

Date of Hearing: March 28, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Rebecca Bauer-Kahan, Chair

AB 606 (Mathis) – As Introduced February 9, 2023

SUBJECT: California Endangered Species Act: accidental take: farms or ranches

SUMMARY: Indefinitely extends the authority for accidental take of listed species in the course of otherwise lawful and routine agricultural activities, and the requirement to report known instances of accidental take to the Department of Fish and Wildlife (DFW) within ten days.

EXISTING LAW:

- 1) Provides under the California Endangered Species Act (CESA) for the listing and protection of species determined through biological scientific analysis to be endangered or threatened with extinction [Fish and Game Code (FGC) §§ 2070 *et seq.*].
- 2) Prohibits the take of species listed as endangered or threatened under CESA (FGC § 2080).
- 3) Allows the accidental take of candidate, threatened, or endangered species resulting from an act by a person acting as a farmer or rancher, a bona fide employee of a farmer or rancher, or an individual otherwise contracted by a farmer or rancher that occurs on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities, and repeals these provisions as of January 1, 2024 (FGC § 2087).
- 4) Requires a person to report accidental take to DFW within 10 days when it is known to occur (FGC § 2087).
- 5) Defines accidental to mean unintended or unforeseen (FGC § 2087).
- 6) Defines routine and ongoing, and excludes several agricultural activities from the definition of “routine and ongoing” including the conversion of agricultural land to nonagricultural uses, timber harvesting activities governed by the Board of Forestry, or activities that intentionally reduce habitat and wildlife to facilitate conversion to non-agricultural use (FGC § 2089; California Code of Regulation Title 14 § 786.1).
- 7) Authorizes locally designed voluntary programs for routine and ongoing agricultural activities on farms that encourage wildlife habitat (FGC § 2086).
- 8) Permits DFW to authorize, by permit, the take of listed species, but not fully protected species, if the take is incidental to an otherwise lawful activity and the impacts are minimized and fully mitigated (FGC § 2081).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** The accidental take provision has been in law since 1997 with five sunset extensions. This bill removes the existing sunset and thereby extends the authority for accidental take indefinitely. According to the author, “This measure protects both farmers

and endangered species. [This bill] will ensure that there's a feasible way for farmers and ranchers to conduct their operations while allowing endangered and threatened species access to as much habitat as possible.”

- 2) **Background.** CESA and the federal Endangered Species Act (ESA) generally provide a scientific basis for determining the status of species that potentially face extinction. Although there are differences between the federal and state acts, the overarching intent of both is to regulate and impose mitigation activities on activities that could contribute to the extinction of species. Under CESA, species whose survival are imperiled may be categorized as “endangered,” “threatened,” or “candidate” and once categorized, the take of those species is prohibited unless authorized by a permit issued by the appropriate regulatory agency. Under CESA, permitting resides with DFW.

What is take? Take is defined in FGC § 86 as hunting, pursuing, catching, capturing, or killing, or attempting to hunt, pursue, catch, capture, or kill. This is different than the definition under the federal ESA, where take is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. California does not have a state equivalent for harassing or harming.

Accidental take provision. One exception to the take prohibition in CESA is the “accidental take” provision. This provision was first enacted in 1997 with a sunset clause. It exempts the accidental take of protected species that occurs on a farm or ranch in the course of routine and ongoing agricultural activities. Since enactment, the Legislature has extended the provision five additional times with minor changes. The accidental take provision sunsets on January 1, 2024.

Supporters maintain that the accidental take law gives a farmer conducting normal and routine agricultural activities the ability to host a listed species on their property. Without the protection of the accidental take law, farmers might avoid activities that benefit wildlife, such as the planting of a certain crop, or the temporary flooding of a field, which in turn, would result in a loss of habitat for the species.

