more likely to occur because of the implementation of Proposition 117, which—according to the author—has resulted in a 200–300% increase in the state mountain lion population; **SB 1485 (Leslie)**, which would have authorized a court to issue inspection warrants for the examination of dams, fishways, or conduits for fish passage or screening; **SB 2114 (Committee on Natural Resources and Wildlife)**, which would have excepted, from existing law which declares that the status of a person as an employee, agent, or licensee of DFG does not confer special rights or privileges to knowingly enter private land without consent or a warrant, Departmental personnel, agents, or licensees authorized by a sworn peace officer if necessary for law enforcement purposes; **SB 1398 (Lewis)**, which would have prohibited FGC or DFG from requiring a fishing license to be visibly displayed on the person while the licensee is engaged in fishing; **AB 2838 (Harvey)**, which would have provided that sport fishing or sport ocean fishing licenses are generally valid for one year from the date of issue; and **AB 899 (Costa)**, which would have—among other things—required DFG to prepare and submit to the legislature and the Governor on or before October 1, 1994, a report addressing specified aspects of the environmental programs of DFG.

LITIGATION

In a 16-page decision, San Francisco Superior Court Judge Thomas J. Mellon, Jr. invalidated FGC's unprecedented delisting of the Mohave ground squirrel from the state's threatened species list under CESA in ***Mountain Lion Foundation, et al. v. California Fish and Game Commission, et al.***, No. 953860 (July 19, 1994).

At the request of Kern County officials, FGC took the unusual action on a 4–0 vote at its May 1993 meeting, and thereafter ratified the action at its June 1993 meeting, published findings in support of the delisting on July 2, 1993, held a final public hearing on the matter on August 27, 1993, and formally adopted a regulatory amendment to section 670.5, Title 14 of the CCR, removing the squirrel from the threatened list. The court action, brought by five environmental groups, contended that Kern County's petition to delist failed to contain the information required by CESA; FGC violated the procedure for delisting set forth in CESA and failed to apply the proper standards for listing and delisting; and FGC violated CEQA by failing to prepare an EIR, an initial study, or a negative declaration. *[13:4 CRLR 176; 13:2&3 CRLR 188-89]*

In his ruling, Judge Mellon addressed and rejected each of petitioners' arguments under CESA, finding that Kern County's petition was adequate (even though it failed to contain any information on the population trend of the squirrel), the Commission was entitled to consider an outside consultant's report produced by Kern County even though it was not submitted until 16 days before the Commission's May 1993 meeting, the Commission did not err in focusing on the present state of the squirrel and whether the species should be listed (instead of delisted), and there was substantial evidence in the record to support the Commission's decision to delist.

However, Judge Mellon ruled in favor of petitioners on their CEQA claim. The court found that the action to remove the squirrel from the CESA threatened list is a "project" under CEQA, thus subject to the EIR requirement unless some exemption is available. Judge Mellon then rejected FGC's three claimed exemptions under PRC sections 15061(b)(3) ("where it can been seen with certainty that there is no possibility that the activity in question may have a significant adverse effect on the environment") and sections 15307 and 15308 (both of which apply to actions taken by regulatory agencies to assure the maintenance, restoration, enhancement, or protection of a natural resource or the environment). Thus, Judge Mellon issued a writ of mandate requiring FGC to set aside its delisting decision.

On June 16 in ***Endangered Species Committee of the Building Industry of Southern California v. Babbitt***, 852 F.Supp. 32, U.S. District Judge Stanley Sporkin granted the federal government's motion for reconsideration and relisted the California gnatcatcher as a threatened species under the federal Endangered Species Act (ESA). That listing placed the bird within federal jurisdiction and enabled the federal government to officially recognize the Wilson administration's NCCP pilot project as a legal alternative to the ESA in preserving the coastal sage scrub habitat of the California gnatcatcher. The goals of the NCCP are to encourage long-term local and regional land use planning which avoids the precipitous declines in species' populations which result in ESA/CESA listings, establish habitat reserves which promote the preservation and proliferation of entire ecosystems (instead of a single declining species), and permit reasonable development on non-enrolled lands by participating landowners. *[14:1 CRLR 146; 13:4 CRLR 188; 13:2&3 CRLR 188]*

In the building industry's challenge to the government's action, Judge Sporkin initially invalidated the listing of the gnatcatcher on procedural grounds, agreeing with developers that the U.S. Department of the Interior violated procedural law governing the federal rulemaking process when it failed to make public the raw data used by Massachusetts ornithologist Jonathan Atwood upon which it relied in its rulemaking proceeding to list the gnatcatcher. *[14:2&3 CRLR 192]* Alarmed that Judge Sporkin's May 2 decision jeopardized the legal underpinnings of the NCCP program, the Clinton administration moved for reconsideration, promising to obtain and release the disputed information for a public comment period if the court would relist the gnatcatcher pending completion of the rulemaking process. Judge Sporkin agreed and vacated his earlier decision, noting that "the listing of the [gnatcatcher] was part of a larger scheme of interlinking federal, state, and local efforts to protect a fragile ecosystem...."

On August 12, the D.C. Circuit Court of Appeals denied the Clinton administration's petition for rehearing and its suggestion for rehearing en banc in ***Sweet Home Chapter of Communities for a Great Oregon v. Babbitt***, 17 F.3d 1463 (Mar. 11, 1994), in which the appellate court ruled that significant habitat degradation is not within the meaning of the term "harm" as used in and prohibited by the federal Endangered Species Act. *[14:2&3 CRLR 192]* The D.C. Circuit's decision conflicts directly with the Ninth Circuit's decision in *Palilla v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), thus setting up possible U.S. Supreme Court review.

