

August 5, 2008

Mr. John Kirlin
Executive Director
Delta Vision Task Force
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

RE: REVISED Supplemental Memo Regarding Reallocation of Water: California Fish and Game Code Issues

Dear Mr. Kirlin:

The Delta Vision Blue Ribbon Task Force has requested the Attorney General's Office advice regarding legal tools that are available to the State of California to reduce and/or reallocate water among water users for ecosystem protection and other purposes. In a memorandum dated July 11, 2008, our office summarized the legal tools available under the law of California water rights. This supplemental memorandum summarizes the legal tools available under the California Fish and Game Code to protect threatened, endangered and other imperiled species, which may have the effect of reducing and/or reallocating water use for ecosystem protection purposes.

These tools are the following: 1) candidate species regulations under the California Endangered Species Act (CESA -- Fish and Game Code section 2050 et seq.); 2) incidental take permits under CESA and the Natural Communities Conservation Planning Act (NCCPA -- Fish and Game Code section 2800 et seq.); 3) consistency determinations under CESA; and 4) state agencies' duty to conserve listed species and their habitat under CESA. The first three tools apply to any storage, diversion, conveyance and use of water that has the potential to "take" any fish, wildlife or plant species that is listed as endangered or threatened, or that is designated as candidate species, under CESA. The latter tool, state agencies' duty to conserve, applies to any state agency action that has the potential to affect a CESA-listed endangered, threatened or candidate species or its habitat. Each of these tools is summarized below.

Finally, this memo discusses the streambed alteration provisions of Fish and Game Code section 1600 et seq. These provisions prohibit any entity from substantially diverting or obstructing the natural flow of, or substantially changing or using any material from the bed, channel or bank of, any river, stream or lake in California without first notifying the Department

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of Fish and Game (DFG) and obtaining a streambed alteration agreement if required by DFG.¹

I. Background: CESA's Prohibition on "Take" of Listed Species

CESA prohibits any "person" from "taking" any fish, wildlife or plant species that is listed as endangered or threatened, or designated as a candidate for listing, under that statute. (Fish & G. Code, §§ 2080, 2085.) The Fish and Game Code defines "fish" as "wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof." (*Id.*, § 45.) "Wildlife" is defined in the Fish and Game Code as "all wild animals, birds, plants, fish, amphibians, reptiles, and related ecological communities, including the habitat upon which the wildlife depends for its continued viability." (*Id.*, § 711.2, subd. (a).)

"Take" is defined as to "hunt, pursue, catch, capture, or kill," or to attempt to do any of these things. (Fish & G. Code, § 86.) There is a debate concerning whether the definition of take includes destruction or modification of a species' habitat that is the cause of death to members of a listed species.² The take prohibition does, however, clearly apply to otherwise lawful activities that are the indirect and unintentional, as well as the direct and deliberate, cause of death of individual members of the species. (See e.g., *Dep't of Fish and Game v. Anderson-Cottonwood Irrig. Dist.* (1992) 8 Cal.App.4th 1554, 1563-1564 [holding that irrigation district's killing of endangered Sacramento River winter-run chinook salmon fry through otherwise legal diversions and pumping activities was a prohibited taking under CESA].) No specific intent to take is required. (*Id.* at 1563.)

"Person" is defined in the Fish and Game Code as "any natural person or any partnership, corporation, limited liability company, trust, or other type of association." (Fish & G. Code, § 67.) Although CESA's definition of "person" does not apply directly to state and local government agencies, government agencies nevertheless can be held indirectly liable for violations of CESA through the actions of their officials, employees, agents and other individuals who commit an offending act and who are acting within the scope of their official

¹ One other relevant provision of the Fish and Game Code, section 5937, is addressed in the memorandum our office prepared for you dated July 11, 2008 (see pp. 14-15).

² The Attorney General's Office has opined that CESA "does not prohibit indirect harm to a state-listed endangered or threatened species by way of habitat modification." (78 Ops. Cal. Atty. Gen. 137 (1995).) DFG, on the other hand, interprets take to include "any act that is the proximate cause of the death of an individual of a listed species or any act the natural and probable consequences of which would be the death of any individual of a listed species." (Memorandum to DFG Environmental Services Division, Natural Heritage Division, and Regional Managers, from Craig Manson, DFG General Counsel, Mar. 31, 1995.) No court has directly addressed this question.

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responsibilities. (Cf. 67 Ops. Cal. Atty. Gen. 355 (1984) [concluding that any officer, employee, contractor or other person who proceeds with a project on behalf of a state or local government agency or public utility is subject to criminal prosecution for violations of the Fish and Game Code].)

