a sensitive species mechanism whereby concerned members of the public may petition the Board to classify a particular plant or animal species as "sensitive" for purpose of protecting it from timber harvesting. *[12:1 CRLR 173]* In rejecting new sections 919.12, 939.12, and 959.12, OAL cited AB 2061 (Polanco) (Chapter 794, Statutes of 1991), which authorizes courts to invalidate a regulation if the declaration by the agency on the economic impact of the regulation is not supported by substantial evidence in the record. The Board intended to revise and resubmit the rule in June.

–Timberland Conversion Permit Fees. Proposed new section 1104.3, Title 14 of the CCR, which would establish a system of permit fees to finance the Board's Timberland Conversion Permit Program under PRC section 4621 *[12:1 CRLR 173]*, was submitted to OAL, withdrawn, and resubmitted on May 3; at this writing, the rule is pending at OAL.

–Watercourse and Lake Protection Zones (WLPZ). After two years of studies and hearings, adoption by the Board of regulations restricting timber harvesting in WLPZs in April 1991, and OAL approval in September 1991, the Board adopted an emergency regulation to delay the effective date of the regulations and has proposed numerous amendments to them. *[12:1 CRLR 172]* Faced with timber industry objections to the changes, the Board has postponed further action until its August meeting.

PALCO Wins Controversial THP Appeal. On March 3, the Board conducted a public hearing on Pacific Lumber Company's (PALCO) appeal of the CDF Director's disapproval of THP 1-90-237-HUM. The 1990 THP proposed harvesting in an area known to be inhabited by one of three remaining populations of marbled murrelets in California, and the Director determined that it failed to meet the standards of sections 898.1 and 898.2, Title 14 of the CCR. After re-submission of the returned plan by PALCO, the Board overturned the Director's denial in March 1991, finding the THP to be in conformance with the Forest Practice Rules. The Sierra Club filed suit, *EPIC v. Board of Forestry*, No. 91-CP-0244, to invalidate the Board's decision; the Board agreed to reconsider the plan, and the court remanded the THP to the Board. On March 5, amidst considerable controversy

over admitted ex parte communications between PALCO representatives and Board members Joseph Russ and James Culver, the Board unanimously (absent Russ and Culver, who recused themselves after a lengthy debate) voted to approve the THP on the condition that PALCO perform surveys before, during, and after harvest, according to the Pacific Seabird Group protocols. Additionally, the preharvest surveys must be shared immediately with CDF and DFG. The ex parte communication problem has since been addressed in SB 1579 (McCorquodale) (*see infra* LEGISLATION).

Board Upholds THP Denial. At its May meeting, the Board upheld the decision of the CDF Director to deny THP 1-91-458-DEL. The plan, submitted by Rellim Redwood Company, was denied by the Director based on inadequate information on potential impacts on the marbled murrelet. The land in question contains "excellent murrelet habitat structure" and thus is under strict scrutiny. DFG reevaluated its original preconsultation determination after new information about the bird surfaced at the November 1991 marbled murrelet workshop at UC Davis (*see supra*). The main reason for DFG's redetermination was its need to survey the property over the range of the peak activity period (June 15–August 15) and, in suitable habitat areas, over a two-year time span. Rellim's site surveys were clustered tightly together during only one year, 1991. Pursuant to its authority to request reasonable assurances against the "taking" of species listed under the state's Endangered Species Act, DFG requested an additional year of surveys. Based on that and other comments, the Board affirmed the CDF Director's denial of the THP.