FUTURE MEETINGS

October 6–7 in Palm Springs.
November 3–4 in Monterey.
December 1–2 in Eureka.
January 4–5, 1995 in San Diego (tentative).
February 2–3, 1995 in Santa Barbara (tentative.)
March 2–3, 1995 in Ukiah (tentative).

BOARD OF FORESTRY

Executive Officer:
Dean Cromwell
(916) 653-8007

The Board of Forestry is a nine-member Board appointed to administer the Z'berg-Nejedly Forest Practice Act (FPA) of 1973, Public Resources Code (PRC) section 4511 *et seq.* The Board, established in PRC section 730 *et seq.*, serves to protect California's timber resources and to promote responsible timber har-

vesting. The Board adopts the Forest Practice Rules (FPR), codified in Division 1.5, Title 14 of the California Code of Regulations (CCR), and provides the California Department of Forestry and Fire Protection (CDF) with policymaking guidance. Additionally, the Board oversees the administration of California's forest system and wildland fire protection system, sets minimum statewide fire safe standards, and reviews safety elements of county general plans. The Board's current members are:

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

Forest Products Industry: Keith Chambers, Thomas C. Nelson, and Tharon O'Dell.

Range Livestock Industry: Robert J. Kersteins (Chair).

The FPA requires careful planning of every timber harvesting operation by a registered professional forester (RPF). Before logging operations begin, each logging company must retain an RPF to prepare a timber harvesting plan (THP). Each THP must describe the land upon which work is proposed, silvicultural methods to be applied, erosion controls to be used, and other environmental protections required by the Forest Practice Rules. All THPs must be inspected by a forester on the staff of the Department of Forestry and, where deemed necessary, by experts from the Department of Fish and Game, the regional water quality control boards, other state agencies, and/or local governments as appropriate.

For the purpose of promulgating Forest Practice Rules, the state is divided into three geographic districts—southern, northern, and coastal. In each of these districts, a District Technical Advisory Committee (DTAC) is appointed. The various DTACs consult with the Board in the establishment and revision of district forest practice rules. Each DTAC is in turn required to consult with and evaluate the recommendations of CDF, federal, state, and local agencies, educational institutions, public interest organizations, and private individuals. DTAC members are appointed by the Board and receive no compensation for their service.

MAJOR PROJECTS

Little Hoover Commission Criticizes the THP Process. In June, the Little Hoover Commission (LHC) released a major report entitled *Timber Harvest Plans: A Flawed Effort to Balance Economic and Environmental Needs.* In its report, LHC reviewed the state's efforts to accommodate multiple uses of California's productive forests without degrading their value or allowing any one use to dominate or exclude the others. The Commission noted that the FPA requires the Board to regulate timbercutting so as to achieve "the goal of maximum sustained production of high-quality timber products...while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment and aesthetic enjoyment." According to LHC, however, "[c]reating a process that meets the variety of concerns expressed...has proven an elusive goal."

LHC's report describes and analyzes the state's THP process administered by CDF and the Board, the policymaking arm of CDF which is statutorily required to adopt Forest Practice Rules to achieve the "maximum sustained production" goal (*see* LITIGATION). Timberland owners who wish to harvest trees must submit a THP prepared and signed by an RPF to CDF for analysis; depending on the characteristics of the stand being cut and its surrounding geology, CDF may be assisted by the Department of Fish and Game (DFG), the Division of Mines and Geology of the Department of Conservation, the Department of Parks and Recreation, and/or the Water Resources Control Board (WRCB) or one of its regional water quality control boards. The THP, which has been certified as functionally equivalent to an environmental impact report under the California Environmental Quality Act (CEQA), must analyze a number of project-specific issues, including the start and completion dates of harvesting; the existing condition of the forest, such as the location of streams and roads, acreage, presence of sensitive wildlife, and a description of the land; and the anticipated approach for harvesting without damaging the environment, including the silvicultural method to be used (*e.g.* evenaged or unevenaged management), the logging equipment to be used, erosion control plans, and habitat protection steps.

Once submitted to CDF, the THP is analyzed and reviewed by a multi-agency review team; the site may be inspected; mitigation measures to minimize the environmental impact of the proposed harvest may be suggested or required; and the THP is subject to a 15-day public comment period. Following the public comment period, the CDF Director must decide whether to approve or reject the THP. If the Director approves the THP, his/her decision may be appealed by the DFG or WRCB Director; it may also be challenged within 30 days in superior court. If the CDF Director rejects the THP, the THP submitter may appeal to the Board, which must hold a public hearing on the appeal. If the Board upholds the CDF Director's decision, the THP submitter may challenge that decision in court.

Following its review of the THP process and a public hearing on February 24, LHC observed: "A well-run system for regulating harvests would have clear guidelines, predictable results, streamlined processes and an outcome that preserves the environment without unduly hampering economic activity. But despite years of refinements and revisions, the Timber Harvest Plan process appears to fall short of these goals." The Commission made two major findings about the process and proposed reform of the state's approach in eight recommendations.

First, the Commission found that the THP process is complex, inequitable, and costly, producing frustration for the administering state departments, the timber industry, and environmental advocacy groups. According to the Commission, the state departments claim that they lack the resources to perform the thorough review required by a combination of complex state and federal laws; in addition to being critical of approval delays, the timber industry claims that demands for more detailed information are making the THPs more lengthy and costly for the harvesters; and environmental groups claim that the limited amount of time for public input effectively rules out any meaningful analysis and response.

In response to its first finding, the Commission recommended that the Governor and the legislature direct the Board, in consultation with CDF, DFG, the timber industry, and environmental groups, to develop integrated policies and guidelines to govern wildlife, fish, and plan issues raised by THPs. Also, because LHC found that the Board is constantly revising the Forest Practice Rules, the Commission recommended that the Governor and legislature enact legislation making regulatory changes promulgated by the Board effective at one or two specific dates per year (such as January 1 or July 1) to eliminate confusion. Finally, LHC suggested that the Governor and legislature enact legislation extending the public comment period for THP reviews and requiring notification of outcome.