Although no Court of Appeal has explicitly addressed this question, in *Watershed Enforcers v. California Dep't of Water Resources*, Case No. RG06292124, the Alameda County Superior Court recently held that CESA's take prohibition applies directly to public agencies, including the state Department of Water Resources (DWR), as well as to individual public officials. (Statement of Decision, Apr. 18, 2007, pp. 8-9.) The *Watershed Enforcers* court held that DWR was unlawfully taking endangered winter run salmon, threatened spring run salmon and threatened delta smelt by operating the State Water Project's Harvey O. Banks Pumping Plant without any take authorization under CESA. The court enjoined DWR from continuing to operate the Banks Pumping Plant until it obtained authorization from DFG to take the three listed species at issue. (*Id.* at pp. 34-35.) The decision is currently stayed on appeal by stipulation of the parties in order to allow DWR time to seek "consistency determinations" under CESA for forthcoming revised federal biological opinions for the coordinated operations of the federal Central Valley Project (CVP) and State Water Project (SWP) -- commonly referred to as the Operations Criteria and Plan biological opinions or OCAP BiOps. (For a discussion of consistency determinations under CESA, see section II.D. below.)

CESA's application to officials, employees or agents of the United States Bureau of Reclamation (BOR) turns upon whether the application of a given CESA requirement (for example, a particular regulatory requirement, mitigation measure in a permit, etc.) can be characterized as a measure "relating to the control, appropriation, use, or distribution of water" within the meaning of section 8 of the Federal Reclamation Act of 1902. (43 U.S.C. § 372.) If so, then the second question is whether the BOR's compliance with the state law requirement is directly inconsistent with a clear congressional directive (i.e. statute) regarding operation of the federal Central Valley Project. (*State of California v. United States* (1978) 438 U.S. 645, 677-678; *United States v. State of California* (9th Cir. 1982) 694 F.2d 1171, 1176.) If not, then the BOR is required to comply with that particular state law requirement. These questions, however, cannot be answered in the abstract and require a careful analysis of the application of a particular regulatory or permit requirement under CESA.

II. Exceptions to CESA's Take Prohibition

Notwithstanding CESA's prohibition on take, there are several mechanisms in the Fish and Game Code by which a person, whose activities (such as water storage, diversion, conveyance and use) may take an endangered, threatened or candidate species, can obtain

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authorization for such take subject to specified terms and conditions.³ These terms and conditions may limit the timing, amount, location, manner and method of undertaking the activities in question in order to reduce the amount of take of listed species that would be caused by the activities, and to minimize and mitigate the impacts of any remaining authorized take which will be caused by the activities. Each of these Fish and Game Code mechanisms for authorization of take is discussed briefly below.

A. Candidate Species Regulations

Section 2084 of the Fish and Game Code authorizes the Fish and Game Commission (Commission) to authorize, subject to any terms and conditions it may prescribe, the taking of any candidate species. The Commission also may authorize the “taking of any fish by hook or line for sport” that is listed as an endangered, threatened or candidate species. (*Ibid.*) The Commission recently exercised this authority by adopting emergency regulations for the take of longfin smelt, which the Commission listed as a candidate species in February of 2008. These regulations authorize incidental take of longfin smelt through diversion of water by any local agency or private party and in connection with operation of the SWP and CVP, subject to specified terms and conditions. (Cal. Code Regs., tit. 14, § 749.3, subd. (a)(3)-(4).)

For example, private and local agency diversions must meet certain screening requirements, and SWP/CVP operations must meet specified Old and Middle River reverse flow requirements, among other conditions.⁴ Although these emergency regulations will only be in

³ This statement does not apply to any activities that may take any “fully protected” species (many of which also are listed as endangered or threatened under CESA and/or the federal Endangered Species Act). Several provisions of the Fish and Game Code strictly prohibit take of certain statutorily-identified fully protected species, except for take necessary for scientific research and species recovery efforts or in connection with implementation of the Quantification Settlement Agreement for the Colorado River. (Fish & G. Code, §§ 2081.7, 3511, 4700, 5050, 5515.)

The CALFED Final Environmental Impact Statement/Environmental Impact Report indicates that some fully protected species, including the salt marsh harvest mouse, greater sandhill crane, California black rail, and California clapper rail reside in the Delta region. (*Id.*, §§ 3511, subds. (c), (d), and (h), 4700, subd. (g); see CALFED Bay-Delta Program Multi-Species Conservation Strategy Final EIS/EIR Technical Appendix (July 2000), Table 2-2.) The cited provisions of the Fish and Game Code prohibit DFG from authorizing any incidental take of such fully protected species in connection with water storage, diversion, conveyance and use in the Delta under either CESA or the NCCPA.

