

California Fish and Wildlife Strategic Vision Project
Notes from the March 8, 2012 Workshop on Statutes and Regulations
March 12, 2012

This document contains notes from the March 9, 2012 workshop where participants discussed potential recommendations for the final strategic vision related to statutes and regulations affecting the California Department of Fish and Game (DFG) and the California Fish & Game Commission (F&GC). The notes in this document do not reflect the evolving and sometimes meandering nature of the discussion; some notes that appear early in the document may have, in fact, been discussed later in the workshop and vice versa.

The potential recommendations in this document were presented in a document prepared specifically for the workshop unless otherwise identified. Suggested additional text identified during the workshop is in underlined text (like this) while suggested deletions are in strikethrough text (~~like this~~).

These potential recommendations will be discussed on March 15, 2012 during meetings of the California Fish and Wildlife Strategic Vision (CFWSV) Blue Ribbon Citizen Commission and CFWSV Stakeholder Advisory Group.

Public comment: Having a definition of “invasive species” in the California Fish and Game Code would be helpful. – would have to be in harmony with California Department of Food and Agriculture definitions, but important to also have in fish and game code for listing of species and developing programs. No cost for this recommendation. No more detailed language suggested in the letter submitted this last week, but Doug Johnson willing to provide more information and background if requested. The recommendation originated from conversations with DFG staff; in order for DFG to work more on invasive species, it was suggested to Doug that a definition would be an important first step. SAG members expressed that while intrigued by the idea, they do not believe they are educated enough about this subject to be comfortable moving a recommendation forward at this moment. Karen Buhr is willing to work with Doug Johnson to develop background materials and specific recommendation language for discussion at the March 15 meetings.

Potential Recommendations

Workshop notes: The potential statutes and regulations recommendation #1 is recommended to be eliminated. This idea has already been addressed through the executive committee and a subsequent conversation that will take place during the mandates workshop on Friday.

1. Statutes and Regulations Recommendation: Perform a Comprehensive Review and Update of the California Fish and Game Code and Related Laws

The BRCC recommends that a comprehensive review of state statutes, constitutional provisions and regulations concerning California Department of Fish and Game (DFG) and the California Fish and Game Commission (F&GC) be undertaken. That review, which should be of a technical, nonpartisan nature, should be initiated without further delay. The independent California Law Revision Commission is an ideal body to undertake the constitutional and statutory review, and to then make recommendations for curative amendments to the California State Legislature for consideration and

enactment. After that process is completed, DFG and the Secretary for Natural Resources should undertake a conforming review process of California's regulations implementing those constitutional and statutory mandates.

California statutes affecting DFG and F&GC have evolved over 140 years. During that period, new and sometimes inconsistent legal mandates have been imposed via legislation. A technical, nonpartisan review would provide recommendations for curative amendments to address the inconsistencies.

2. Statutes and Regulations Recommendation: Evaluate potential statutory changes to the California Endangered Species Act (CESA) to improve the permitting process: Uniformity in permitting process, efficiency in permitting, consistency in the application of CESA standards, and opportunity for applicants to appeal DFG decisions.

Implementation actions include:

- Provide the ability for DFG to allow incidental take for threatened species through regulations (as opposed to individual permits), similar to federal 4(d) rule and incidental take for candidates.

Workshop notes: Under the federal Endangered Species Act the U.S. Fish and Wildlife Service has recognized that certain activities have benefit to certain threatened and endangered species. There is a list of activities that are allowed for "take." Under CESA (i.e., salamander) don't have same protection as under federal ESA. This conversation has been held many, many times in recent years. Some desire to have elements of CESA strengthened, while others desire to have more consistency with the federal ESA. Dan Silver and Kim Delfino need to be part of this conversation (they are likely to have concerns and, while their negotiating position is understood, it is not clear what they want), otherwise the current language works for those SAG members participating the workshop.

- Create an internal appeals process that an applicant can invoke when unable to reach agreement on terms for an incidental take permit.