Aside from being procedurally defective, LHC found that the process does not work. The Commission found that the THP process has not proven effective in achieving a sound balance between economic and environmental concerns because it assesses potential damage on a site-by-site basis rather than across entire ecosystems, making it difficult to assess

cumulative impacts over time and throughout watersheds. The Commission also recognized that litigation, rather than resolution, is often the focus of the participants, leading to a strained decisionmaking process and lack of consensus. Also, the Commission found that resources and priorities are devoted to issues of process rather than outcome; as a result, people are more interested in whether the correct procedure is followed than in determining how effective mitigation measures are.

In response to its second finding, the Commission recommended that the Governor and legislature enact legislation that would require the completion of master protection plans for watersheds containing productive forests; establish a public appeals process to allow non-litigation challenges to THP approvals; and direct CDF to draft a plan within one year for shifting priorities from plan review to performance monitoring, feedback on effectiveness of requirements, and enforcement activities. Also, the Governor and legislature should direct the Board of Forestry to establish a certification process allowing timber owners to satisfy environmental concerns in advance of harvest proposals, and to develop an objective environmental risk assessment system that would assist in the evaluation of THPs.

Classification of Coho Salmon as a Sensitive Species Delayed. On April 7, the Fish and Game Commission (FGC) listed the coho salmon as a candidate for threatened species status under the California Endangered Species Act (CESA); the listing designates the species as a candidate for threatened status in all creeks south of San Francisco. Simultaneously, DFG petitioned the Board to list the coho salmon as a sensitive species under section 919.12 (939.12, 959.12), Title 14 of the CCR, which would entitle the species to additional protections from the impacts of timber harvesting in these areas. *[14:2&3 CRLR 186, 195]* Following public hearings at its April 7, June 8, and July 7 meetings, the Board published modified language of its proposal to list the coho salmon as a sensitive species, and scheduled a September 13 hearing on the modified language.

As originally published, this rulemaking proceeding sought to amend section 895.1 to add the coho salmon to its list of sensitive species, and listed a range of alternatives for coho salmon mitigation measures which the Board would consider if it decided to list the species as sensitive. In its original notice of proposed rulemaking, the Board listed three general mitigation alternatives which it might consider should it list the coho salmon as sensitive, including the following: (1) DFG consultation—this approach, which was recommended by DFG in its petition, would require CDF, in its review of THPs, to consult with DFG on the proper application of the FPR with respect to timber harvesting restrictions in coho salmon areas; (2) a "decision matrix development" process to develop an expert-driven systematic decisionmaking procedure that links coho salmon habitat relationships from literature and professional knowledge; the intent is to provide a science-based, flexible strategy for linking local conditions and management proposals with appropriate habitat protection and mitigation measures; and (3) the development of fixed habitat protection standards, which would involve identifying specific management standards that are uniformly applied, usually over large areas.

As modified on July 15, the proposal continues to amend section 895.1 to add the coho salmon to the list of sensitive species. However, it also adds new section 919.13 (939.13), which contains coho salmon protection standards. The proposed rule permits RPFs to choose one of four options when submitting a THP whose timber operations will impact the habitat of the coho salmon:

• Option 1 (which represents Alternative 1 in the original notice) requires consultation with DFG following submission of a THP in which the RPF has addressed all factors adversely affecting coho salmon habitat. If the RPF concludes that there is a potential significant adverse impact, he/she shall propose onsite or offsite mitigation measures to reduce or lessen the impacts to the point of insignificance. The CDF Review Team shall consult with DFG if the CDF Director believes the THP will cause a significant adverse effect to coho salmon habitat, or where a THP occurs in a watershed designated by the DFG Director as at high risk to coho salmon.

• Option 2 (which represents Alternative 2 in the original notice) incorporates "decision matrix development" and requires completion of Technical Rule Addendum #4 entitled "Coho Salmon Habitat Management Assessment." Use of the Addendum methodology enables a comprehensive assessment of all aspects of the watershed and identification of threats to coho salmon in the watershed due to timber harvesting. Option 2 also requires consultation with DFG.

• Option 3 permits timber operations to commence only in conformance with a conservation plan approved by the DFG Director, an approved Habitat Conservation Plan approved by the National Marine Fisheries Service or other appropriate federal agency, or a special incidental take order from FGC pursuant to state listing. This option was developed as a result of public testimony before the Board to the effect that some landowners are developing, or wish to develop, a conservation plan that addresses coho salmon habitat.

• Option 4 (which represents Alternative 3 in the original notice) establishes fixed habitat protection standards. This option is designed to be a "safe harbor" approach that permits landowners to harvest without preparing a detailed analysis or consulting with DFG. According to the Board, the standards for this option are intended to provide a conservative approach which generally has a high probability for protecting coho habitat. In addition to existing Board rules, the following standards must be observed under Option 4: no tractor operations on slopes over 50%; no use of logging and tractor roads and landings for timber operations under high soil moisture conditions; no timber harvesting or salvage operations unless approved in a THP within specified buffer zones on Class I and II streams; 25-foot equipment limitation zone on Class III watercourses; no new roads or landings in watercourse and lake protection zones (WLPZs); and no winter period operations unless roads are rocked. Within WLPZs, the construction of new roads and landings is not permitted. Existing roads must be reconstructed or maintained as appropriate to reduce sediment transport into streams. The CDF Director may also require specified road maintenance.

At its September 13 meeting, the Board heard testimony on the modified language, and then postponed discussion of the coho salmon listing until its November meeting.

