California v. California Department of Forestry and Fire Protection, No. A047871 (Mar. 5, 1992). The First District held that the Board's emergency rules protecting the northern spotted owl applied to a THP that had been approved prior to the adoption of the rules. *[12:2&3 CRLR 246]*

On June 11, the California Supreme Court granted review of the First District's decision in ***Sierra Club v. California Board of Forestry (Pacific Lumber Company, Real Party in Interest)***, No. A047924 (Mar. 18, 1992), in which the court reversed the Board's approval of two 1988 THPs submitted by Pacific Lumber Company. The court 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. *[12:2&3 CRLR 246–47]*

In ***Redwood Coast Watershed Alliance v. California State Board of Forestry, et al.***, No. 932123 (San Francisco Superior Court), RCWA alleges—through San Francisco environmental attorney Sharon Duggan—that the Board and CDF's regulation of timber operations on private land violates certain requirements of CEQA. RCWA seeks a judicial determination and declaration that the Board and CDF are in violation of CEQA, and that the THP process administered by the Board and CDF is not functionally equivalent to the environmental impact review process required by CEQA. *[12:1 CRLR 176]* The court heard oral argument in early September and decided to hold the case under submission until after the Board's October 15–16 meeting, at which it was scheduled to discuss proposed rule changes regarding silvicultural methods with a sustained yield objective (*see supra* MAJOR PROJECTS).

FUTURE MEETINGS

January 5–6 in Sacramento.
February 2–3 in Sacramento.
March 2–3 in Sacramento.

INDEPENDENTS

AUCTIONEER COMMISSION

Executive Officer: Karen Wyant
(916) 324-5894

The Auctioneer and Auction Licensing Act, Business and Professions Code section 5700 *et seq.*, was enacted in 1982 and establishes the California Auctioneer Commission to regulate auctioneers and auction businesses in California.

The Act is designed to protect the public from various forms of deceptive and fraudulent sales practices by establishing minimal requirements for the licensure of auctioneers and auction businesses and prohibiting certain types of conduct.

Section 5715 of the Act provides for the appointment of a seven-member Board of Governors, which is authorized to adopt and enforce regulations to carry out the provisions of the Act. The Board's regulations are codified in Division 35, Title 16 of the California Code of Regulations (CCR). The Board, which is composed of four public members and three auctioneers, is responsible for enforcing the provisions of the Act and administering the activities of the Commission. Members of the Board are appointed by the Governor for four-year terms. Each member must be at least 21 years old and a California resident for at least five years prior to appointment. In addition, the three industry members must have a minimum of five years' experience in auctioneering and be of recognized standing in the trade.

The Act provides assistance to the Board of Governors in the form of a council of advisers appointed by the Board for one-year terms. In September 1987, the Board disbanded the council of advisers and replaced it with a new Advisory Council. *[7:4 CRLR 99]*

MAJOR PROJECTS

Legislature Defunds Commission in Retaliation for Lawsuit Challenging Required Transfer of Reserve Funds. The Auctioneer Commission was abruptly defunded by the legislature shortly after it filed *California Auctioneer Commission v. Hayes*, No. 370773 (Sacramento County Superior Court), on June 15. Similar to the action filed by the Commission in the Third District Court of Appeal in April, the petition for writ of mandate sought a court order prohibiting state budget officers from carrying out a June 30 transfer to the general fund of all but three months' worth of operating expenses from the Commission's reserve fund, in compliance with a legislative directive in the Budget Act of 1991. The Commission was attempting to prevent a loss of $127,000 in auctioneers' licensing fees to the general fund. *[12:2&3 CRLR 248; 12:1 CRLR 177]*

Within days after the lawsuit was filed and oral argument was scheduled for August 14, the legislature completely defunded the Commission, thereby preventing it from pursuing its lawsuit. Other occupational licensing agencies which had intended to file *amicus curiae* briefs or support the Commission's action in other ways quickly reversed course in fear of similar retaliation. The legislature did not repeal the Auctioneer and Auction Licensing Act, the provisions of law which establish the Commission and its Board of Governors and set forth their respective authorities, or any other provision of law affecting the licensing of auctioneers or the conduct of auctions in California, with the minor exception of AB 2734 (Peace) (*see infra* LEGISLATION). It simply eliminated all funding for the Commission, preventing it from paying the attorneys handling its lawsuit and from functioning in any other way. Technically, the lawsuit is still pending, but there is no petitioner to pursue it at this writing. (*See supra* COMMENTARY for related discussion.)

In a September 2 farewell letter to licensees paid for by the California State Auctioneers Association, Board of Governors President Howard Hall noted that "[t]he seizure of your license fees would have required a substantial increase in your fees in the future to make up for the money taken, especially since [the legislature] seem[s] intent on continuing to transfer a portion of your licensee fees to the General Fund each year. In essence, this imposes a tax on individuals required to pay a fee to earn a living....We were the only organization to challenge this seizure, and we were the only regulatory agency eliminated....Following the Commission's elimination, there will no longer be any State agency to issue licenses or to

enforce the auction laws."

Hall also informed licensees that, upon elimination of the Commission, the legislature intended to transfer the $377,000 remaining in the Commission's operating budget to the general fund as well.