⁴ These requirements modify and expand upon similar requirements imposed by the federal district court in *Natural Resources Defense Council v. Kempthorne* upon state and federal

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effect for 180 days (through August 26, 2008), they may be extended for two 90-day periods (until February of 2009, when the Commission will consider listing the longfin smelt as an endangered or threatened species under CESA). If the longfin smelt are listed, persons whose activities could cause take of longfin will be required to obtain take authorization under CESA or the NCCPA (see sections II.B and II.C below).

B. Incidental Take Permit Under CESA

Section 2081 of the Fish and Game Code allows DFG to issue permits authorizing take of any endangered, threatened or candidate species incidental to an otherwise lawful activity. (Fish & G. Code, § 2081, subd. (b)(1).) These permits are referred to as “incidental take permits” or “ITPs.” A CESA ITP is the state analogue to a federal incidental take statement (ITS) or incidental take permit (ITP). A federal ITS may be issued by the U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS) in conjunction with a biological opinion prepared pursuant to section 7 of the federal Endangered Species Act (ESA) for activities authorized, funded or carried out by federal agencies that may take federally listed species. (16 U.S.C. § 1536.) A federal ITP may be issued by the FWS and/or NMFS to state and local government agencies and private parties whose activities may take a federally listed species and who elect to prepare a habitat conservation plan (HCP) under section 10 of the federal ESA. (16 U.S.C. § 1539(a).) DFG may issue an ITP to a person authorizing take of a listed species under CESA if all of the following requirements are met:

1. Mitigation measures

The impacts of the authorized take must be “minimized and fully mitigated.” (Fish & G. Code, § 2081, subd. (b)(2).) For purposes of this section, impacts of take include “all impacts on the species that result from any act that would cause the proposed taking.” (*Ibid.*) This includes direct, indirect and cumulative impacts. Any adverse impacts that are the result of “purposeful activity” are subject to the full mitigation requirement. (*Environmental Protection Information Center et al. v. Calif. Dep’t of Forestry et al.* (2008) __ Cal.4th __; Slip Op. at p. 66 [hereafter “*EPIC v. CDF*”].) The full mitigation requirement also applies to natural disasters that are caused by the activity in question or to which the activity contributed, or natural disasters that might adversely affect the baseline conditions for listed species, thereby exacerbating the impacts of the activity in question on listed species. (*Id.* at p. 66.)

project operations to protect delta smelt under the federal Endangered Species Act.

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Any mitigation measures selected must be consistent with three basic limitations.⁵ First, the measures must be “roughly proportional in extent to the impact of the authorized taking on the species.” (Fish & G. Code, § 2081, subd. (b)(2).) The meaning of the “roughly proportional” limitation recently was held by the California Supreme Court to prohibit both “excessive” and “inadequate” mitigation. (*EPIC v. CDF, supra*, Slip Op. at p. 63.) Specifically, the Court held that “reading the ‘roughly proportional’ language together with the ‘fully mitigate’ language leads to the conclusion the Legislature intended that the landowner bear no more -- but also no less -- than the costs incurred from the impact of its activity on listed species.” (*Ibid.*) What constitutes excessive or inadequate mitigation will, of course, depend upon the facts of the particular case.

Second, the mitigation measures must be “capable of successful implementation.” (Fish & G. Code, § 2081, subd. (b)(2).) Thus, DFG must consider whether the measures are “legally, technologically, economically, and biologically practicable.” (Cal. Code Regs., tit. 14, § 783.4, subd. (c).) New and experimental mitigation measures can be relied upon if they have “a reasonable basis for utilization and a reasonable prospect for success.” (*Ibid.*)

Third, where various alternative measures exist, each of which will minimize and fully mitigate the impacts of the take, “the measures required shall maintain the applicant's objectives to the greatest extent possible.” (Fish & G. Code, § 2081, subd. (b)(2); *EPIC v. CDF, supra*, Slip Op. at p. 65.)

2. Funding for mitigation measures and monitoring

The permit applicant also must “ensure adequate funding to implement” the required mitigation measures, as well as for monitoring compliance with and the effectiveness of these measures. (Fish & G. Code, § 2081, subd. (b)(4).) In order to meet the ensured funding requirement, DFG generally requires cash security, a trust account, or an irrevocable letter of credit sufficient to cover the costs of reporting and monitoring as well as the costs of implementing the mitigation measures that are not completed prior to impacts on listed species and habitat.

⁵ These limitations are set forth in Fish and Game Code sections 2052.1 and 2081, subdivision (b)(2). Section 2052.1 declares that “[t]his section governs the full extent of mitigation measures or alternatives that may be imposed on a person” pursuant to CESA. This statement has been interpreted to mean that ITP applicants who are not state agencies are only required to mitigate the direct, indirect and cumulative impacts of their particular projects and are not required to go farther and undertake other actions that contribute to the species’ recovery prospects. For a discussion of state agencies’ recovery responsibilities under CESA, see section III below.