Proposed Local Forest Practice Rules for Mendocino County. At its September 14 meeting, the Board entertained lengthy testimony on proposed amendments to section 912 and the addition of section 923 *et seq.*, Title 14 of the CCR, proposed local FPR for Mendocino County which were drafted by Mendocino County's Forest Advisory Committee and approved by the County Board of Supervisors on May 10. PRC section 4516.5 authorizes individual counties to recommend county-specific regulations for the content of THPs and the conduct of timber harvesting operations to accommodate local needs, and requires the Board to adopt rules consistent with a county's proposal within 180 days of recommendation if it finds that the proposal is consistent with the intent and purpose of the FPA and is necessary to protect the needs and conditions of the county.

According to the Board's notice of proposed rulemaking, the Mendocino County Board of Supervisors is concerned about the rapid depletion of its natural forest resources, which will result in reduced future harvest and economic loss for the County. According to the Board of Supervisors, (1) the annual percentage of timber inventory has declined in excess of 3% each year for several years, (2) employment directly generated from timber harvests has decreased significantly since 1988, (3) the contribution of timber yield tax to county revenues is only about 1% of the county's total operating budget (and is heavily offset by the costs of repairing secondary roads damaged during winter timber operations), (4) average saw timber trees are getting smaller and, although the total county harvest is less than total estimated growth, the timber industry is harvesting more than it grows, and (5) "workers, manager, loggers, foresters, and environmentalists are troubled by the pace of the cutting." The Board of Supervisors also noted that the coho salmon population in streams and creeks within its boundaries is "rapidly disappearing, [and] that its habitat of heavily timbered watersheds is severely degraded by continuous and intensive harvest" (*see above*).

The heart of Mendocino County's proposed rules is section 923.2, which would restrict harvest volume to 2% of inventory ("2POI") per year, or 20% of standing inventory over a ten-year period, within the County. Proposed section 923.3 establishes a four-year transition timeframe for graduated implementation towards the 2POI volume control standard. Other proposed provisions would set prescriptive limitations for clearcutting and group regeneration harvesting; define set stocking restrictions on timber harvest operations under evenage, unevenage, group regeneration, and sanitation-salvage methods; and require each timberland ownership subject to the local rules to submit Harvest Assessment Data (HAD) to the CDF Director as part of each THP submitted.

The proposed rules provide that their intent is to gradually increase the current levels of timber volume inventory and stocking until the FPA's overall goal of maximum sustainable production is achieved. The Board of Supervisors stated that "the rules are designed to meet the following criteria: without sacrificing long-term goals, the rules will provide flexibility for varying economic conditions, establish clear standards that are enforceable and verifiable, leave silvicultural decisions to RPFs, create incentive for long-range planning, reward good forestry and prudent management, and avoid imposition of severe financial burdens on owners or regulators."

The proposed rules generated much testimony and discussion at the Board's September 14 meeting, which was broadcast on a public radio station. The Board took no action, and deferred the matter to its October meeting.

Modified Timber Harvest Plan. At its September 14 meeting in South Lake Tahoe, the Board voted to readopt sections 1051, 1051.1, 1051.2, and 1052.3, Title 14 of the CCR, to reimplement the modified timber harvest plan (MTHP) for non-industrial owners. These regulations provide forestland owners with an entire ownership of 100 acres or less with a cost-effective alternative to filing a regular THP. The Board previously adopted these rules in 1993, and the Office of Administrative Law (OAL) approved them on July 6, 1993 *[13:4 CRLR 185; 13:2&3 CRLR 194]*; by their own terms, however, they expired on July 6, 1994.

Section 1051 sets forth the conditions and mitigation measures with which MTHP submitters must comply, which include the following: No more than 70% of any existing tree canopy layer may be harvested on parcels of 40 acres or less, and no more than 50% on parcels of 41–100 acres; additionally, no more than 10% of the THP area may be harvested under the rehabilitation method. The clearcutting and shelterwood removal methods are prohibited, with limited exceptions; and the applicable stocking standards must be met immediately after harvesting operations are completed. No heavy equipment operations may take place on slopes greater than 50%, on areas with high or extreme erosion hazard ratings, and within WLPZs, meadows, or wet areas. Section 1051 also prohibits construction of new skid trails on slopes over 40%; prohibits timber operations in Special Treatment Areas and/or on slides or unstable areas; and restricts road construction and reconstruction. No listed species may be directly or indirectly adversely impacted by the timber operations proposed in a MTHP; nor may timber operations be conducted within potentially significant archeological sites. The MTHP submitter must also agree to limitations on timber harvesting in WLPZs and on the use of alternatives, exceptions, and in-lieu practices otherwise permitted in WLPZs. The rule sets standards for conducting winter timber operations, and specifies that harvesting must not reduce the amount of late-succession stands greater than or equal to five acres in size.

Section 1051.1 sets forth the required contents of the MTHP. The RPF must identify and map understocked areas not to be harvested; use a specified topographic map base; certify that the conditions in section 1051 exist in the plan area and that no significant effects remain undisclosed; and certify that a pre-harvest meeting will occur between the RPF and the licensed timber operator. Section 1051.1 also provides that timber operations conducted under a MTHP may use an alternative to the usual cumulative effects analysis, because operations under a MTHP are presumed to be unlikely to cause significant adverse environmental effects due to the specific required mitigation measures. Section 1051.2 addresses the review of a MTHP by CDF, and section 1051.3, as published, again imposed a one-year sunset date on the MTHP program. After lengthy discussion, the Board agreed to modify section 1051.3 to provide for a two-year sunset date.

At this writing, the Board is preparing the rulemaking package for submission to OAL.