LEGISLATION

AB 2734 (Peace) amends Business and Professions Code section 5730(c), which currently provides that an auctioneer's license is not required for an auction sale of real estate, to instead provide that such a license is not required for a sale of real estate or a sale of real estate with personal property or fixtures or both in a unified sale pursuant to Commercial Code section 9501(4)(a)(ii). This bill was signed by the Governor on September 29 (Chapter 1095, Statutes of 1992).

BOARD OF CHIROPRACTIC EXAMINERS

Executive Director:
Vivian R. Davis
(916) 739-3445

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

The Board consists of seven members, including five chiropractors and two public members. On July 22, Governor Wilson appointed Michael J. Martello, DC, to fill a chiropractor position on the Board. The terms of BCE members Matthew A. Snider, DC, and John Emerzian, DC, recently expired; at this writing, Governor Wilson has not named replacements to fill the vacant positions. Thus, the Board is currently operating with only five members.

MAJOR PROJECTS

Unprofessional Conduct Regulation Draws Fire. On June 19, BCE conducted a public hearing on a proposal by the California Medical Association (CMA) that the Board adopt one of two alternative versions of proposed new section 317(v), Title 16 of the CCR, concerning unprofessional conduct by chiropractors. *[12:2&3 CRLR 249]*

Under alternative one, new section 317(v) would provide that it is unprofessional conduct for a chiropractor to fail to refer a patient to a physician or other licensed health care provider if, in the course of a diagnostic evaluation, the chiropractor detects an abnormality that indicates that the patient has a physical or mental condition, disease, or injury that is not subject to appropriate management by chiropractic methods and techniques. This version of section 317(v) would not apply when the patient states that he/she is already under the care of a physician or licensed health care provider who is providing the appropriate management. This section would also allow the chiropractor to accept the patient's statement. Under alternative two, new section 317(v) would define unprofessional conduct in much the same way, except that the section would not apply when the chiropractor has knowledge that the patient is already under the care of a physician or licensed health care provider who is providing appropriate management; alternative two would require the doctor of chiropractic to obtain this knowledge.

The Board is obligated to adopt some form of section 317(v) under the stipulated settlement agreement in *California Chapter of the American Physical Therapy Ass'n, et al. v. California State Board of Chiropractic Examiners*, Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court). The settlement, reached in early 1991, ended a four-year-long battle among medical doctors, physical therapists, and chiropractors over the language of section 302, Title 16 of the CCR, BCE's scope of practice regulation. Under the agreement, the parties to the litigation—CMA, the California Chapter of the American Physical Therapy Association, the Medical Board, the Physical Therapy Examining Committee, and BCE—purported to agree to the language of amendments to section 302 and new section 317(v) which would be adopted by BCE in an Administrative Procedure Act rulemaking proceeding and presumably approved by the Office of Administrative Law (OAL).

Parlan Edwards, DC, the first witness at the June 19 hearing, challenged the legality of the settlement agreement because it had not been submitted to or authorized by the chiropractic profession, and called the regulatory hearing "a charade." Dr. Edwards argued that "[b]owing to the dictates of the CMA is not a reason to propose a rule replete with deficiencies and adverse implications for the profession."

Most witnesses agreed with Dr. Edwards and opposed both versions of the proposed regulation, opining that this new section would serve to greatly limit the right and ability of chiropractors to treat and diagnose their patients without the supervision of other health care professionals. Others viewed the proposed new section as duplicative and claimed that certain language of both alternatives is vague and ambiguous.

At its July 23 meeting, BCE tabled its consideration of the regulatory language of new section 317(v); at this writing, the Board is scheduled to revisit the proposal at its meeting on January 7.

OAL Rejects Board's Proposed Regulation Defining "Adjustment." On July 29, OAL rejected the Board's proposed adoption of section 310.3, Division 4, Title 16 of the CCR, which would have defined a chiropractic adjustment and/or manipulation, in order to facilitate the detection of unlicensed practice. *[12:2&3 CRLR 248]* Section 310.3 would have defined the adjustment and/or manipulation of hard tissues as "manually or mechanically moving such tissues beyond their passive physiological range of motion by applying a forceful thrust." OAL found that the rulemaking file submitted by BCE failed to comply with the necessity, clarity, and procedural standards of the Administrative Procedure Act (APA) and that the Board failed to adequately respond to public comments.

According to OAL, the Board's initial statement of Reasons (ISR) indicated that the proposed regulation was intended to strengthen the Board's ability to protect the public from unlicensed persons performing adjustment procedures. However, the Board admitted that it did not rely on any technical, theoretical, or empirical studies, reports, or documents in proposing adoption of the regulation. In the ISR, the Board further stated that the Attorney General's Office will not prosecute unlawful practice of chiropractic without a clear definition of the term "adjustment." According to OAL, however, the Board failed to include evidence in the rulemaking file of consultation with the Attorney General at any time during the rulemaking process. OAL found that "there is no evidence that the proposed regulation will be considered a 'clear definition' by the prosecutor, and thus be useful in carrying out its prescribed purpose of enforcement. A regulation that does not or cannot fulfill its purpose is unnecessary."

OAL also found that section 310.3's definition of unlicensed practice of chiropractic facially appears to be ex-