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With respect to the SWP, DWR has authority to provide “adequate funding” for any CESA-mandated mitigation measures “for the preservation of fish and wildlife” by including the costs of those measures in the prices, rates and charges provisions of its SWP water and power contracts. (Wat. Code, § 11912.)

3. No jeopardy to the species

DFG must find that issuance of the permit would not “jeopardize the continued existence of the species.” (Fish & G. Code, § 2081, subd. (c).) DFG’s jeopardy determination must be “based on the best scientific and other information that is reasonably available.” (*Ibid.*) In making this determination, DFG must consider the following factors: (a) the species’ ability to survive and reproduce and (b) any adverse impacts of the proposed taking on these abilities in light of: (i) known population trends, (ii) known threats to the species, and (iii) reasonably foreseeable impacts on the species from other related projects and activities. (*Ibid.*)

DFG must include in every ITP “such terms and conditions” as it “deems necessary or appropriate to meet” the foregoing mitigation, funding and no jeopardy requirements. (Cal. Code Regs., tit. 14, § 783.4, subd. (c).)

4. Application of CESA ITP process to water storage, diversion, conveyance and use

The CESA ITP process can be utilized for any number of activities involving water storage, diversion, conveyance and use that may directly or indirectly affect state-listed species in and around the Delta. For example, a variety of stakeholders currently are attempting to develop a conservation plan for the Sacramento-San Joaquin Bay Delta region. The so-called Bay Delta Conservation Plan (BDCP) would provide the basis for certain “potentially regulated entities” (including DWR, BOR, several urban and agricultural water districts and Mirant Delta LLC), to obtain an ITP for state-listed endangered, threatened and candidate species under CESA and/or the NCCPA in connection with certain “covered activities.” These activities include, but are not limited to: (1) existing and future operation and maintenance of the SWP and CVP (including SWP and CVP water conveyance and transfer operations); (2) new capital, operational and other improvements to the SWP and CVP water supply and conveyance systems; (3) existing and future projects of other Delta water users; (4) projects to improve water quality in the Delta; and (5) current operations of Mirant Delta power plants. (DWR Notice of Preparation, Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan, Mar. 17, 2008, pp. 2, 5.)

The BDCP and accompanying environmental documentation will examine “at least four alternative Delta conveyance strategies,” including dual and isolated conveyance systems. (*Id.*, pp. 2-3.) Covered species will include Central Valley steelhead, Central Valley chinook salmon (spring, fall and late fall runs), Sacramento River winter run chinook salmon, Delta smelt,

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Sacramento splittail and longfin smelt. (*Id.*, p. 6.)

Conditions to protect covered species are likely to include Delta habitat restoration and enhancement actions, “other conservation actions to help address a number of stressors” on species covered by the plan, water operations and management to achieve the plan’s species and habitat conservation goals, and a comprehensive monitoring, assessment and adaptive management program. (DWR Notice of Preparation, Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan, Mar. 17, 2008, p. 5.)

C. Incidental Take Permit Under the Natural Communities Conservation Planning Act

1. Background and overview

In lieu of obtaining authorization for incidental take of state-listed endangered, threatened and candidate species under CESA, a private individual or state or local government agency may elect to obtain such authorization under the NCCPA, Fish & Game Code section 2800 et seq. The NCCPA originally was enacted in 1991 to “conserve long-term viable populations of California's native animal and plant species and their habitats in areas large enough to ensure their continued existence” while at the same time allowing for “compatible and appropriate” urban development and economic growth. (DFG, *1991-92 Report on the Status of the Natural Communities Conservation Planning Program.*)

In early 2002, the California Legislature enacted major legislation that completely repealed and re-enacted the NCCPA, and added numerous new procedural and substantive requirements to the statute. (SB 107 (Sher), Chap. 4, Stats. of 2002 and SB 2052 (Sher), Chapter 133, Stats. of 2002.) In many respects, however, this bill simply codified DFG’s longstanding administrative practice in implementing the NCCPA. General information on the NCCP process is available on DFG’s NCCP webpage at www.dfg.ca.gov/habcon/nccp/index.html.

The focal point of the NCCPA is the development of a natural community conservation plan (NCCP) which identifies and provides for “those measures necessary to conserve and manage natural biological diversity in the plan area, while allowing compatible and appropriate economic development, growth, and other human uses.”⁶ (Fish & G. Code, § 2805, subd. (h).)