Other Board Rulemaking. The following is a status update on other rulemaking proceedings conducted by the Board in recent months and covered in detail in previous issues of the *Reporter*:

• ***Three-Zone Rule for Protection of the NSO.*** At its April, May, and July meetings, the Board discussed its proposal to adopt section 919.8 and amend sections 895, 898.2(d), 919, 919.1 (939.1, 959.1), 919.4 (939.4, 959.4), 912 (932, 952), 912.9 (932.9, 952.9), 913.6 (933.6, 953.6), 914 (934, 954), 915 (935, 955), 916.3 (936.3, 956.3), 916.4 (936.4, 956.4), Title 14 of the CCR, its existing regulations to protect the northern spotted owl (NSO), which was listed as threatened by the federal government in July 1990. *[14:2&3 CRLR 193–94; 10:4 CRLR 157]* These proposed regulatory changes are based on suggestions made by the Resources Agency and DFG in a document entitled *Proposal for Northern Spotted Owl Habitat Conservation Rules for Private Forestlands in California.*

Under the Board's current NSO rules, every THP, nonindustrial timber management plan (NTMP), conversion permit, spotted owl resource plan, or major amendment thereof must contain protection measures for the NSO if they are found in the timber operations area. Usually, this includes owl surveys and protection measures developed to protect the nest site or activity area and foraging area around the nest site. Under the current no-take rules, NSOs are protected where they occur by assuring the continued presence of suitable habitat within a set radius of the owl pair site. The Board's proposed

regulatory changes would implement a three-zone rule for protection of the NSO. According to the Board, the present distribution of NSOs, ownership protection, and habitat potential can be roughly divided into three zones. Zone One is a high-owl-density, high-potential habitat, mostly private ownership coastal forest (essentially the California Coastal Province). Zone Two is high-owl-density, high-potential habitat, mostly public ownership mixed evergreen forest (essentially the California Klamath Province). Zone Three is low-owl-density, low-potential habitat, mixed ownership forests (essentially the California Cascades Province).

These regulatory changes are proposed to protect NSO habitat and general wildlife habitat elements consistent with the terrestrial distribution pattern of owls and the occurrence of high-quality habitat potential as described by DFG and summarized above in Zones One, Two, and Three. In Zone One, the proposed rules—specifically new section 919.8—would change the emphasis to maintaining and producing functional habitat rather than protecting nesting owls from take under the current NSO rules. The proposed section sets forth specified habitat conservation strategies and states that, if any of them are met in a THP, take is considered incidental to timber operations and pre-harvest NSO surveys are not required. In other words, the existing rules' emphasis on individual take determinations and pre-harvest surveys is replaced with an emphasis on implementation of habitat conservation strategies over ownership-wide or planning watershed areas. According to the Board, Zone One is regulated in this manner with detailed standards and guidelines because it is an area of high-owl-density, high-potential habitat, and mostly private ownership zones.

In Zone Two, relief from the current NSO regulation is recommended, as this is a zone of large amounts of public lands protection and high owl densities. The Board believes this zone does not require the same functional habitat maintenance approach as Zone One. In Zone Three, no rule changes are proposed as this is a zone of low owl density and low potential habitat and current NSO rules will remain in effect. Similarly, habitat maintenance is not required here given low owl density and low-potential habitat. But, since the ownership is mixed and private landowners may encounter some owl nesting sites, it is necessary to maintain the current rules to prevent incidental take harm to nesting pairs.

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

At public hearings on the proposed rule changes, DFG representatives expressed concern about the cost the rule changes would impose on the small landowner, and Gil Murray of the California Foresters Association testified that the Zone One requirements will be expensive to coastal private landowners; he expressed concern that the Board is expanding the NSO rules to protect general wildlife concerns rather than maintaining a focus on the owl.

Following discussion at its July meeting, the Board continued the public hearing until its October meeting.

• ***Biologist Consultation Contracts.*** At its June 8 and July 7 meetings, the Board held public hearings on the revised version of its proposed amendments to sections 919.9 and 939.9, Title 14 of the CCR, two provisions of the Board's existing NSO protection rules. These sections require the CDF Director, when considering a THP which proposes to use the procedures in sections 919.9(a), (b), or (c) (939.9(a), (b), or (c)), to consult with a biologist prior to approving the plan. Under the existing rules, the Director must consult with a state-employed biologist designated by CDF and acceptable to DFG and to the U.S. Fish and Wildlife Service (USFWS). *[14:2&3 CRLR 194–95]*

The May 16 amended language, which was adopted by the Board at its July 7 meeting, implements the following procedures: The CDF Director shall consult with a "state-employed designated biologist" acceptable to DFG or USFWS. Where necessary, the designated biologist shall make written observations and recommendations regarding whether the retained habitat configuration and protection measures proposed in the THP will prevent a take of the owl. In order to recognize consultants who specialize in NSO protection, a biologist may be specially designated by CDF to act as an independent consultant. The independent consultant must be accepted by DFG or USFWS; to do so, the consultant must demonstrate sufficient knowledge and education to recognize and analyze data from field conditions and present information which helps determine harm or harassment of the NSO.

At this writing, Board staff is preparing the rulemaking file on these proposed regulatory changes for submission to OAL.

• ***Board Modifies Proposed "Exempt Conversion" Rules.*** At its June 8 meeting, the Board finally adopted proposed amendments to sections 895 and 1104.1, to tighten the so-called "exempt conversion" process. The Board adopted the May 16 revised version of the proposed regulatory changes *[14:2&3 CRLR 196]*, and further specified that, once approved by OAL, the rule changes will not take effect until January 1, 1995.

Revised section 1104.1 establishes a "conversion exemption" (meaning that the conversion of timberland to non-timber uses is exempt from the conversion permit and THP requirements) for less than three acres in one contiguous ownership, provided that the timber operations conducted pursuant to the exemption comply with all other applicable provisions of the FPA, the FPR, and currently effective provisions of county general plans, zoning ordinances, and any implementing ordinances. Further, this conversion exemption may only be used once per contiguous land ownership.

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

OAL approved these changes on August 31.