Workshop notes: Already have an appeals process once a permit is submitted and reviewed. Internal appeals process before actually engaging in the permitting process is what stakeholders are seeking here. Concern with use of the term "appeal"? Title 14, Section 783.8 has a process for reconsideration of a variety of decisions, not just for permits. Informal requests for reconsideration not uncommon according to DFG staff; this is essentially an appeal to the regional manager. Maybe really looking for an amendment to the existing process? "Amend internal appeals process so that an applicant can invoke it when unable to reach agreement on terms of a permit with a specific staff member." Maybe ask counsel to put process in writing? Change "create" to "amend" and possibly add new language. Process description needs to be in writing. See Title 14, Section 783.8, subsection (a) for existing "applicant" language. This may not be sufficient. Want new internal process that addresses permit standards or conditions prior to submitting a permit, or make regulatory changes to section 738.8. *Suggested new language: Amend Title 14, Section 783.8 to provide for appeals of proposed permit standards, terms or conditions.*

- Allow arbitration similar to 1600 arbitration for incidental take permits issued under CESA (consistency of application of standards).

Workshop notes: Dan Silver and Kim Delfino need to be part of this conversation about incidental take permits (they are likely to have concerns), otherwise the current language works for those SAG members participating in the workshop.

Workshop notes: Potential statutes and regulations recommendation #2 moves forward with the requested language amendment for the second bullet.

3. Statutes and Regulations Recommendation: Allow the incidental take of fully protected species following review and under specified circumstances

Implementation actions include:

- Only allow take for defined restoration projects or agreed upon beneficial projects.
- Reviewing status of fully protected species to determine the need for protection.
- Eliminate fully protected status or alternatively list under CESA depending on status review.
- New bullet? Allow incidental take of fully protected species similar to CESA.

Description: The fully protected species statute is outdated and needs addressing. Until the statutory change made in 2011, there was no way to allow for take of fully protected species. This caused challenges for projects throughout California and deterred habitat improvement projects that could benefit fully protected species because of the risk of take during the restoration project. While some would support abolishing the fully protected species statutes completely, broader support could be gained by moving species needing protection to CESA and eliminating it for those that don't warrant protection. However, DFG has stated that its workload would be significantly less it would be much easier for DFG if the statutes were eliminated, rather than requiring the review and listing of current fully protected species.

Ties to Strategic Vision: Goal 3, Objective 3; Goal 4, Objective 2

Workshop notes: DFG recommendation presented at the January 5 BRCC/SAG meeting: "Seek authority to sponsor legislation that would allow incidental take under certain circumstances of 'fully protected' species related to management activities (e.g. fold into CESA or mirror CESA take authority)." How are "certain circumstances" and "management activities" defined in the DFG recommendation? Would love to support DFG with this kind of recommendation, because it sounds like a greater universe than the NCCP legislation, yet still is being mindful of the needs of the fully protected species; seems to be a "tweener" suggestion. There is this statutory authority where endangered species are protected which may or may not make sense, causes a lot of problems for a lot of people, and creates heartburn not only for Natural Community Conservation Plan (NCCP) participants but also anyone trying to look at how to deal with their property as a landowner. Let's do this though legislation under certain circumstance and certain management activities and take care of this problem.

Suggestion is to eliminate the four bullets above and instead amend the recommendation language to reflect the recommendation from DFG. Suggested recommendation language: Seek statutory changes to the Fully Protected Species Act to allow incidental take under certain circumstance of fully protected species related to certain management activities. Expect the reaction from the conservation

community will be that the Fully Protected Species Act was just amended for NCCPs and should wait to see how that works. The response is what is the difference between an NCCP and someone who needs an incidental take permit? If DFG needs this kind of additional flexibility for more conservation on a much greater scale, why maintain such a roadblock? In the conservation community, an organization like TNC might appreciate this kind of change as it would be of benefit when the Fully Protected Species Act is a hindrance to macro-projects but don't want to go through the hassles of an NCCP, then stuck. Such a statutory change will give DFG greater flexibility and reduce disincentives for landowners to engage in habitat conservation. This will again require conversations with members of the conservation community; March 15 SAG meeting will be an important opportunity. Not sure ready to further define management activities at this time without more input from DFG and further dialogue with conservation community. The suggested language works for those SAG members participating the workshop.