⁶ “Conserve” and “conservation” are defined, similar to the definition in section 2061 of CESA, as “to use, and the use of, methods and procedures within the plan area that are necessary to bring any [listed] species to the point at which” the measures provided by CESA are no longer required, and those methods and procedures within the plan area that are necessary “to maintain or enhance the condition of” any unlisted species so that listing will not be required. (Fish & G. Code, § 2805, subd. (d).)

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The plan must provide “comprehensive management and conservation of multiple wildlife species,”⁷ including but not limited to, species listed under CESA. (*Id.*, § 2810, subd. (a).) If DFG approves an NCCP, it concurrently may issue a permit authorizing the taking of any species “whose conservation and management is provided for” in the plan. (*Id.*, § 2835.) Permittees are some or all of those entities who have executed the plan’s implementing agreement. (*Id.*, §§ 2805, subd. (j)(2), 2820, subd. (f).)

Once a permittee has received authorization to take state-listed species pursuant to the NCCPA, it need not receive separate authorization under CESA. However, if an NCCP (or a CESA ITP) covers one or more federally-listed species, the permittee(s) still must receive take authorization under the federal ESA from the FWS and/or NMFS (either an HCP and ITP under section 10 or a biological opinion and accompanying incidental take statement (ITS) under section 7, as applicable). Consequently, many NCCPs are combined with federal HCPs and/or biological opinions, and are prepared in close coordination with the federal wildlife agencies. The BDCP, for example, is being developed in coordination with both FWS and NMFS and will be designed to meet requirements for take authorization under both section 10 and section 7 of the federal ESA, as well as CESA and/or (possibly) the NCCPA. (DWR Notice of Preparation, Environmental Impact Report and Environmental Impact Statement for the Bay Delta Conservation Plan, Mar. 17, 2008, pp. 1-2, 4.)

While the NCCPA’s ITP process is subject to higher approval standards and is more involved than the CESA ITP process, the NCCP process does offer certain advantages to participants in the process. First, unlike CESA, the NCCPA expressly authorizes DFG to provide “regulatory assurances” to NCCP plan participants (see below). (*EPIC v. CDF, supra*, Slip Op. at pp. 61-62, 68-69; Fish & G. Code, § 2820, subd. (f).) Second, also unlike CESA, the NCCPA expressly authorizes DFG to permit take of currently unlisted species that may become listed in the future, subject to the terms and conditions of the NCCP and ITP. (*EPIC v. CDF, supra*, Slip Op. at p. 58, n. 18; Fish & G. Code, § 2835.) Third, NCCPs are intended to be comprehensive, long-term, large-scale watershed or ecosystem-based species and habitat conservation plans. (Fish & G. Code, §§ 2801, 2805, subd. (h), 2820, subds. (a)(3) and (a)(4).) Thus, the NCCP process offers both greater long-term certainty to permittees and potentially greater overall conservation benefits to listed species than the CESA ITP process.

⁷ As elsewhere in the Fish and Game Code, the NCCPA defines “wildlife” broadly as “all wild animals, birds, plants, fish, amphibians, and related ecological communities, including the habitat upon which the wildlife depends for its continued viability.” (Fish & G. Code, § 2805, subd. (l).)

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2. Requirements for approval of an NCCP.

DFG must make a number of findings in order to approve an NCCP and issue an ITP under the NCCPA.

First, concurrent with its approval of a final NCCP, DFG must establish a list of “covered species” that are adequately “conserved and managed” and thus authorized for take under the plan and the NCCPA. (Fish & G. Code, §§ 2805, subd. (e), 2821, subd. (a).) These may include both state-listed and currently unlisted species. (*Id.*, § 2805, subd. (e).) The DFG must make specific findings supporting coverage of each species. (*Id.*, § 2821, subd. (a).) In determining what species are entitled to “coverage” under the plan, DFG must apply the plan approval standards in section 2820 as well as the species coverage criteria specified in section 2821, subdivision (a). (*Ibid.*) In particular, the plan must provide adequate conservation and mitigation measures for *each* covered species, as required by section 2820, subdivision (a)(6).

Second, in order to approve an NCCP, the DFG must find, based on substantial evidence, that the plan does, among other things, all of the following:

- Includes an adaptive management and monitoring program that meets the specific requirements of sections 2820, subdivision (a)(2), and 2805, subdivisions (a) and (g) (Fish & G. Code, § 2820(a)(7) and (8));
- “Provides for the protection of habitat, natural communities, and species diversity on a landscape or ecosystem level through the creation and long-term management of habitat reserves or other measures that provide equivalent conservation of covered species appropriate for land, aquatic and marine habitats within the plan area” (*Id.*, § 2820, subdivision (a)(3));⁸
- Includes the development of reserve systems and conservation measures in the plan area as necessary to provide for the conservation of covered species. The reserves and conservation measures must meet the detailed standards, based on

⁸ The NCCPA does not define the concept of “equivalent” conservation measures, but this phrase was included to address NCCPs that deal with ongoing activities, such as timber harvesting, agricultural operations and water diversions and operations. The apparent intent of this language is to provide flexibility in developing a conservation program for NCCPs involving resource management activities, so as to allow for the use of best management practices (BMPs) and other measures in lieu of “hard line” habitat reserves. Such alternative conservation measures are allowed *if* they can be shown to provide the same level of species and habitat protection as a habitat reserve and will still achieve the fundamental conservation (*i.e.* recovery) standard of the NCCPA.