LEGISLATION

AB 2229 (Sher), as amended August 23, would have required the Board to adopt regulations, initially as emergency regulations, governing the conduct of timber operations for the protection of WLPZs that are adjacent to Class I fish-bearing streams supporting major runs of coho salmon. These provisions would only have become operative upon the effective date that the U.S. Department of the Interior lists state stocks of coho salmon as either threatened or endangered under the federal Endangered Species Act. On September 26, Governor Wilson vetoed this bill, stating that the Board is authorized under existing law to adopt regulations it deems necessary to protect the coho salmon, and noting that the Board is in the process of reviewing its regulations for this very purpose (*see* MAJOR PROJECTS).

AB 3812 (V. Brown). Existing law requires the planning agency of each county containing a state responsibility area to submit a draft of the safety element of the county's general plan, or any amendments to the safety element, to the Board of Forestry and to local agencies providing fire protection, at least 90 days prior to adoption; existing law requires the Board, and authorizes a local agency, to review a draft and submit its written recommendations to the planning agency within sixty days of its receipt of the draft. As amended August 25, this bill would have instead required the planning agency to submit for review a draft safety, conservation, or land use element, or amendment thereto, as prescribed. The bill would have included local CDF offices designated by the Department among the entities reviewing a draft, and required the Board, a local CDF office, or a local agency to review a draft and report its written recommendations to the planning agency.

On September 15, Governor Wilson vetoed this bill, opining that "[p]ermitting this breadth of formalized state agency comments on local planning documents is unprecedented and would greatly increase state involvement in matters of local jurisdiction. There is no reasonable justification for requiring counties to send their land use and conservation elements to the state for review and comment." Wilson also contended that "[i]f there are existing problems between the state and local agencies in regards to planning and fire prevention, those problems have not been identified."

The following is a status update on bills reported in detail in CRLR Vol. 14, Nos. 2 & 3 (Spring/Summer 1994) at pages 196–97:

SB 1667 (Mello). Under the FPA, generally, no person may conduct timber operations on timberland unless the person has submitted a THP to CDF and received approval of that plan from the CDF Director. The Act authorizes the board of supervisors of certain counties, not later than ten days after approval of a THP by the Director, to appeal that approval to the Board of Forestry. The Act requires the Board to grant a hearing if it makes a determination that the appeal raises substantial issues with respect to the environment or public safety and to hold a public hearing within thirty days of the filing of the appeal, or a longer period mutually agreed upon by the Board, the county, and the plan submitter. The Board is authorized, by regulation, to delegate that determination to the chairperson of the Board. As amended June 29, this bill instead requires the Board to grant to a county that meets the requirements for filing an appeal an initial hearing to consider the county's request for an appeal at the next regularly scheduled Board meeting following the receipt of the request, and, if the Board determines that the appeal raises substantial issues, to grant a public hearing on the appeal and to hold that hearing within thirty days from the date of granting the hearing, or at the Board's next regularly scheduled meeting, whichever occurs first, or within a longer period of time that is mutually agreed upon by the Board, the county, and the plan submitter. The bill also deletes the Board's authority to delegate the determination to its chairperson. This bill was signed by the Governor on September 22 (Chapter 763, Statutes of 1994).

AB 49 (Sher). The FPA authorizes the Board of Forestry to exempt from the Act specified forest management activities; authorizes the filing of an emergency notice for immediate harvest activities; requires an emergency notice to include a declaration, under penalty of perjury, that a *bona fide* emergency exists which requires immediate harvest activities; and requires the CDF Director, within ten days after the receipt of an emergency notice, to notify the State Board of Equalization with regard to the payment of applicable timber yield taxes. As amended August 25, this bill exempts the cutting or removal of trees to reduce fire hazards, as prescribed, and requires the Board to adopt regulations, initially as emergency regulations, to implement and to obtain compliance with the provisions of that exemption; this bill does not exempt the timberland owner from the payment of timber yield taxes on timber harvested pursuant to its provisions. This urgency bill was signed by the Governor on September 21 (Chapter 746, Statutes of 1994).

AB 325 (Sher). Existing law authorizes the Governor to offer a reward of not more than $50,000 for information leading to the arrest and conviction of any person who commits specified crimes. As amended June 6, this bill includes any person who willfully and maliciously sets fire to, or who attempts to willfully and maliciously set fire to, any property which is included within a hazardous fire area, if the fire or attempt to set a fire results in death or great bodily injury to anyone, including fire protection personnel, or if the fire causes substantial structural damage.

Under existing law, CDF is authorized to pay rewards for information leading to an arrest and conviction or commitment in connection with the setting of, or attempt to set, a fire. For the purpose of obtaining information leading to the arrest and conviction of persons who willfully and maliciously set fire to, or who attempt to willfully and maliciously set fire to, any property that is included within a state responsibility area, including a designated hazardous fire area, this bill requires CDF, during the fire season, to make a toll-free 800 telephone number available for, and to establish, a program to protect the anonymity of persons providing that information and to facilitate the identification of persons eligible for payment of a reward. This bill was signed by the Governor on July 20 (Chapter 243, Statutes of 1994).

The following bills died in committee: **SB 1776 (Dills)**, which would have required the Secretary of the Resources Agency to negotiate with federal agencies, local agencies, or private persons to acquire and develop appropriate management strategies for the Headwaters Forest; **SB 122 (McCorquodale)**, which would have—among other things—prohibited Board members from soliciting or accepting campaign contributions for the benefit of their appointing authority (which, in this case, is the Governor), and from donating, soliciting, or accepting campaign contributions from persons under specified circumstances; **SB 892 (Leslie)**, which would have exempted from the Surface Mining and Reclamation Act of 1975 onsite excavations or grading for the exclusive purpose of obtaining materials for roadbed construction and maintenance conducted in connection with timber operations and watershed protection; **AB 1185 (Cortese)**, which would have, among other things, prohibited the Board from licensing the activities of resource professionals (such as certified rangeland managers) which it did not license prior to July 1, 1993; and **SB 1062 (Thompson)**, which would have deleted obsolete provisions with regard to stocking.

