

INTRODUCTION

The United States Department of the Interior, Fish and Wildlife Service, has requested a revised Memorandum of Law from the California Department of Fish and Wildlife (CDFW) which demonstrates continuing compliance with the federal Endangered Species Act of 1973 (ESA) concerning an adequate and active program for the conservation of endangered and threatened species. 16 U.S.C. section 1535(c) of ESA entitled "Cooperation With the States," provides for cooperative agreements with individual states, which the Secretary of the Interior (Secretary) shall enter into if the Secretary finds that the state program for the conservation of endangered and threatened species is in accordance with the ESA. To be adequate under the ESA, the Secretary must find the following:

1. That authority resides in the state agency to conserve resident species of fish, wildlife or plants determined by the state agency or the Secretary to be endangered or threatened. (16 U.S.C. § 1535(c)(1)(A) and (c)(2)(A).) The term "conserve" is defined in 16 U.S.C. section 1535(3) of ESA to mean use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to ESA are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking;
2. That the state agency has established acceptable conservation programs consistent with the purpose and policies of ESA, for all resident fish or wildlife, and for plants within the state determined by the state agency or the Secretary to be endangered or threatened and has furnished a copy of such plan and program together with all pertinent details, information and data requested to the Secretary; (16 U.S.C. § 1535(c)(1)(B) and (c)(2)(B));
3. That the state agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish, wildlife, and plants (16 U.S.C. § 1525(c)(1)(C) and (2)(C));
4. That the state agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish and wildlife (16 U.S.C. § 1535(c)(1)(D));
5. That provision is made for public participation in designating resident species of fish, wildlife, and plants as endangered or threatened (16 U.S.C. § 1535(c)(1)(E) and (c)(2)(D));
6. Or that under the State program
 - a. With regard to resident species of fish and wildlife, the requirements set forth in paragraphs 3, 4, and 5 are complied with, and
 - b. With regard to resident species of plants, the requirements set forth in paragraphs 3 and 5 are complied with and plans are included under which

immediate attention will be given to those resident species of fish and wildlife or plants which are determined by the Secretary or the state agency to be endangered or threatened and which the Secretary and the state agency agree are most urgently in need of conservation programs (16 U.S.C. § 1535 (c)(1)(E)(ii) and (c)(2)(D)(ii).)

This Memorandum will describe the substantial legal authority given to the State Legislature by the California Constitution to conserve fish, wildlife and plants and the legislative delegation of that authority to the Fish and Game Commission and CDFW. The specific statutory enactments pertaining to conservation of fish, wildlife and plants as set out in the Fish and Game Code will be discussed in detail, along with implementing regulations. As will be shown, the Fish and Game Commission and CDFW possess adequate power to conserve resident species that are now considered to be endangered or threatened or any that will become so.

DISCUSSION

California Constitution - Fish and Game Provisions

Article IV, section 20 of the California Constitution provides the authority for the protection of fish and game in California and for the delegation by the California Legislature of powers relating to the protection and propagation of fish and game to the Fish and Game Commission. Article IV, section 20 states:

“(a) The Legislature may provide for division of the State into fish and game districts and may protect fish and game in districts or parts of districts.

(b) There is a Fish and Game Commission of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 6-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. The Legislature may delegate to the commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. A member of the commission may be removed by concurrent resolution adopted by each house, a majority of the membership concurring.”

Many of the powers relating to the regulation and protection of fish and game in California have been delegated to the Fish and Game Commission pursuant to subdivision (b) above and have been codified in the Fish and Game Code.

Fish and Game Code and Regulations

Article IV, section 20 establishes the Fish and Game Commission within the California Natural Resources Agency. (Fish & G. Code, § 101.) The Fish and Game Commission’s regulatory powers are set out in Fish & Game Code section 200 et seq., and include the ability to regulate the taking and possession of birds, mammals, fish, amphibia, and reptiles. The California Fish and Game Code creates CDFW and gives CDFW the power to enforce the code (Fish & G. Code, §§ 700, 702.) The Commission retains policy oversight over CDFW’s conduct

and administration. (Fish & G. Code, § 703.) The Wildlife Conservation Board is within the Department and generally facilitates the acquisition of lands for the conservation and recreational use of fish and wildlife. (Fish & G. Code, § 1345 et seq.)

Fish and Game Commission Meetings – Public Participation

The Fish and Game Commission is required to hold at least eight regular meetings per year, if the Commission has adequate funding for travel. The Commission may also hold additional special meetings. (Fish & G. Code, § 206, subd. (a).) At least three of those meetings must be to consider and adopt regulations. All of the meetings are noticed to the public and are open to the public. (Fish & G. Code, §§ 206, subds. (b),(c), 207.)