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the principles of conservation biology, specified in section 2820, subdivision (a)(4)(A)-(E);

- Identifies activities, and any restrictions on those activities, “allowed within reserve areas that are compatible with conservation of species, habitats, natural communities, and their associated ecological functions” (*Id.*, § 2820, subdivision (a)(5));
- “Contains specific conservation measures that meet the biological needs of covered species and that are based upon the best available scientific information regarding the status of the covered species and the impacts of permitted activities on those species” (*Id.*, § 2820, subdivision (a)(6));
- Includes an estimated time frame and process by which the habitat reserves or other conservation measures must be implemented, and identifies the obligations of plan signatories (*Id.*, § 2820, subdivision (a)(9)); and
- Ensures adequate funding to implement the plan’s conservation measures (*Id.*, § 2820, subdivision (a)(10)).

(Fish & G. Code, § 2820, subd. (a).)

Third, DFG must find that the plan’s mitigation measures do all of the following: (1) promote “coordination and cooperation among public agencies, landowners, and other private interests”; (2) provide a means to “effectively address” cumulative impacts; (3) promote conservation of unfragmented habitat areas and “broad-based natural communities and species diversity”; (4) promote “multispecies and multihabitat management and conservation”; and (5) ensure that the mitigation is “appropriate” and “roughly proportional to impacts on fish and wildlife.” (Fish & G. Code, §§ 2821, subd. (b), 2801, subd. (d).)

Finally, an approved NCCP also must include an implementing agreement that contains all of the provisions described in Fish and Game Code section 2820, subdivision (b), including provisions to ensure that “the implementation of [plan] conservation and mitigation measures . . . is roughly proportional in time and extent to the impact on habitat or covered species authorized under the plan.” (Fish & G. Code, § 2820, subd. (b)(9).) The NCCP implementing agreement is binding on all signatories and qualifies such signatories as official “plan participants” whose activities are covered by the provisions of any NCCP take permit and associated regulatory assurances (see immediately below).⁹ (*Id.*, §§ 2805, subd. (j)(2), 2820, subd. (f).)

⁹ Note that, although the literal language of the statute qualifies all plan participants for regulatory assurances, it is an open question whether such assurances are properly granted to

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3. Authorization of take and regulatory assurances

If DFG makes all of the above findings and approves the plan, it may then “permit the taking of any covered species whose conservation and management is provided for” in the approved plan. (Fish & G. Code, § 2835.) In addition, DFG also may provide regulatory “assurances” to any NCCP plan participant. (*Id.*, § 2820, subd. (f).) Such assurances must be “commensurate with long-term conservation assurances and associated implementation measures” in the approved plan. (*Ibid.*)

DFG must consider a variety of factors when determining the level of, and time limits for, regulatory assurances provided to NCCP plan participants. (Fish & G. Code, § 2820, subd. (f)(1)(A)-(H).) If such assurances are granted for one or more covered species, plan participants may not be required (without their consent) to: (1) provide additional land, water or money; or (2) implement additional restrictions on the use of land, water or other natural resources, to mitigate for impacts to that species. (*Id.*, § 2820, subd. (f)(2).) These restrictions on additional mitigation apply if “unforeseen circumstances” arise that were not anticipated and provided for in the NCCP. (*Ibid.*) “Unforeseen circumstances” are defined as “changes affecting one or more species, habitat, natural community or geographic area covered by [an NCCP] that could not reasonably have been anticipated at the time of plan development, and that result in a substantial adverse change in the status of one or more covered species.” (*Id.*, § 2805, subd. (k).)

The assurances against additional mitigation for unforeseen circumstances remain in place for whatever period of time is specified in the NCCP implementing agreement. (Fish & G. Code, § 2820, subd. (f)(2).) Assurances only apply, however, to the extent that the plan is being properly implemented “consistent with the substantive terms” of the NCCP implementing agreement. (*Ibid.*) Moreover, DFG must suspend or revoke an NCCP ITP, in whole or in part, if the continued take of a species covered by the permit would jeopardize the continued existence of that species. (*Id.*, § 2823.) DFG also must suspend or revoke an NCCP ITP, in whole or in part, if any of the circumstances listed in Fish and Game Code section 2820, subdivisions (b)(3) and (c) occurs.