LEGISLATION:

SB 1579 (McCorquodale), as introduced February 19, would 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, unless specified conditions are satisfied. *[A. NatRes]*

SB 1777 (Leslie), as introduced February 20, would require that all members of the Board shall be appointed on the basis of their educational and professional qualifications and their general knowledge of, interest in, and experience with problems relating to watershed management, forest management practices, fish and wildlife, range management, forest economics, or land use planning. *[A. NatRes]*

AB 2562 (Farr), as amended April 28, would authorize moneys in the Forest Resources Improvement Fund to be expended, when appropriated, for the acquisition of adjacent parcels of land to expand the Soquel Demonstration State Forest in Santa Cruz County. *[A. W&M]*

AB 3045 (T. Friedman), as amended April 21, would require CDF to establish a three-year demonstration project in the counties of Los Angeles, Alameda, Santa Barbara, Ventura, and Contra Costa for the purpose of testing, and integrating with conventional firefighting technology, the use of fixed-wing firefighting aircraft with the ability to scoop water from a reservoir, lake, or the ocean and deliver it with a foam additive directly to the fire without having to return to a fixed base to reload. The bill would require the Department to allocate funds to the counties for the project by January 31, 1993. *[A. W&M]*

AB 3092 (Connelly), as amended April 6, would impose an annual state responsibility area fire protection benefit fee on each parcel of land located, in whole or in part, within a state responsibility area, with specified exceptions. The amount of the fee would be set by statute for the first two years and determined by the Board thereafter. The money would be available, upon appropriation, for fire prevention and suppression services by CDF. The bill would also levy—until July 1, 1993—a timber yield tax surcharge upon any person who harvests any timber under the FPA, at the rate of 1.03% of the total immediate harvest value of the timber. *[S. Rls]*

AB 3250 (Farr), as amended April 7, would require that, within the Southern Subdistrict of the Coast Forest District, feasible alternative practices that are needed to mitigate significant adverse environmental impacts, submitted in writing to the review team chairperson by review team members, shall be accepted by the review team chairperson and incorporated into the THP or the Director would be required to deny the plan. *[A. Floor]*

AB 3756 (Sher), as amended May 7, would require a THP to include a description of the known locations of any stands of the species Taxus brevifolia (Pacific Yew) larger than a specified size and to indicate the planned disposition or use of any such trees to be cut or removed as a result of timber operations. *[A. Floor]*

The following is a status update on bills reported in detail in CRLR Vol. 12, No. 1 (Winter 1992) at pages 173–74:

SB 854 (Keene), AB 641 (Hauser), AB 714 (Sher), and ***SB 300 (McCorquodale)*** was a package of bills, each joined to the other and none of which will become law unless all do. The language of the bills was negotiated and resulted in the so-called "Sierra Accord," an agreement between environmental groups and Sierra Pacific Industries, the state's largest timberland owner. Many of their more important provisions were amended into AB 860 (Sher) in a conference committee session on September 10; however, Governor Wilson vetoed AB 860 on October 10. Following the veto, the package was renegotiated and became known as the "Grand Accord." (*See supra* MAJOR PROJECTS.)

SB 854 (Keene), as amended January 9, would have required long-term timber management plans for Type A timberland (any timberland owned or controlled by any person who owns or controls more than 20,000 acres of commercial timber, timberland, cutover land, or timber rights) or Type B timberland (timberland owned or controlled by any person who owns or controls more than 5,000 but less than 20,000 acres), and would have required the Board to adopt specified regulations by specified dates to implement the program, including requirements for long-term timber management plans. SB 854 was rejected by the Assembly on February 6.

AB 641 (Hauser), as amended January 9, would establish wildlife habitat requirements for the long-term timber management plans proposed in SB 854 (Keene), including special requirements for ancient forests. The bill would also require the Board to commission a study of habitat needs for wildlife species related to old growth forest and late seral stages and to report thereon to the legislature and the Governor by January 1, 1994. Although this bill was enrolled to the Governor, that action was rescinded and the bill remains in the Senate inactive file.

AB 714 (Sher), as amended January 9, would—among other things—require all harvests in ancient forest to protect significant natural resource values associated with ancient forests and be subject to specified limitations. Although this bill passed both the Assembly and Senate, the Assembly refused to concur in Senate amendments.

