

Date of Hearing: April 29, 2025

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

AB 697 (Wilson) – As Introduced February 14, 2025

**SUBJECT:** Protected species: authorized take: State Route 37 improvements

**SUMMARY:** Allows the Department of Fish and Wildlife (CDFW) to authorize the incidental take of the fully protected species salt-marsh harvest mouse, the California clapper rail, the California black rail, and the white-tailed kite (covered species) as a result of construction on State Route (SR) 37. Specifically, **this bill:**

- 1) Allows CDFW to authorize the incidental take of the covered species resulting from impacts attributable to the covered SR 37 projects through the counties of Marin, Sonoma, Napa, and Solano, if all of the following conditions are satisfied:
  - a) The take of any of the covered species is incidental to an otherwise lawful activity;
  - b) The impacts to the covered species are minimized and fully mitigated, and that the applicant ensures adequate funding to ensure impacts are minimized, fully mitigated, and monitored;
  - c) The issuance of the permit be issued for the covered species will not jeopardize the continued existence of the species;
  - d) CDFW ensures that measures necessary to satisfy the conservation standard of the Natural Community Conservation Planning (NCCP) Act and to avoid take to the maximum extent possible are incorporated into each project;
  - e) The permit provides for the development and implementation, of a monitoring program and an adaptive management process that satisfy the conservation standard of the NCCP Act for monitoring the effectiveness of the measures to minimize and fully mitigate the impacts of the authorized take; and
  - f) The applicant pays a permit application fee, as specified in Fish and Game Code (FGC) § 2081.2.
- 2) Specifies the projects covered are:
  - a) The Sears Point to Mare Island Improvement Project (Interim Project) on SR 37 from post mile 2.4 in the County of Sonoma to post mile 8.5 in the County of Solano; and
  - b) Projects implementing the preferred alternative described in the 2022 SR 37 Planning and Environmental Linkages (PEL) Study or subsequent updates.
- 3) States that a permit shall cover any incidental take of a species for which take is authorized that may occur in the course of implementing mitigation or conservation actions required in the permit.

- 4) States that permit conditions are subject to amendment when required by the monitoring program and adaptive management process.
- 5) Clarifies that this bill shall not be construed to exempt the SR 37 construction from any other law.

**EXISTING LAW:**

- 1) Designates certain species as fully protected, and prohibits the taking of these species, with exceptions for necessary scientific research and, for fully protected bird species, the protection of livestock (FGC §§ 3511, 4700, 5050, and 5515).
- 2) Allows for the take of fully protected species for any fully protected species conserved and managed as a covered species under an approved NCCP (FGC § 2835).
- 3) Authorizes CDFW to permit the take of certain fully protected species in specific cases, with restrictions (FGC §§ 2081.4, 2081.5, 2081.6, 2081.7, 2081.9, 2081.10, 2081.11, and 2081.12).
- 4) Prohibits the taking of an endangered species, threatened species, or candidate species, except in certain situations, including through the issuance of a permit commonly known as an incidental take permit (ITP), if all of the following conditions are met:
  - a) The take is incidental to an otherwise lawful activity;
  - b) The impacts of the authorized take are minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species.; and
  - c) The applicant ensures adequate funding to implement the measures required by paragraph (b), and for monitoring compliance with, and effectiveness of, those measures [FGC § 2081 (b)].
- 5) Prohibits the issuance of an ITP if issuance of the ITP would jeopardize the continued existence of the species. Requires CDFW to make this determination based on the best scientific and other information that is reasonably available, and includes consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities [FGC § 2081 (c)].
- 6) Specifies the application fees applicable to ITPs (FGC § 2081.2).
- 7) Defines "conserve," "conserving," and "conservation" to mean to use, and the use of, methods and procedures within the plan area that are necessary to bring any covered species to the point at which the measures provided pursuant to the California Endangered Species Act (CESA) are not necessary, and for covered species that are not listed pursuant to CESA, to maintain or enhance the condition of a species so that listing pursuant to CESA will not become necessary (FGC § 2805).