D. CESA Consistency Determination

Section 2080.1 of the Fish and Game Code provides yet another exception to CESA’s take prohibition for species that are listed under both CESA and the federal ESA, such as the winter-run salmon and the delta smelt. Under section 2080.1, no ITP is required under CESA or the NCCPA for take of species listed as endangered, threatened or candidate species under CESA if all of following requirements are met: (a) the species also is listed as endangered or threatened under the federal ESA; (b) the person undertaking the activity that may cause take of

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such species has obtained authorization under the federal ESA to take such species in connection with that same activity (i.e. a biological opinion and ITS issued under section 7, or an HCP and ITP issued under section 10); and (c) DFG issues a so-called “consistency determination” certifying that the federal take authorization is consistent with CESA’s requirements. (Fish & G. Code, § 2080.1, subd. (a).) In such circumstances, the person is entitled to take the state and federally listed species, for purposes of state law, under the terms and conditions of the federal ITS or ITP. (*Ibid.*)

A person who has obtained a federal ITS or ITP for a dual-listed species and who wishes to rely on the federal take authorization in lieu of obtaining a state ITP must notify the DFG in writing and include a copy of the federal ITS or ITP. (Fish & G. Code, § 2080.1, subd. (a)(1)-(2).) DFG must immediately publish a notification of its receipt of the section 2080.1 notice in the General Public Interest section of the California Regulatory Notice Register. (*Id.*, § 2080.1, subd. (b).) Within thirty days of its receipt of a 2080.1 notice, DFG must determine whether the federal ITS or ITP is consistent with CESA. (*Id.*, § 2080.1, subd. (c).) DFG typically makes this determination by evaluating whether the federal ITS or ITP meets the requirements of Fish and Game Code section 2081, subdivisions (b) and (c) for issuance of a CESA ITP (see section II.B above), although other provisions of CESA also may be relevant for state agency permittees (see section III below). If DFG determines, based on substantial evidence, that the federal take authorization is not consistent with CESA, then the take of the state-listed species must be authorized pursuant to CESA or the NCCPA. (*Ibid.*) DFG must immediately publish a notice of its consistency determination in the General Public Interest section of the California Register. (*Id.*, § 2080.1, subd. (d).)

III. State Agencies’ Duty to Conserve

Finally, CESA indicates that state agencies have a greater obligation to protect state-listed species under that statute than do local government entities and private parties. Section 2052 of the Fish and Game Code provides that “it is the policy of this state to conserve, protect, restore and enhance any endangered species or any threatened species and its habitat.” Section 2055 of the Fish and Game Code further states that “it is the policy of this state that all state agencies, boards and commissions *shall* seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter.”¹⁰ (Emphasis added.) Like the NCCPA, CESA defines “conserve” broadly as “to use, and the use of, all methods and procedures which are necessary to bring any endangered species or

¹⁰ Two other legislative intent sections that apply to state agencies, Fish and Game Code sections 2053 and 2054, were keyed to the former state agency consultation process in CESA (former Fish and Game Code section 2090 et seq.). Because the state agency consultation process sunset from the statute on January 1, 1999, the status and continued applicability of these legislative intent provisions is unclear.

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threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary,” that is, to the point of recovery and delisting. (*Id.*, § 2061.)

Fish and Game Code section 2052.1 in turn draws a distinction between state agencies’ and other persons’ responsibilities and duties to protect listed species under CESA. (Fish & G. Code, § 2052.1.) This section sets forth the basic limitations on “mitigation measures or alternatives to address a particular impact” on a candidate, threatened or endangered species that a person may be required to implement under CESA. Section 2052.1 further states that:

This section governs the full extent of mitigation measures or alternatives that may be imposed on a person pursuant to this chapter. This section shall not affect the state’s obligations set forth in Section 2052.

(*Ibid.*)

There is no case law interpreting these provisions of CESA.

IV. Streambed Alteration Agreements

In addition to CESA and the NCCPA, the requirements of Fish and Game Code sections 1600 et seq. are designed to conserve and protect the state’s fish and wildlife resources from the harmful impacts of projects and activities that occur in and near any rivers, streams, lakes in the state. (Fish & G. Code, §§ 1600, 1602, subd. (a).) Sections 1600 et seq. apply to both public and private entities, and apply regardless of the amount of flow in the stream or river that may be affected by the activity and regardless of whether that flow is perennial or intermittent.¹¹ (*Id.*, § 1601, subd. (d).) Sections 1600 et seq. are usually referred to as the “streambed alteration agreement” provisions. Although these provisions were originally added to the Fish and Game Code in 1961 and recodified in 1976, they were substantially amended, reorganized and strengthened in 2003. (SB 418 (Sher), Chap. 736, Stats. 2003.)