SB 300 (McCorquodale), as amended January 9, would have—among other things—specified special conflict of interest rules for members of the Board; required the Board to divide the state into not less than three regions, and appoint in each region a regional forest sustainability committee with specified duties; and required the Board to establish watercourse and lake protection zones for designated

classes of watercourses, and to develop rules and regulations for the protection of the zones. This bill was rejected by the Assembly on February 6.

AB 512 (Sher), as amended April 9, would create the Timberland Conversion Account in the general fund, and require specified fees to be deposited in the account. The funds would be available, upon appropriation, for purposes of administration of the timberland conversion provisions of CDF. *[S. inactive file]*

SB 888 (Keene) would enact the Old-Growth and Native Forests Protection Act of 1992 which, if adopted, would authorize, for purposes of financing a specified old-growth forest protection program, the issuance of bonds in the amount of $300 million. *[A. BF&BI]*

AB 87 (Sher) has been substantially amended and is no longer relevant to the Board.

The following bills died in committee: ***AB 1533 (Farr)***, which would have—among other things—revised the composition of the Board of Forestry to include one county supervisor, one member from a local chamber of commerce, and two members from conservation organizations; ***AB 1127 (Campbell)***, which would have prohibited any person not registered as a professional forester from performing the duties of an RPF or using the title of a registered professional forester; ***AB 445 (Sher)***, which would have enacted the California Releaf Act, requiring cities and counties to include specified tree planting and protection ordinances in their general plans by January 1, 1993; ***AB 1407 (Lempert)***, which would have required THPs within the Southern Forest District to be submitted for approval to the county in which the timber operation is to take place, in lieu of CDF; ***AB 959 (Areias)***, which would have required CDF to establish a program for the provision of mobile communications vans, mobile command offices, and mobile kitchen trailers, and support staff for the maintenance and operation of that equipment; ***AB 1976 (Campbell)***, which would have required all timber operations to comply with specified minimum requirements, including a requirement that timber operations shall not be permitted that may degrade the waters of this state; ***SB 848 (Vuich)***, which would have required all owners of 75,000 acres or more of timberland to submit to CDF for approval, and to manage their lands pursuant to, a long-term resource management plan prepared by an RPF, unless the owner elects to be subject to specified alternative limitations; and ***SB 1072 (McCorquodale)***, which would have required the Board to develop and coordinate a program of best management practices to protect water quality on rangelands, and to report to the legislature on or before December 1, 1992, and annually thereafter, on the progress of this program.

LITIGATION:

In ***Public Resources Protection Association of California v. California Department of Forestry and Fire Protection***, No. A047871 (Mar. 5, 1992), the First District Court of Appeal held that the Board's emergency rules protecting the northern spotted owl applied to a THP that had been approved prior to adoption of the rules. The controversy surrounded THP 1-88-665 MEN, submitted by the Louisiana-Pacific Corporation (L-P) in September 1988. The plan indicated that there were no known rare or endangered species in the plan area. CDF eventually approved the THP, amidst controversy concerning the existence of the northern spotted owl in the plan area. The Public Resources Protection Association of California (PuRePAC) immediately challenged CDF's approval of the THP by filing a petition for writ of mandate. After a hearing, the trial court rejected PuRePAC's challenges to the THP and denied the writ. After the trial, and while the matter was pending on appeal with logging operations stayed, the federal government listed the northern spotted owl as a threatened species under the federal Endangered Species Act. As a result of this listing, the Board of Forestry enacted emergency rules for protection of the spotted owl. *[10:4 CRLR 157–58]*

The question on appeal became whether these emergency rules should apply to a THP approved by CDF and upheld by the superior court prior to the rules' adoption. The court examined PRC section 4583, which provides that "all timber operations shall conform to any changes or modifications of 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 court concluded that "[b]y its plain terms, the statute requires not only that a THP conform to the rules and regulations in effect at the time the plan is approved..., but that ongoing timber operations conducted pursuant to that THP conform to changes and modifications to the rules and regulations thereafter made." Thus, the only bar to section 4583's retroactive application would be interference with a vested right. The court made no determination about whether L-P incurred "substantial liabilities." The matter was remanded for either the preparation of a new THP in conformity with the emergency owl rules or, in the alternative, a determination of whether L-P incurred "substantial liabilities" in good faith between the date the THP was approved and the date the emergency rules went into effect. The court opined that the latter was not likely since no timber operations were commenced during that time due to the appellate stay.