**FISCAL EFFECT:** Unknown. This bill is keyed fiscal.

**COMMENTS:**

- 1) **Purpose of this bill.** According to the author, “[The aim of this bill] is to advance the SR 37 project in the most cost-effective and environmentally beneficial manner, consistent with the longstanding local, regional, and state support for SR 37 improvements that improve mobility and restore critical habitat while enhancing resilience.” The author notes that this bill has been refined during transportation and regulatory agency meetings and the Interim Project was identified as an ideal candidate given the significant restoration benefits of the project.
- 2) **Background.** In the 1960s, California began its efforts to identify and protect animals that were rare or at risk of extinction within the state. These efforts resulted in lists of fully protected species: animals that may not be taken or possessed, except in limited circumstances such as for scientific research or, in the case of fully protected birds, for the relocation of birds to protect livestock. Currently, there are 11 fully protected birds (FGC § 3511), five fully protected reptiles and amphibians, nine fully protected fish (FGC § 5515), and nine fully protected mammals (FGC § 4700).

Since the creation of the fully protected species lists, Congress and the Legislature enacted ESA and CESA, respectively. CESA- or ESA-listed species differ from fully protected species in a couple of key ways. First, the endangered species lists are intended to be maintained according to the best available scientific information, whereas the fully protected species lists were codified by the Legislature and had not been updated until recently. The scientific status of most of the fully protected species are not known. CDFW conducts five-year reviews of CESA-listed species, with reviews completed recently for nine species, including two fully protected species (Owens pupfish and California bighorn sheep).

Of the 34 species currently designated as fully protected, eight are listed as threatened and 19 are listed as endangered under CESA. Until recently, the American peregrine falcon, brown pelican, and thicktail chub were given fully protected status until they were delisted from CESA by the Fish and Game Commission based on scientific findings that the protections afforded by listing were no longer necessary. Both the American peregrine falcon and brown pelican had recovered and the thicktail chub was extirpated (locally extinct). SB 147 (Ashby) Chapter 59, Statutes of 2023, requires CDFW to develop a plan to assess the population status of each fully protected species by July 1, 2024, which has not yet been released.

*Covered species.* This bill permits the incidental take of four fully protected species: salt-marsh harvest mouse, California clapper rail, California black rail, and white-tailed kite for SR 37 improvements.



The salt-marsh harvest mouse has been listed as endangered under CESA since 1971 and has been listed as endangered under the federal ESA since 1970. This nocturnal mouse is found in the pickleweed of marshes of the San Francisco Estuary. The endangered status of the salt-marsh harvest mouse is primarily due to the commercial and residential development around the San Francisco Bay, which has resulted in marsh loss and therefore a loss of pickleweed habitat.

The California clapper rail, reclassified as California Ridgway's rail after further genetic studies, has been listed as endangered under CESA since 1971 and has been listed as endangered under the federal ESA since 1970. This shy species is one of the largest rails and is almost exclusively found in tidal and brackish marshes with unrestricted daily tidal flows where it can enjoy a variety of seafood. Unfortunately, development, non-native predators, water contamination, and sea level rise all continue to threaten the California clapper rail.



The California black rail has been listed as threatened under CESA since 1971, and is primarily found in the tidal salt marshes of the San Francisco Bay. Because of development and habitat fragmentation and degradation, the population of the California black rail has also suffered. The California black rail is difficult to encounter as it enjoys the densely vegetated habitat and hunts for insects in few remaining pristine marshlands.

The white-tailed kite is not listed under CESA or the federal ESA, but is tracked in California's Natural Diversity Database, which is an inventory of the status and locations of rare plant and animal species in the state. The white-tailed kite is found throughout most of California's coastal and valley lowlands, most frequently in agricultural areas where it can forage on small mammals, insects, and occasionally other birds. This species had once been considered on the verge of extinction, likely due to indiscriminate shooting and loss of food source in the 1920s and 1930s, which precipitated its inclusion as a fully protected species. Although considered recovered since then, development and drought is considered to be putting continued pressure on the white-tailed kite and may be contributing to a modern decline in population.