California Endangered Species Act (CESA, Fish & G. Code, § 2050 et seq.)

This important conservation legislation sets out state policy regarding threatened and endangered species, provides for a listing and review process, and prohibits certain acts damaging to listed species. Both the Commission and CDFW are given important powers and duties to protect listed species.

CESA sets out the state’s interest in threatened and endangered species (Fish & G. Code, § 2051) and describes the state’s policy as to those species:

“The Legislature further finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat and that it is the intent of the Legislature, consistent with conserving the species, to acquire lands for habitat for these species.” (Fish & G. Code, § 2052.)

The state’s policy is that state agencies shall seek to conserve listed species. (Fish & G. Code, § 2055.) In addition, state agencies should seek reasonable and prudent alternatives to avoid jeopardizing the continued existence of an endangered species or threatened species. (Fish & G. Code, § 2053.) The California definitions of endangered and threatened species (Fish & G. Code, §§ 2062, 2067) are similar to federal definitions, but not identical. (See 16 U.S.C. §§ 1532(6) and 1532(20).) The tools listed for “conserving” resources (Fish & G. Code, § 2061) are identical to the federal ESA. (16 U.S.C. § 1532(3).) The above policies demonstrate the state’s authority to conserve resident species of fish, wildlife and plants¹ as required by **16 U.S.C. section 1535(c)(1)(A) and (c)(2)(A)**.

To be conserved, species must first be listed. The Fish and Game Commission is responsible for making listing decisions based upon consideration of sufficient scientific information. (Fish & G. Code, § 2070.) Any interested person may initiate the listing process by petition. (Fish & G. Code, §§ 2071, 2072, and 2072.3.) CDFW may also recommend listing. (Fish & G. Code, § 2072.7.) CDFW evaluates petitions and recommends to the Commission whether the petition contains sufficient information to determine if action is warranted. (Fish & G.

¹ The California Endangered Species Act definitions for endangered and threatened species do not explicitly include invertebrates. Shasta Crayfish and California Freshwater Shrimp were grandfathered with endangered status, and Trinity Bristle Snail was grandfathered with threatened status when CESA was amended in 1984.

Code, § 2073.5.) After a public hearing, the Commission acts on petitions and CDFW-initiated recommendations, and decides whether to reject the petition or accept it for consideration. (Fish & G. Code, § 2074.2.) Formal review and the corresponding “candidate species” status triggers substantial opportunities for additional public participation through the notification of interested parties. (Fish & G. Code, §§ 2074, 2074.2, 2075, 2077 and 2078.) This notification and opportunity to participate continues throughout the designation process, thus satisfying the public participation requirement of **16 U.S.C. section 1535 (c)(1)(E) and (c)(2)(D)**. Formal review itself may take up to one year and results in a Department report on listing including, if appropriate, a preliminary identification of the habitat that may be essential to the continued existence of the species and recommendations as to management activities and other recommendations for recovery of the species. (Fish & G. Code, § 2074.6.) Next follows Commission final action accepting or rejecting the need to list. (Fish & G. Code, §§ 2075 and 2075.5.) If listing is accepted a regulation incorporating the designation must be adopted pursuant to Government Code section 11340 et seq. with the attendant opportunities for public participation. (Fish & G. Code, § 2075.5(e)(2).) California’s list of threatened or endangered plants and animals is set out in Title 14, California Code of Regulations, sections 670.2 and 670.5. This listing is subject to periodic CDFW review and appropriate Commission response. (Fish & G. Code, § 2077.) The above listing process demonstrates that the State has authority to conserve resources, conduct sufficient investigations concerning listing and is required to involve the public in that process, thus satisfying **16 U.S.C. section 1535 (c)(1)(A), (C), and (E) and (c)(2)(A), (C), and (D)**.

Once a species is listed “[N]o person shall import into this state, export out of this state, or take, possess, purchase, or sell within this state, any species, or any part or product thereof, that the commission determines to be an endangered species or a threatened species, or attempt any of those acts,” subject to some exceptions principally involving plants. (Fish & G. Code, § 2080.) Violation of this section is a criminal misdemeanor punishable as such. (Fish & G. Code, §§ 12000, 12008.) This prohibition applies to candidate species undergoing formal review. (Fish & G. Code, § 2085.) These code sections further demonstrate state authority to conserve resident listed species as required by **16 U.S.C. section 1535 (c)(1)(A) and (c)(2)(A)**.

The Natural Community Conservation Planning Act (Fish & G. Code, § 2800 et seq.)