LITIGATION

On August 2, Judge Stuart R. Pollak issued a 37-page opinion in favor of petitioner on one of the major issues in ***Redwood Coast Watershed Alliance v. California State Board of Forestry, et al.***, No. 932-123 (San Francisco Superior Court). In this case filed in May 1991, RCWA—through environmental attorney Sharon Duggan—alleged that the Board violated the legislature's mandate in the Forest Practice Act of 1973 primarily because, during an 18-year period, it adopted no meaningful standards to define or implement the FPA's express statutory goal—the regulation of timbercutting so as to yield "maximum sustained production (MSP) of high-quality timber products." Specifically, RCWA argued that the FPA requires the Board "to promulgate rules which prescribe the mix of age classes that must remain before harvesting on private timber lands is permitted." *[14:2&3 CRLR 197–98; 12:4 CRLR 214; 12:1 CRLR 176]* In his August 2 opinion, Judge Pollak agreed with RCWA that the 1973 FPA imposes a mandatory duty on the Board of Forestry to "adopt and enforce regulations which ensure that aggregate timber harvests on private lands do not outstrip growth and lead to an ever-diminishing supply of timber," and that—because the Board's rules as they existed at the time the lawsuit was filed failed to contain any such standards—the Board violated its statutory duty.

RCWA initiated its lawsuit after almost two decades of inaction by the Board on the MSP issue, and the failure of two November 1990 ballot initiatives which would have overhauled the composition of the Board and established in statute stringent silvicultural rules and timbercutting restrictions. The lawsuit also followed a 1991 petition by CDF to the Board, in which CDF urged the Board to adopt emergency regulations defining and implementing the MSP goal. In its petition, CDF staff stated that the existing FPR "do not fully meet the intent of the [Forest Practice] Act because they do not provide adequate guidance to assure the sustainability of high-quality timber products from lands producing at or near capacity." At its April 1991 meeting, the Board acknowledged that "the issue of the maintenance of maximum sustained production may not be clearly addressed in the rules" but declined to adopt emergency rules, preferring instead to adopt regulations through the normal rulemaking process. *[11:3 CRLR 172–73, 176]*

While the lawsuit was pending, the legislature passed AB 860 (Sher) in September 1991; based loosely on the failed ballot initiatives, the bill was a negotiated compromise which would have changed the composition of the Board and forced upon it strict forestry management standards which it had never chosen to adopt. Governor Wilson vetoed the bill on October 10, 1991, and his veto message echoed the prayer for relief in the pending *RCWA* action. He ordered CDF and the Board "to begin implementing key reform provisions under their existing authority as provided in the Z'Berg-Nejedly Forest Practice Act." *[11:4 CRLR 188]*

With both the lawsuit and Governor Wilson's directive applying pressure, the Board finally promulgated four packages of emergency regulations in October 1991, including one which defined MSP and established a plan for achieving this goal within each timber ownership. In public documents justifying the emergency regulations to OAL, the Board not only explained the need for MSP standards ("[t]he use of these standards is necessary in order to clarify that 'maximum sustained production' must be determined on the basis of biological maturity") but determined they were urgently needed because "a long-term decline in the supply and abundance of timber products is predicted and will be evidenced over the next decade." In its emergency filing, the Board also stated that its "slowness to adapt the regulatory system to the changing forest conditions and to incorporate a broader set of goals for forest regulation has led to a crisis situation." *[12:1 CRLR 169–72]*

Although OAL approved the Board's emergency regulations, the timber industry filed suit to invalidate them; in February 1992, a superior court struck the rules on grounds that no "emergency" within the meaning of the Administrative Procedure Act existed *[12:2&3 CRLR 241]*, leaving the Board to promulgate the rules in the usual course. That process took the Board over two years: In October 1993, the Board finally submitted permanent rules to OAL, which approved them in January 1994. However, while they were at OAL pending approval, the Board both petitioned Judge Pollak to dismiss RCWA's claim for declaratory relief as moot, and initiated rulemaking proceedings to substantively amend the MSP rules and delay their effective date until May 1, 1994. *[14:2&3 CRLR 195]* This conduct (which Judge Pollak characterized as "stop-start[ing]"), coupled with the Board's continued insistence that it is under no duty to act at all, appears to have prompted Judge Pollak to issue his August 2 decision.

In his ruling, Judge Pollak engaged in an exhaustive legislative history of the FPA, finding that the statute "was a significant reform born of concern over a diminishing lumber supply [and] increased demand in the future." The legislature's stated goal consisted of two parts: the establishment of appropriate restocking standards, and achievement of a balance between growth and harvest. According to Judge Pollak, this intent was reflected in PRC sections 4513 (which directs the Board of Forestry to achieve "the goal of maximum sustained production of high-quality timber products" while giving consideration to other important values offered by forestlands), and sections 4531 and 4551, which require the Board to divide the state into at least three districts and to adopt district FPR "to assure the continuous growing and harvesting of commercial forest tree species...." By May 1991, Judge Pollak found that the Board had divided the state into three districts and adopted some silvicultural and restocking rules, but had not adopted "any measure specifically addressing the balance between growth and harvest...."

Judge Pollak and all parties to the action acknowledged that the content and adequacy of the Board's new rules is not at issue in this matter (*see below* for other cases on that issue); "[t]he issue is whether the FPA imposes a mandatory duty on the Board of Forestry to adopt and enforce regulations limiting the aggregate harvest of timber on private timberlands in relation to the supply of standing timber, and if so, whether the Forest Practice Rules as they existed on May 10, 1991 were sufficient to meet the mandates of the statute."