In *People v. Murrison* (2002) 101 Cal.App.4th 349, 360-361, the Third District Court of

¹¹ DFG has designated “all rivers, streams, lakes, and streambeds in the State of California, including all rivers, streams and streambeds which may have intermittent flows of waters” as subject to the requirements of section 1600 et seq. (Cal. Code Regs., tit. 14, § 720; *Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1278.) DFG regulations define a “stream” as “a body of water that flows at least periodically or intermittently through a bed or channel having banks and [that] supports fish or other aquatic life. This includes watercourses having a surface or subsurface flow that supports or has supported riparian vegetation.” (Cal. Code Regs., tit. 14, § 1.72.) Additionally, the provisions of section 1600 et seq. by their terms apply to all rivers, streams and lakes in the state. (Fish & G. Code, § 1602, subd. (a).)

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Appeal held that sections 1600 et seq. apply to water right holders, including holders of pre-1914 water rights. The court reasoned that:

This statutory requirement is inherent in the state's sovereign power to protect its wildlife and Murrison's water rights are subject to these powers. A water right, whether it predates or postdates 1914, is not exempt from reasonable regulation. Just as a real property owner does not have an unfettered right to develop property in any manner he or she sees fit (citation omitted), an owner of a water right may be similarly restricted.

(*Id.* at p. 361.) DFG's issuance of a streambed alteration agreement under sections 1600 et seq. may affect the allocation or distribution of water through measures and agreement terms necessary to protect the fish or wildlife resources at issue, including instream resources.

The requirements of sections 1600 et seq. are triggered whenever any entity¹² proposes to do any of the following:

- Substantially divert or change the natural flow of any river, lake or stream;
- Substantially obstruct the natural flow of any river, lake or stream;
- Substantially change the bed, bank or channel of any river, lake or stream;
- Use any material from the bed, bank or channel of any river, lake or stream; or
- Deposit or dispose of debris, waste or other material containing crumbled, flaked or ground pavement where it may pass into any river, lake or stream.

(Fish & G. Code, § 1602, subd. (a); Cal. Code Regs., tit. 14, § 720.)

Any entity proposing to undertake any of the above activities must first notify DFG in writing of the proposed activity, including specified information. (Fish & G. Code, § 1602, subd. (a)(1).) Once DFG determines that the notification is complete and the entity has paid the applicable fees (*id.*, §§ 1602, subd. (a)(2)-(3), 1609), DFG must make one of the following determinations:

- The activity *may* substantially adversely affect an existing fish or wildlife resource. In this case, the activity may not commence until DFG and the entity

¹² "Entity" is defined as "any person, state or local governmental agency, or public utility." (Fish & G. Code, § 1601, subd. (d).)

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proposing to undertake the activity enter into, or an appointed panel of arbitrators issues, a final streambed alteration agreement that includes reasonable measures necessary to protect the resource. (*Id.*, §§ 1602, subd. (a)(4)(B)-(C), 1603, emphasis added.)

- The activity *will not* substantially adversely affect an existing fish or wildlife resource. In this case, the entity may commence the activity without entering into a streambed alteration agreement after receipt of written notice of DFG's determination. (*Id.*, § 1602, subd. (a)(4)(A), emphasis added.)

With certain exceptions, the term of a streambed alteration agreement shall not exceed five years (with the possibility of one renewal of the agreement for up to five years). (Fish & G. Code, § 1605.) DFG may suspend or revoke a streambed alteration agreement at any time if it determines, inter alia, that an entity is not in compliance with terms of the agreement. (*Id.*, § 1612.)

If an activity involves routine maintenance and operation of water supply, drainage, flood control or waste treatment and disposal facilities, and the entity provided notice to and obtained an agreement from DFG prior to January 1, 1977, no subsequent notice to and agreement with DFG is required. However, this exception does not apply if DFG determines that: 1) the work described in the initial agreement has substantially changed; and/or 2) conditions affecting the fish or wildlife resource have substantially changed and those resources are adversely affected by the activity conducted under the agreement. (Fish & G. Code, § 1602, subd. (b)(1).) In addition, for certain types of emergency work, an entity need not notify DFG prior to commencing the work, but must provide notice within fourteen days of beginning the work. (*Id.*, § 1610.)

V. Conclusion

In sum, as outlined above, there are several mechanisms by which water can effectively be reallocated or redistributed to protect species, habitats and ecosystems under the Fish and Game Code.

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Please feel free to contact me at 510-622-2136 if you have any questions or would like any additional information. Thank you.

Sincerely,

[Original signed by]

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