What are routine and ongoing agricultural activities? Routine and ongoing agricultural activities are defined in regulation, and include the cultivation and tillage of soil; crop rotation; fallowing; dairying; the production, cultivation, growing, replanting, and harvesting of any agricultural commodity including viticulture, vermiculture, apiculture, or horticulture; the raising of livestock, fur bearing animals, fish, or poultry; any practices performed by a farmer on a farm as incident to or in conjunction with those farming operations, including the preparation for market, delivery to storage or to market, or delivery to carriers for transportation to market, including any such activities recognized as compatible uses pursuant to the Williamson Act (Government Code § 51200 *et seq.*) provided such activities are consistent with the economics of agricultural operations; and other similar agricultural activities as determined by DFW during its review and approval of a particular voluntary local program. Ordinary pasture maintenance and renovation and dry land farming operations consistent with rangeland management are considered routine and ongoing agricultural activities.

Routine and ongoing agricultural activities do not include conversion of agricultural land to

nonagricultural use, timber harvesting activities governed by the State Board of Forestry or activities that intentionally reduce habitat and wildlife to facilitate conversion to non-agricultural use. The conversion of rangeland to more intensive agricultural uses such as permanent crops is not considered a routine and ongoing agricultural activity.

Reporting Requirement. The most recent sunset extension [SB 62 (Dodd), Chapter 137, Statutes of 2019] requires the reporting of known instances of accidental take to the DFW within ten days. The committee analysis for SB 62 pointed out that while there is value in collecting data on the utilization of the accidental take provision, any reports compiled from this information will only be as good as the data the DFW receives. In this case, there is no data. As of March 2023, DFW has not received any reports of accidental take since the reporting requirement became law. Absent any information, it is difficult to know what impacts routine and ongoing agricultural activities may have on listed species. It is also difficult to quantitatively assess the benefits to endangered species of extending the accidental take provisions.

- 3) **Arguments in support.** Numerous agricultural groups write in support, stating that “[a]ccidental take is an important provision of CESA as it reduces liability for growers who either have no reason to believe a protected species is present on their land, or have taken action to prevent take of the species and still accidentally take a listed species.” Additionally, the accidental take protections “[...] provide an incentive for California’s farmers and ranchers to produce food and fiber in an environmentally friendly manner by reducing some of the liability associated with providing wildlife habitat on their property.”
- 4) **Related legislation.** SB 62 (Dodd), Chapter 137, Statutes of 2019, extends the sunset date on the authority for accidental take of listed species in the course of otherwise lawful and routine agricultural activities until January 1, 2024, and requires the reporting of known instances of accidental take to DFW within ten days. SB 62 also extends the California State Safe Harbor Agreement Program Act indefinitely.

SB 749 (Wolk), Chapter 387, Statutes of 2013, extended the accidental take provision until January 1, 2020, and defines accidental, among other provisions.

SB 1303 (Wolk), Chapter 290, Statutes of 2010, extended the accidental take provision until January 1, 2014, and encouraged public education for voluntary programs for agricultural activities that promote wildlife habitat.

SB 1436 (Ducheny), Chapter 82, Statutes of 2008, extended the accidental take provision until January 1, 2011.

SB 550 (Costa), Chapter 32, Statutes of 2002, extended the accidental take provision until January 1, 2009, and deletes the requirement that the agricultural acts be inadvertent or ordinary negligent acts in order for the exception to apply.

SB 231 (Costa), Chapter 528, Statutes of 1997, created the accidental take provision in law for routine, ongoing agricultural activities, and requires the DFW to adopt regulations that authorize locally designed voluntary programs for routine and ongoing agricultural activities on farms or ranches to encourage habitat for candidate, threatened, and endangered species, and wildlife generally.

REGISTERED SUPPORT / OPPOSITION:

Support

California Farm Bureau Federation (Sponsor)
African American Farmers of California
Agricultural Council of California
American Pistachio Growers
California Alfalfa & Forage Association
California Apple Commission
California Association of Pest Control Advisers
California Association of Winegrape Growers
California Blueberry Association
California Blueberry Commission
California Cattlemen's Association
California Cotton Ginners & Growers Association
California Fresh Fruit Association
California Grain and Feed Association
California Pear Growers
California Seed Association
California Tomato Growers Association
California Walnuts
Nisei Farmers League
Olive Growers Council of California
Rural County Representatives of California
Western Agricultural Processors Association
Western Plant Health Association
Wine Institute

Opposition

None on file

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