Upon rehearing in ***Sierra Club v. California Board of Forestry (Pacific Lumber Company, Real Party in Interest)***, No. A047924 (Mar. 18, 1992), the First District Court of Appeal again reversed the Board's approval of two 1988 THPs submitted by Pacific Lumber Company (PALCO). In so ruling, the First District reaffirmed its September 23, 1991 decision in the same case. *[11:4 CRLR 191–92]* The March 18 decision again held that CDF is authorized to require timberland owners or timber operators to include surveys of old-growth-dependent wildlife species in THPs relating to stands of old-growth forests with complex habitat characteristics.

Acting at the insistence of DFG, CDF demanded such wildlife surveys for the first time with respect to several PALCO THPs submitted near the beginning of 1988. DFG contended that surveys were necessary to enable it to recommend suitable measures to mitigate the environmental impact of the THPs pursuant to the FPA and the California Environmental Quality Act (CEQA). PALCO refused to provide the wildlife surveys. DFG and CDF insisted, and CDF later rejected the two THPs as incomplete due to PALCO's failure to provide them. CDF's denial was later overturned by the Board on two grounds: (1) CDF and DFG were "unreasonable" in requesting the wildlife surveys in question, and (2) in ambiguous language, the Board concluded that the THPs would have no significant adverse effects on old-growth-dependent wildlife species. The Sierra Club sued to invalidate the Board's decision.

Central to this appeal is the interplay between the FPA and CEQA. The interrelationship of the two acts turns on the interpretation of a provision of CEQA, PRC section 21080.5, which exempts certain regulatory programs from the requirement of an environmental impact report (EIR). In section 15251(a), Title 14 of the CCR, the Secretary of the Resources

Agency certified that THPs filed under the FPA are the functional equivalent of an EIR and therefore qualify for the exemption under section 21080.5. However, the CEQA guidelines established in section 15250, Title 14 of the CCR, specifically state that "a certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible." Citing *Environmental Protection Information Center, Inc. v. Johnson*, 170 Cal. App. 3d 604 (1985), for the proposition that the FPA and CEQA are "not in conflict, but rather supplement each other and, therefore, must be harmonized," the court agreed with the Sierra Club's argument that CDF is authorized to demand the wildlife surveys under section 21160 of CEQA. The court also found that the FPA establishes a statutory and regulatory framework that, "construed *in pari materia* with CEQA, implicitly confers on the Department a similar authority to request reasonable wildlife surveys when needed to evaluate a timber harvest plan."

The court next examined whether CDF had acted reasonably in requiring the wildlife surveys. It noted that such surveys are indistinguishable from other inspections of the proposed logging site required by the FPA and its regulations and that no unreasonable delay need occur so long as the THP submitter, reasonably anticipating the necessity of surveys, initiates them in advance of THP submission.

During its initial debate on the THPs and the trial court proceeding, the Board had made three findings regarding the impact of harvesting under the THPs on old-growth-dependent wildlife species or habitat. Initially, it stated that it was "unable to determinatively say whether there will or there will not be significant adverse effect," although it acknowledged that DFG had serious concerns. In a second finding, the Board claimed that it had found that there would be no significant environmental effect. The trial court returned the THPs to the Board and requested clarification. In yet a third finding, the Board unequivocally stated that "there will not be any significant adverse effect on old-growth-dependent wildlife species or habitat from the harvesting that will occur under these two plans." The court found the record lacked substantial evidence to support the Board's third finding because it failed to address CDF's authority to require PALCO to supply additional information regarding the environmental impact of timber harvesting. "Since the Director of the Department was authorized to request the wildlife surveys, he possessed authority to deny the plans as incomplete under California Code of Regulations, Title 14, section 898.2, when PALCO failed to supply the data. The Board therefore erred in finding that the timber harvest plans, which lacked properly requested information, were 'in conformance' with its 'rules and regulations' and abused its discretion by proceeding on the basis of this erroneous legal premise."