The Natural Community Conservation Planning Act (NCCPA) of 1991 was enacted to foster voluntary cooperation between government wildlife agencies, local governments, and private development interests. SB 107 revised that law effective January 1, 2002 (Sen. Bill No. 123 (2000-2001, Reg. Sess.) A “natural community conservation plan” identifies and provides measures necessary to conserve and manage natural biological diversity within a plan area while allowing compatible and appropriate economic development, growth, and other human uses. (Fish & G. Code, § 2805, subd. (h).)

The purpose of natural community conservation planning is to sustain and restore those species and their habitat identified by CDFW that are necessary to maintain the continued viability of those biological communities impacted by human changes to the landscape. (Fish & G. Code, § 2801, subd. (i).) To be approved, a natural community conservation plan must meet

detailed requirements set out in the NCCPA, including: 1) the plan must provide for the protection of habitat, natural communities, and species diversity on a landscape or ecosystem level; 2) the development of reserve systems and conservation measures in the plan area must provide certain requirements as needed for the conservation of species; 3) the plan must contain specific conservation measures that meet the biological needs of the species covered under the plan; and 4) the plan must contain provisions that ensure adequate funding to carry out the conservation actions identified in the plan. (Fish & G Code, § 2820, subd. (a)(1-10).) Draft documents associated with NCCPs that are being considered for adoption must be available for public review and comment at least 60 days prior to the adoption of the draft document, and preliminary public review documents must be made available at least 10 working days prior to any public hearing addressing those documents. (Fish & G. Code, § 2815, subd. (a).) The NCCP process demonstrates that the state has authority to conserve resident species of fish, wildlife and plants (which satisfies **16 U.S.C. 1535(c)(1)(A) and (B) and (c)(2)(A) and (B)**), and that the state is authorized to establish programs for the conservation of resident listed species, thus satisfying **16 U.S.C. section 1535(c)(1)(D) and 1535(c)(1)(B)**.

Native Plant Protection Act (Fish & G. Code, §§ 1900-1913)

This legislation specifically protects rare and endangered plants. As such it should be read together with CESA to protect all listed species (since CESA defines “endangered” and “threatened” species to include plants.) (Fish & G. Code, §§ 2062, 2067.) CESA listing procedures are used for plants (see Fish & G. Code, §§ 1901 and 1904). CDFW is authorized to undertake botanical research and field investigations to conserve, protect, and perpetuate native plants. (Fish & G. Code, § 1905.) The take, possession and sale of listed plants is generally prohibited. (Fish & G. Code, § 1908.) State agencies are required to carry out programs for the conservation of listed plants. (Fish & G. Code, § 1911.) The Native Plant Protection Act provides further authority to conserve plant species and conduct investigations in support of conservation in accordance with **16 U.S.C. section 1535(c)(1)(A) and (C), and (c)(2)(A) and (C)**.

Wildlife Conservation Board

The Wildlife Conservation Law of 1947 created the Wildlife Conservation Board, within CDFW. (Fish & G. Code, § 1320.) The Board was created to acquire land and facilities for recreational purposes, and adaptable for conservation, propagation, and utilization of the fish and game resources of the state. (Fish & G. Code, § 1301.) The Board has the authority to investigate, study, and determine what areas of the state are most essential and suitable for wildlife production and preservation, and other uses by species. (Fish & G. Code, § 1345(a).) As a result of the studies, the Board shall determine what areas, lands, or rights in lands or waters should be acquired by the state to effectuate a coordinated and balanced program resulting in the restoration of wildlife in the state. (Fish & G. Code, §1347.) The Board’s authority establishes compliance with **16 U.S.C. section 1535(c)(1)(C) and (D)** (requiring authority to conduct investigations and acquire habitat) and with **16 U.S.C. section 1535(c)(1)(A)** (requiring authority to conserve fish and wildlife.)

Ecological Reserves

“Ecological reserves” are land or water areas that are designated by the Commission to be preserved in a natural condition, or provided some level of protection as determined by the Commission. (Fish & G. Code, § 1584.) With the approval of the Commission, CDFW may obtain land to be used as an ecological reserve to protect threatened or endangered native plants, wildlife, or aquatic organisms or specialized habitat types. (Fish & G. Code, § 1580.) It is unlawful to enter an ecological reserve, except in accordance with regulations adopted by the Commission. (Fish & G. Code, § 1583.) The ecological reserve program demonstrates compliance with **16 U.S.C. 1535(c)(1)(D)** respecting programs, including the acquisition of habitat, for the conservation of resident listed species.