**SR 37.** SR 37 is a heavily used, 21-mile long roadway from US 101 to I-80, along the shore of San Pablo Bay, which connects job markets and housing within Marin, Sonoma, Napa, and Solano counties. Portions of SR 37 are highly congested during weekday commutes and weekends by travelers visiting wine country, with an estimated 30,000 daily users. Travelers experience particularly notable delays on the portion of highway between Sears Point and Mare Island, where the highway narrows from four lanes to two. Additionally, modeling suggests that portions of SR 37 will suffer from continued flooding and some portions will be completely inundated due to sea level rise by 2050. Due to the notable traffic congestion, periodic flooding, and threat of sea level rise, the California Department of Transportation (Caltrans) is working with Metropolitan Transportation Commission (MTC), Napa Valley Transportation Authority, Sonoma County Transportation Authority, and Solano Transportation Authority (regional transportation authorities) to develop a more resilient SR 37 corridor. SR 37 was built in the 1920s and disrupted natural processes such as marsh migration, preventing the habitat from adapting to sea level rise. The sensitive marshland habitat of the San Pablo Bay will be both impacted and enhanced through the improvements

planned for SR 37.



**SR 37 PEL.** The PEL process was developed by the Federal Highway Administration to encourage an early and integrated approach to transportation planning and environmental review. A PEL study gathers preliminary data and considers the conceptual level of design, traffic analyses, and evaluation of environmental impacts while engaging regulatory and transportation agencies, stakeholders, and the public in the process—ideally to reduce long-term project costs, time, and risk to the public while promoting environmental stewardship and equity.

The PEL process was used to develop and identify a project to improve SR 37 which would include two general purpose lanes in each direction, with a peak period shoulder running lane in each direction, with bicycle/pedestrian access. This project, also referred to as the “ultimate project,” has the potential to impact 47 special-status species including two mammals, 11 birds, six amphibians, three insects, three crustaceans, six fish, and 16 plants.

The ultimate project is estimated to cost over \$11 billion (in 2022 dollars) and is still undergoing environmental review. Given the financial and logistical challenges of constructing 21 new miles of highway all at once, the ultimate project was broken down into eight smaller projects, which were prioritized in the PEL addendum. The first priority section is in Marin County from US 101 to Atherton Ave. The second priority sections are from the SR 37/SR 121 interchange at Sears Point to the SR 37/Walnut Ave interchange at Mare Island (the light-blue portion on the map).

**SR 37 Improvement Project.** As noted above, the ultimate project faces logistical and financial hurdles, which will delay desired improvements to traffic congestion and flooding issues for many years. The proposed solution, also known as the “interim project,” involves the widening of the two-lane highway to a four-lane highway between Sears Point to Mare Island. The interim project includes an eastbound high-occupancy vehicle lane, an open road tolling system, and an 8-foot shoulder in both directions. The Environmental Impact Report for the interim improvement project outlines the avoidance, minimization, and mitigation measures that will be performed to protect the salt-marsh harvest mouse, California clapper rail, and California black rail. Because the white-tailed kite is not expected to nest in the area, take is considered unlikely. Beyond highway improvements, the interim project includes two elements that are intended to restore functionality to the marshland, which will benefit

wildlife and increase the natural resiliency of the construction. First, the widening of Tolay Creek Bridge will increase flows to enable ecological restoration of Tolay Creek. A recent addendum to the EIR for the interim project includes enhancements to the degraded marsh habitat of Strip Marsh East, which is expected to up lift approximately 600 acres of degraded habitat and create approximately 230 acres of new emergent salt marsh habitat, 80 acres of tidal channel habitat, and 290 acres of tidal flats from existing seasonal lagoons.

The interim project is currently funded through the project approval and environmental document phase. The estimated total cost of the interim project is \$500 million.

- 3) **Policy considerations.** SR 37 construction is not without controversy. It is important to note that while the more achievable, interim project may provide some congestion relief, the ultimate project will eventually be needed because the interim project will also be underwater due to sea level rise. The interim project will include highway widening, but will not elevate the causeway, which calls into question the value of a project that will ultimately need to be deconstructed.

