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852 F.2d 1106 (9th Cir. 1988), and rejected USFWS' arguments that its definition of "harm" is authorized by the ESA as originally enacted in 1973 and was ratified by Congress in its 1982 amendments to the Act.

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

RECENT MEETINGS

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

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

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

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

FUTURE MEETINGS

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

INDEPENDENTS

BOARD OF CHIROPRACTIC EXAMINERS

Executive Director:
Vivian R. Davis
(916) 227-2790

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

The Board consists of seven members—five chiropractors and two public members. In April, Governor Wilson appointed Sharon Ufberg, DC, of Emeryville and Jeffrey Steinhardt, DC, of San Diego to the Board; the new members replace R. Lloyd Friesen, DC, and Deborah Pate, DC, whose terms expired in February.

MAJOR PROJECTS

OAL Disapproves BCE's Unprofessional Conduct Regulation. In September 1993, BCE adopted—on an emergency basis—section 317(y), Title 16 of the CCR, which stated that unprofessional conduct by a chiropractor includes treatment for infectious disease, defined as a disease caused by pathogenic microorganisms in the body; the section also provided that it shall not be interpreted to prohibit the treatment of neuromusculoskeletal or other conditions, diseases, or injuries within the scope of practice of a chiropractor in any patient with an infectious disease. BCE adopted the rule at the suggestion of Assemblymember Burt Margolin, who was concerned about a series of advertisements and a news article

in which chiropractors touted the effectiveness of chiropractic as a substitute for immunization and in treating infectious disease. In October 1993, BCE published notice of its intent to permanently adopt section 317(y), and held a public hearing on the proposal on December 9 in Sacramento. At the hearing, many chiropractors expressed their opposition to the proposed language on various grounds, and also alleged that various Board members have conflicts of interests which render them ineligible to vote on the adoption of section 317(y); specifically, those chiropractors contended that certain Board members' affiliation with the California Chiropractic Association (CCA), which they allege petitioned BCE to adopt the proposed rule, requires those Board members to recuse themselves. The Board delayed action on matter until its January meeting, in order to allow the Fair Political Practices Commission (FPPC) to review the conflict of interest matter. *[14:1 CRLR 155–56; 13:4 CRLR 188–89]*

At its January 6 meeting, BCE noted that the FPPC response indicated that if CCA is a source of income to any member of the Board, that member could participate in the decision regarding the adoption of section 317(y) only if the decision will have no financial effect on CCA. Following discussion, BCE adopted the proposed section, with BCE members Louis Newman, Rose-Mei Lee, Lloyd Boland, and John Bovée voting in favor; Michael Martello and Deborah Pate opposed the action, and R. Lloyd Friesen abstained.

On January 25, BCE submitted its completed rulemaking action on the permanent adoption of section 317(y) to the Office of Administrative Law (OAL) for review and approval. On March 9, however, OAL disapproved section 317(y) and repealed the emergency action because it found that BCE's rulemaking file on the proposed rule failed to provide sufficient information about the conduct it covers; the section has a variety of possible meanings and thus cannot be easily understood by those who are directly affected by it; BCE's response to public comment regarding the clarity of section 317(y) does not satisfy the requirements of the Administrative Procedure Act; and the rulemaking file did not contain substantial evidence of necessity to justify the permanent adoption of section 317(y).

At BCE's May 5 meeting, BCE Chair Louis Newman read a statement into the record regarding the status of section 317(y). Specifically, Newman announced that, due to OAL's disapproval of the section, and "particularly in view of the apparently unsurmountable objections raised" by OAL, "BCE has decided that it will not attempt to revisit this regulation at this time." However, no such decision was made by the Board at that meeting, as the subject was not on the May 5 agenda. This position—if ever formally adopted by the Board—would appear to open the door to the future introduction of bills like AB 2249 (Margolin) (*see* LEGISLATION).

LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 14, No. 1 (Winter 1994) at page 156:

AB 2294 (Margolin). The Chiropractic Act provides that a license to practice chiropractic does not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in materia medica. As amended May 25, 1993, this bill would have also provided that a license to practice chiropractic does not authorize the treatment of infectious disease, nor the substitution of chiropractic for immunization. This bill would have provided for the submission of these amendments to the voters; they would have become effective only when approved by the electors. This bill died in committee.

AB 667 (Boland). The Pharmacy Law regulates the use, sale, and furnishing of dangerous drugs and devices. Existing law prohibits a person from furnishing any dangerous device, except upon the prescription of a physician, dentist, podiatrist, or veterinarian. However, this prohibition does not apply to the furnishing of any dangerous device by a manufacturer or wholesaler or pharmacy to each other or to a physician, dentist, podiatrist, or veterinarian, or physical therapist acting within the scope of his or her license under sales and purchase records that correctly give the date, the names and addresses of the supplier and the buyer, the device, and its quantity. As amended March 29, this bill would have provided that the prohibition does not apply to the furnishing of any dangerous device by a manufacturer or wholesaler or pharmacy to a chiropractor acting within the scope of his/her license.

Existing law authorizes a medical device retailer to dispense, furnish, transfer, or sell a dangerous device only to another medical device retailer, a pharmacy, a licensed physician and surgeon, a licensed health care facility, a licensed physical therapist, or a patient or his/her personal representative. This bill would additionally have authorized a medical device retailer to dispense, furnish, transfer, or sell a dangerous device to a licensed chiropractor. This bill died in committee.

RECENT MEETINGS

At its January 6 meeting, BCE elected chiropractors Louis Newman to serve as Chair; Lloyd Boland to serve as Vice-Chair; and Deborah Pate to serve as Secretary.

At its March 24 meeting, BCE agreed to pursue regulatory language regarding the establishment and operation of chiropractic referral services *[14:1 CRLR 156; 13:4 CRLR 190]*; at this writing, BCE has not released the proposed language and has not published notice of its intent to pursue the proposal in the *California Regulatory Notice Register.*

Also at its March 24 meeting, BCE agreed to pursue amendments to section 349, Title 16 of the CCR, to provide that prior to being scheduled for the practical portion of the California Board examination, an applicant must show proof of either National Board status or successful completion of the entire written portion of the California licensure examination, and to clarify that the term "National Board status" means successful completion of Parts I, II, III, and physiotherapy. *[14:1 CRLR 156]* At this writing, BCE has not published notice of its intent to pursue the proposal in the *California Regulatory Notice Register.*

At its May 5 meeting, BCE rejected a proposal to administer three, instead of two, exams each year. Among other things, members expressed concern over the additional expense and staff resources that would need to be devoted to a third exam. However, the Board directed staff to determine exactly what costs and changes would be incurred in order to implement the additional exam, and is expected to continue its discussion at a future meeting.

FUTURE MEETINGS

June 9 in Palm Springs.
July 7 in San Diego.
September 8 in Sacramento.
October 13 in Los Angeles.
December 15 in Sacramento.

CALIFORNIA HORSE RACING BOARD

Executive Secretary:
Roy Wood
(916) 263-6000
Toll-Free Hotline:
800-805-7223

The California Horse Racing Board (CHRB) is an independent regulatory board consisting of seven members. The Board is established pursuant to the Horse