The court reversed and remanded to the superior court with instructions to issue a peremptory writ of mandate directing the Board to rescind its approval of the THPs.

In ***Lane County Audubon Society v. Jamison***, Nos. 91-36019 and 91-36340 (Mar. 4, 1992), the U.S. Ninth Circuit Court of Appeals held that the federal Bureau of Land Management (BLM) may not lawfully proceed with sales of timber from spotted owl habitat until it has consulted with the U.S. Fish and Wildlife Service (USFWS) to obtain USFWS' biological opinion regarding the effects of its so-called "Jamison Strategy" for logging spotted owl habitat.

In June 1990, the USFWS listed the northern spotted owl as a threatened species pursuant to the federal Endangered Species Act (ESA). In response, BLM promulgated a document entitled *Management Guidelines for Conservation of the Northern Spotted Owl, FY 1991 through FY 1992*, which came to be known as the "Jamison Strategy." The Jamison Strategy set forth criteria and management guidelines for selection of land for logging in the millions of acres administered by BLM in Washington, Oregon, and California, and included a program to offer 750 million board-feet of timber for sale each year.

On December 4, 1990, Lane County Audubon Society (LCAS) and various environmental groups filed a 60-day notice of their intention to file an ESA suit to challenge BLM's failure to consult with USFWS on the Jamison Strategy pursuant to 16 U.S.C. section 1536 ("Section 7") of the ESA. In January 1991, BLM submitted about 174 proposed timber sales to be conducted in fiscal year 1991 to USFWS for consultation pursuant to Section 7, but did not submit the Jamison Strategy. LCAS then filed an action seeking an injunction barring any sale until the Jamison Strategy had undergone the consultation process. The district court agreed that BLM's Jamison Strategy constitutes an "agency action" within the meaning of the ESA, requiring consultation with USFWS. In April 1991, the court enjoined BLM from implementing the Jamison Strategy pending compliance with Section 7; however, the court refused to enjoin timber sales scheduled for 1991 despite USFWS' finding that the Jamison Strategy as applied to the 1991 sales was insufficient to protect the owl habitat. LCAS appealed the district court's refusal to enjoin the 1991 timber sales.

Writing for the unanimous Ninth Circuit panel, Judge Mary Schroeder affirmed in part and remanded in part. The first issue surrounded the question of whether the Jamison Strategy is an agency action. Section 7(a)(2) of the ESA requires the Secretary of the Interior to ensure that "an action of a federal agency is not likely to jeopardize the continued existence of any threatened or endangered species." The court affirmed the district court's finding that BLM's Jamison Strategy is "'without a doubt'...an agency action 'authorized, funded or carried out by the BLM.' Accordingly, the BLM must submit the Jamison Strategy to the [US]FWS for consultation before the Jamison Strategy can be implemented through the adoption of individual sale programs." The court further concluded that "[i]n implementing the Jamison Strategy before consultation with the [US]FWS, the BLM has violated the ESA. The district court properly enjoined implementation of the Strategy."

Next, the court addressed the issue of enjoining the sales. The Ninth Circuit held that since the Jamison Strategy has never been submitted to USFWS for consultation pursuant to the mandate of the ESA, "the individual sales cannot go forward until the consultation process is complete on the underlying plans which BLM uses to drive their development." The court concluded that the case must be remanded for an injunction barring future announcement or conduct of additional sales and for reconsideration of whether the 1991 sales already announced but not awarded should be enjoined.

FUTURE MEETINGS:

August 4–5 in Sacramento.