Further, research indicates that adding capacity to roadways fails to alleviate congestion for long and will increase net vehicle miles traveled (VMT). Modeling for the interim project also indicates that, without the implementation of tolling, the highway widening will increase VMT. The interim project is intended to address equity concerns of lower-income Solano residents who may travel to Marin for work; indeed, the PEL addendum indicates that 85% of the travelers on SR 37 have household incomes lower than the Bay Area median income. How tolling can be implemented to achieve an equity benefit is still to be seen.

The interim project could still proceed without this legislative authorization to take fully protected species. However, to avoid take, the sponsors note that construction would need to be limited to a three-month window (instead of the ideal seven-month window), which would greatly delay construction and increase costs.

Finally, when compared to previous legislative authorizations for fully protected species take, this bill would permit one of the largest non-restoration projects and the take of the greatest number of species.

- 4) **Proposed committee amendments.** The development of the preferred alternative of ultimate project as described in the PEL is still on going, so it would be premature to provide coverage for a developing project. Further, should the interim project be constructed, the ultimate project identified in the PEL, would not include highway widening and should be able to take advantage of the exemption in FGC § 2081.15. *To this end, the Committee may wish the author to consider limiting this bill to the interim, Sears Point to Mare Island Improvement Project, as well as amendments that conform that language of this bill to the requirements in FGC § 2081.15:*

(a) Notwithstanding Sections 3511 and 4700, the department may authorize, under this chapter, the incidental take of the salt-marsh harvest mouse (*Reithrodontomys raviventris*), the California clapper rail (~~*Rallus longirostris obsoletus*~~), ***California Ridgway's rail (*Rallus obsoletus obsoletus*)***, the California black rail (*Laterallus jamaicensis coturniculus*), and the white-tailed kite (*Elanus leucurus*) resulting from impacts attributable to **the Sears Point to Mare Island Improvement Project on State Route 37 from east of Lakeville Highway near State Route 121 in the County of Sonoma to west of Sacramento Street in the County of**



~~**Solano the transportation, resilience, and restoration improvements on the State Route 37 corridor described in subdivision (b)**~~ through the Counties of ~~Marin~~, Sonoma, Napa, and Solano, if all the following conditions are satisfied:

- (1) The requirements of subdivisions (b) and (c) of Section 2081 are satisfied as to the species for which take is authorized.
- (2) The department ensures that all further measures necessary to satisfy the conservation standard of subdivision (d) of Section 2805 and take is avoided to the maximum extent possible as to the species for which take is authorized are incorporated into each project.
- (3) The take authorization provides for development and implementation of a monitoring program and an adaptive management plan, approved by the department, process that satisfy the conservation standard of subdivision (d) of Section 2805 for monitoring the effectiveness of, and amending, as necessary, the measures to minimize and fully mitigate the impacts of the authorized take.
- (4) The applicant pays a permit application fee consistent with Section 2081.2.

~~**(b) Projects covered by this section shall only include the following improvement projects implemented by the Department of Transportation on the State Route 37 corridor:**~~

~~**(1) The Sears Point to Mare Island Improvement Project on State Route 37 from post mile 2.4 in the County of Sonoma to post mile 8.5 in the County of Solano.**~~

~~**(2) Projects implementing the preferred alternative described in the 2022 State Route 37 Planning and Environmental Linkages Study or subsequent updates.**~~

~~**(b) - (e)**~~ A permit issued pursuant to subdivision (a) shall cover any incidental take of a species for which take is authorized that may occur in the course of implementing mitigation or conservation actions required in the permit.

~~**(c) - (d)**~~ The permit conditions are subject to amendment when required by the monitoring program and adaptive management plan process adopted pursuant to paragraph (3) of subdivision (a).

~~**(d) - (e)**~~ This section shall not be construed to exempt the improvements described in subdivision (b) from any other law.

- 5) **Arguments in support.** Numerous engineering, labor, and transportation authority's write in support of this bill. Supporters write that SR 37 is a vital commute corridor that connects travelers to jobs and recreation opportunities and is also a major east-west freight link for the Bay Area. They also note that SR 37 is plagued with heavy congestion and does not offer a transit option, with idling vehicles contributing to poor air quality. Many supporters also note that the work on SR 37 will create jobs. Solano Transportation Authority (sponsor) writes that "Proceeding without the authority created by [this bill] would significantly prolong project construction by shortening the project's work windows, while residents experience longer construction-related delays. Project costs would also increase substantially because of the longer timeline and the shortened work windows. From an ecological perspective, the

short work windows would also result in an increase in the number and overall duration of project related disturbances to the fully protected species, which would be expected to have a greater adverse impact on species and habitats.”