California State Wildlife Action Plan

In 2000, Congress enacted the State Wildlife Grants Program to support state programs that broadly benefit wildlife and habitats but particularly “species of greatest conservation need.” As a requirement for receiving funding under this program, state wildlife agencies were required to submit a Wildlife Action Plan (a comprehensive wildlife conservation strategy) to the U.S. Fish and Wildlife Service (USFWS). In 2005, CDFW directed the development of a report titled “California Wildlife: Conservation Challenges” (Bunn et al. 2005). The report answers three primary questions:

- What are the species and habitat of greatest conservation need?
- What are the major stressors affecting California’s native wildlife and habitats?
- What are the actions needed to restore and conserve California’s wildlife, thereby reducing the likelihood that more species will approach the condition of threatened or endangered?

The 2005 report relies on a designated Special Animals List, also referred to as “species at risk” or “special status species”, to identify the species in greatest conservation need. This list includes approximately 800 species representing marine, aquatic, and terrestrial habitats, and includes birds, mammals, reptiles, amphibians, fish, and invertebrates. It focuses on threatened and endangered species and species of special concern, as well as species that are rare or declining in numbers.

States must review and, if necessary, revise their Wildlife Action Plan every ten years. For the 2015 update, CDFW will update its reports on species of special concern for birds, mammals, reptiles, and fish, and will include new or updated species range maps and climate change vulnerability assessments. In addition, the 2015 update will include plants. Two hundred and eighteen plants are listed as either rare, threatened, or endangered under CESA and the NPPA. For the 2015 Wildlife Action Plan, CDFW and the California Native Plant Society are working to identify the 100 plant species that have the greatest conservation need. The existing State Wildlife Action Plan, approved by the USFWS, demonstrates CDFW’s plans to give immediate attention to the species that the Secretary and the state agree are most urgently in

need of conservation programs, which shows the state's compliance with **16 U.S.C. 1535(c)(1)(E)(ii) and (c)(2)(D)(ii)**.

Conservation Program

Within CDFW, the Conservation Planning Program is responsible for statewide oversight of various approaches used to balance the needs of threatened, endangered, and sensitive species and habitats with the needs of land users. The primary focus is to provide policy guidance to large-scale, multi-species planning approaches that are partnerships between state, federal and local governments and private interest groups. The Conservation Planning Program also coordinates habitat acquisition associated with plans, local assistance grants for conservation planning and implementation, conservation and mitigation banking, and voluntary integrated resource management plans. Detailed information regarding CDFW's ongoing multi-species planning processes throughout the state can be viewed on CDFW's web page at:

<https://www.wildlife.ca.gov/Conservation/Planning>

CDFW's extensive conservation programs satisfy **16 U.S.C. section 1535(c)(1)(B) and (c)(2)(B)**.

Enforcement

The statutory scheme contained in the Fish and Game Code intends that violations of the Code be punished as a crime. (Fish & G. Code, § 12000.) Division 9, chapter 1 of the Fish and Game Code lists specific fines and/or jail sentences for specific code violations. (see Fish & G. Code, §§ 12002-12010.) Section 12153 et seq. provides for forfeitures of hunting privileges, permits, licenses and forfeitures of devices used in taking birds, mammals, fish and amphibians upon conviction of violation of the code or regulations and for seizure of the fish and game unlawfully taken, possessed, sold or transported contrary to any state law.

Several other divisions of the Fish and Game Code contain provisions relating to law enforcement. For example, Fish and Game wildlife officers are granted "all the powers and authority conferred by law upon peace officers listed in section 830.6 of the Penal Code to make arrests for violations of this code, and may serve all processes and notices throughout the state." (Fish & G. Code, § 850.) Fish and Game Code section 875 et seq. provides for county game wardens who are also empowered as peace officers as defined in Penal Code section 830.6.

Section 2012 of the Fish and Game Code gives authorized CDFW employees the ability to inspect, upon demand, all licenses, tags, and the animals taken with those licenses and tags, and the devices used to take those animals. Similarly, CDFW may inspect boats, stores, and other buildings, as well as receptacles where animals may be stored. (Fish & G. Code, § 1006.)

Thus, the authority for the state agency to conserve resident species, as required by **16 U.S.C. section 1535(c)(1)(A) and (c)(2)(A)**, has been set forth in the Fish and Game Code.

CONCLUSION

As described above, CDFW has been granted substantial legal authority to conserve fish, wildlife, and plants. That statutory authority, along with the conservation programs that CDFW has established and implemented, results in an adequate and active program for the conservation of endangered and threatened species within the state. Therefore, CDFW's program meets Endangered Species Act requirements for cooperative agreements with states.