On examination of the FPA and its legislative history, Judge Pollak found "numerous indications that the references to the goal of maximum sustained production...was meant to be more than a statement of aspirations. Preservation of our invaluable forest resources for balanced use not only today, but over the long term, is the central theme of the FPA." The court found that the legislature imposed a duty on the Board to "establish[] a workable limitation," and that "neither this background nor the language of the statute contain any suggestion that the adoption of appropriate measures to balance harvest and growth could be postponed indefinitely."

Judge Pollak relied not only upon his examination of the statute and its history, but on the "unambiguous" representations of CDF in its 1991 petition for emergency rulemaking to the Board, and the Board itself in October 1991 emergency documents and in its subsequent notice of rulemaking published in December 1991. In these documents, Judge Pollak found

that both CDF and the Board agreed that "restocking standards alone do not assure that an adequate stocking level will be maintained over time....To achieve this goal on a sustained basis over time, a mix of age classes must be present at all times throughout each ownership."

Thus, Judge Pollak granted RCWA's prayer for declaratory relief on the issue of the Board's duty and its failure to satisfy that duty. Because the Board has finally adopted MSP regulations, he denied RCWA's petition for a writ of mandate. He also scheduled an August 19 status conference to discuss a key remaining issue in the case: RCWA has also alleged that the THP process administered by CDF and the Board is not functionally equivalent to the environmental impact report (EIR) process required by the California Environmental Quality Act (CEQA). At the August 19 status conference, the parties decided that resolution of this issue should await a decision on the adequacy of the Board's new MSP rules, which is being challenged in ***Sierra Club and Redwood Coast Watershed Alliance v. California State Board of Forestry***, No. 951041 (San Francisco Superior Court), and ***Redwood Coast Watershed Alliance v. Board of Forestry***, No. 960626 (San Francisco Superior Court). At this writing, oral argument in these two writ cases has been scheduled for November 4.

On July 21, the California Supreme Court settled an important question in ***Sierra Club v. State Board of Forestry, et al. (Pacific Lumber Company, Real Party in Interest)***, 7 Cal. 4th 1215 (1994), by unanimously ruling that—in approving THPs—CDF and the Board "must conform not only to the detailed provisions of the [Forest Practice] Act, but also to those provisions of CEQA from which it has not been specifically exempted by the Legislature."

In early 1988, PALCO submitted two THPs for the logging of two separate stands of virgin old-growth forest in Humboldt County. At the urging of DFG, CDF requested that PALCO submit additional survey information with respect to the presence of old-growth-dependent wildlife in the THP areas. PALCO refused to provide the surveys, contending that such information was not required by the FPR; because DFG insisted the surveys were necessary to enable it to recommend suitable mitigation measures, CDF rejected the THPs on grounds they were incomplete. PALCO appealed to the Board, which overturned CDF's denial. The Sierra Club filed a petition for writ of mandate, and the trial court returned the THPs to the Board for specific findings on the environmental impact of the THPs and the mitigation measures suggested by DFG. Applying only the FPR, the Board found no significant adverse impact on the environment, and the trial court dismissed the case. On appeal, the First District Court of Appeal stayed timber operations pending its review of the case, and subsequently issued two similar decisions, both finding that CDF is authorized to require the additional wildlife surveys and that the Board's failure to require them and consider the information therein was improper. *[12:2&3 CRLR 246–47; 11:4 CRLR 191–92]*

The Supreme Court affirmed. The court noted that the specific issue in the case—the authority of CDF to require the timber industry to provide information on the presence of old-growth-dependent wildlife species within a proposed THP—is technically moot, as the Board's FPR have been amended to provide for the submission of information pertaining to old-growth-dependent species. However, the court found that "the department's authority to request information not specified in the rules remains a relevant concern for future cases." The Supreme Court found both that (1) CDF is impliedly authorized to request information not specified in the FPR because of its statutory duty to disapprove THPs which do not incorporate methods which substantially lessen significant adverse environmental impacts ("[t]he department cannot discharge its obligation to disapprove plans that do not incorporate feasible measures to reduce the significant adverse impacts on the environment if it is unable to identify those significant adverse impacts due to a lack of information"); and (2) PRC section 21160, part of CEQA, "gives the department express authority to request information that it needs to identify the significant adverse impacts of a timber harvesting plan...."

In so ruling, the high court finally rejected PALCO's argument that, because the Resources Secretary has certified the THP process as "functionally equivalent" to the CEQA EIR requirement, timber harvesting is wholly exempt from CEQA. The court noted that the legislature has listed the projects which are categorically exempt from CEQA in PRC section 21080; timber harvesting is not listed in section 21080. The court found that the Secretary's certification exempts the THP process only from the provisions of chapters 3 and 4 and section 21167 of CEQA, thus permitting CDF to request additional information on a proposed THP under PRC section 21160. Because the Board approved the THPs without following CEQA, the court found that its approvals were "prejudicial" and "frustrated the purpose of the public comment provisions of the Forest Practice Act."

On August 12, the D.C. Circuit Court of Appeals denied the Clinton administration's petition for rehearing and its suggestion for rehearing en banc in ***Sweet Home Chapter of Communities for a Great Oregon v. Babbitt***, 17 F.3d 1463 (Mar. 11, 1994), in which the appellate court ruled that significant habitat degradation is not within the meaning of the term "harm" as used in and prohibited by the federal Endangered Species Act. *[14:2&3 CRLR 198–99]* The D.C. Circuit's decision conflicts directly with the Ninth Circuit's decision in *Palilla v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), thus setting up possible U.S. Supreme Court review.

FUTURE MEETINGS

October 4–5 in Bass Lake.
November 8–9 in Sacramento.
December 5–6 in Sacramento.
January 9–11, 1995 in Sacramento.