- 6) **Arguments in opposition.** A variety of environmental and active transportation groups write in opposition. These organizations raise concern over the need for the interim project and assert that “the interim project may delay and undermine the long-term sustainable solution for travel across the North Bay.” They also argue that the goals of the interim project “could be accomplished more quickly, cost-effectively and in alignment with state and regional priorities by implementing tolling on the existing lanes without widening. By applying an equitable tolling structure to existing travel lanes, traffic flow could be free-flowing, additional revenue generated to support additional transit service and future capital investment, and that revenue collection could be designed to minimize financial impacts on low-income households.” The Federated Indians of Graton Rancheria (FIGR) argues that, “The [interim] project is a near-term project to enhance the carrying capacity of the existing SR 37 for the estimated 15-year period between now and implementation of the preferred alternative identified in the 2022 [SR 37 PEL], but without making any real attempt at insulating the roadway from climate change. Further, even though it is viewed as an interim measure, it will have permanent impacts to tribal cultural resources, including cultural species such as the salt-marsh harvest mouse. FIGR has raised numerous concerns with the environmental and cultural impacts of the two designated projects but has seen little evidence that Caltrans intends to meaningfully consult with FIGR rather than blindly trudging ahead along its preferred path.”
- 7) **Related legislation.** SB 147 (Ashby) Chapter 59, Statutes of 2023, allows CDFW to permit the take of fully protected species for specified projects and requires CDFW to develop a plan to assess the population status of each fully protected species by July 1, 2024.

Several bills have authorized CDFW to permit the incidental take of fully protected species resulting from specific projects:

- AB 1973 (Olsen), Chapter 121, Statutes of 2012, for the take of the limestone salamander in the Ferguson Slide Permanent Restoration Project;
- AB 353 (Lackey), Chapter 620, Statutes of 2015, for the take of the unarmored threespine stickleback in Bouquet Creek projects;
- AB 1845 (Dahle), Chapter 293, Statutes of 2016, for the take of the rough sculpin in the Spring Creek Bridge replacement;
- AB 2488 (Dababneh), Chapter 387, Statutes of 2016, for the take of the unarmored threespine stickleback in the Foothill Feeder project;
- AB 2640 (Wood), Chapter 586, Statutes of 2018, for the take of the Lost River sucker and shortnose sucker in the removal of several dams on the Klamath River; and
- SB 495 (Vidak), Chapter 224, Statutes of 2018, for the take of the blunt-nosed leopard lizard in the water well project in the Allensworth Community Services District.



**REGISTERED SUPPORT / OPPOSITION:****Support**

Solano Transportation Authority (sponsor)  
Associated General Contractors of California  
Bay Area Council  
California-Nevada Conference of Operating Engineers  
California Alliance for Jobs  
California Construction & Industrial Materials Association  
California State Association of Electrical Workers  
California State Council of Laborers  
District Council of Iron Workers of the State of California and Vicinity  
International Union of Operating Engineers  
Metropolitan Transportation Commission  
Napa County Transportation and Planning Agency/Napa Valley Transportation Authority  
North Bay Leadership Council  
Rebuild Social Partnership  
Sonoma County Transportation Authority/regional Climate Protection Authority  
Southern California Contractors Association  
Transportation California  
United Contractors

**Opposition**

350 Bay Area Action  
Active San Gabriel Valley  
Bike East Bay  
CA Coalition for Clean Air  
Calbike  
California Climate Action  
Citizens' Climate Lobby San Mateo County Chapter  
Climate Plan  
Federated Indians of Graton Rancheria  
Kidsafe SF  
Natural Resources Defense Council  
Nextgen California  
Planning and Conservation League  
Rails-to-Trails Conservancy  
Rise South City  
San Francisco League of Conservation Voters  
Save the Bay  
Streets for All  
Transbay Coalition  
TransForm

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