Calif. Protected Species Law Changes: Real Fix Or Red Tape?

By **Paul Weiland** (August 25, 2023)

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On July 10, California Gov. Gavin Newsom signed S.B. 147 into law, amending California's "fully protected species" statutes. These laws were enacted in 1970, and currently protect 37 species native to California, ranging from the massive North Pacific right whale to the diminutive salt marsh harvest mouse.

The amendments enacted by the Legislature and signed into law by the governor create a temporary, 10-year permitting regime that allows proponents of a limited, defined set of projects to pursue authorization from the California Department of Fish and Wildlife, or CDFW, to proceed even where they could take — that is, harm — one or more fully protected species.

That said, the law creates a novel and seemingly onerous permitting standard. For this reason, it remains to be seen whether this legislative reform effort that was initially billed as permit streamlining will live up to that moniker — or become another obstacle to the projects it purports to benefit.

Newsom unveiled a suite of legislative proposals in May to achieve permitting and project review reform, intended to accelerate the building of renewable energy, transportation and water infrastructure in response to climate change. Among them was a bill intended to repeal the fully protected species statutes, and designate all but three of the species protected by those statutes as threatened or endangered under the California Endangered Species Act, or CESA.

The governor's streamlining effort ran into a buzz saw in the Legislature, including his effort to repeal the fully protected species statutes. This was the case despite the fact that CESA, modeled on the federal Endangered Species Act, provides robust protection for listed species — including a prohibition on take of candidate and listed species without authorization, and a requirement that anyone seeking to take such species must "minimize and fully mitigate" the impact of the taking.

As amended by the Legislature and signed into law, S.B. 147 retains the fully protected species statutes, but provides a temporary permitting process, through 2033, for take of such species associated with a limited number of expressly identified activities. The activities for which project proponents may seek a permit are:

- A maintenance, repair or improvement project to a state water project undertaken by the California Department of Water Resources;

- A maintenance, repair or improvement project to critical regional or local water agency infrastructure;

- A transportation project undertaken by a state, regional or local agency, that does not increase highway or street capacity for automobile or truck travel;

- A wind project, and any appurtenant infrastructure improvement; or

- A solar photovoltaic project, and any appurtenant infrastructure improvement.

Proponents of other types of projects, such as development of affordable housing, continue to have no recourse if those projects are expected to result in the take of even a single individual of a fully protected species.

The California Supreme Court confirmed the stringency of the fully protected species statutes in 2016, in Center for Biological Diversity v. California Department of Fish and Game, when it rejected the CDFW's approval of the environmental impact report for the proposed Newhall Ranch development north of Los Angeles.

The court ruled against the CDFW because (1) the agency permitted the project proponent to trap and transplant the unarmored threespine stickleback, a fully protected fish species, to avoid harm to individual sticklebacks, and (2) such conduct amounted to impermissible take. As interpreted by the court, the laws are so rigid that they trump all other societal priorities.

As for those entities eligible to seek a permit, they are required to meet a novel, two-part standard. First, they must meet the standard to obtain a permit under CESA, including the requirement that an applicant minimize and fully mitigate the impacts of the authorized take.

Second, they must satisfy the CDFW that (1) they have taken all further measures necessary to satisfy the conservation standard of Section 2805(d) of the Fish and Game Code, and (2) take is avoided to the maximum extent possible as to the species for which take is authorized.

Because the first part of the standard replicates the requirement to obtain an incidental take permit under Section 2081 of the Fish and Game Code, which the Legislature added to CESA through the 1984 amendments, it is relatively straightforward. The second part of the new permitting standard, on the other hand, is both novel and ambiguous.

The first subpart of this requirement is new and confusing, since Section 2085(d) is a definition and not a standard. It also is unclear how any individual project proponent would meet this subpart, since the definition of "conserve" that is referenced means the collective methods and procedures necessary to either bring a CESA-listed species to a point where listing is no longer necessary — because it is recovered — or enhance the condition of a species not listed under CESA so that it need not ever become listed.

The CDFW and the courts could reasonably interpret this provision to require a project proponent to contribute to conservation of the target species, rather than the illogical and impractical requirement that the project proponent must demonstrate the activity in

question will, by itself, actually conserve the species.

The second subpart requires avoidance of take "to the maximum extent possible." The CDFW and the courts could reasonably interpret this provision to require a project proponent to avoid take where it can do so while achieving the objectives of the project, and where doing so is economically and technologically feasible for the proponent.

Irrespective of whether the CDFW adopts the precise interpretations suggested above, the agency should endeavor to implement the standard in a manner that is clear and workable, acknowledging that the purpose of the amendments is to streamline permitting for the activities expressly identified by the Legislature.

If the agency opts not to do so, the consequences will be borne by all Californians, as desperately needed energy, transportation and water infrastructure projects line up in an ever-growing regulatory queue. In an era of accelerating environmental change, our political leaders must resist regulatory gridlock, and the parochial interests that seek to perpetuate it.

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