

Date of Hearing: June 29, 2023

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE
Rebecca Bauer-Kahan, Chair
SB 147 (Ashby) – As Amended June 26, 2023

SENATE VOTE: 29-8

SUBJECT: Fully protected species: California Endangered Species Act: authorized take

SUMMARY: Authorizes the Department of Fish and Wildlife (DFW) to issue a permit that would authorize the take of a fully protected species resulting from impacts attributable to the implementation of specified projects if certain conditions are satisfied. Specifically, **this bill:**

- 1) Allows DFW to authorize by permit the take of fully protected species resulting from impacts attributable to the implementation of specified project types if all of the following conditions are satisfied:
 - a) The take is incidental to an otherwise lawful activity;
 - b) The impacts of the authorized take are minimized and fully mitigated, and the permit applicant ensures adequate funding to implement and monitor mitigation measures;
 - c) The issuance of the permit will not jeopardize the continued existence of the species;
 - d) The permit includes measures necessary to satisfy the conservation standard of the Natural Community Conservation Planning (NCCP) Act;
 - e) Measures ensuring that take is avoided to the maximum extent possible are incorporated into each project;
 - f) The permit provides for the development and implementation, in cooperation with DFW and applicable federal and state agencies, of a monitoring program and an adaptive management plan 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
 - g) The applicant pays a permit application fee, as specified in Fish and Game Code (FGC) § 2081.2.
- 2) Specifies projects or categories of projects eligible for a take authorization permit are limited to all of the following:
 - a) Maintenance, repair, or improvements to the State Water Project, including existing infrastructure, undertaken by the Department of Water Resources;
 - b) Maintenance, repair, or improvements to critical regional or local water agency infrastructure;

- c) Transportation projects, including any associated habitat connectivity and wildlife crossing projects, undertaken by a state, regional, or local agency, that do not increase highway or street capacity for automobile or truck travel;
 - d) Wind projects, and any appurtenant infrastructure improvements, and associated electric transmission projects carrying electric power from a facility that is located in the state to a point of junction with any California-based balancing authority; and
 - e) Solar photovoltaic projects, and any appurtenant infrastructure improvements, and associated electric transmission projects carrying electric power from a facility that is located in the state to a point of junction with any California-based balancing authority.
- 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) Specifies that the take authorization authority does not apply to the design or construction of through-delta water conveyances in the Sacramento-San Joaquin Delta or the design or construction of ocean desalination projects.
 - 5) Sunsets the authority to issue permits after December 31, 2033, and allows authorizations issued before this date to remain in effect.
 - 6) Requires DFW to develop a plan on or before July 1, 2024, to assess the population status of each fully protected species. Specifies that the plan shall include recommendations to the Legislature for resources necessary to determine the scientific status of each fully protected species.
 - 7) Requires DFW, on or before July 1, 2025, and annually thereafter, to prepare and submit a report to the relevant legislative policy and budget committees regarding the implementation of this authority. Requires the report to include, at a minimum, all of the following information:
 - a) For each individual project authorized to take fully protected species pursuant to this section, the type and location of the project; the fully-protected species at risk due to the project; any take of the fully-protected species due to the project in the preceding calendar year; actions taken to avoid, minimize, and fully mitigate the take of, and to conserve, the fully-protected species; a description of the monitoring program, including observation frequency; and any adaptive management-driven modifications to the monitoring program in the preceding calendar year; and
 - b) The cost to DFW of the implementation of this authority in the preceding calendar year broken down by task.
 - 8) Removes the American peregrine falcon, brown pelican, and thicktail chub from the lists of fully protected species.
 - 9) Makes conforming changes, including by deleting an exemption for American peregrine falcons used in the practice of falconry from fully protected species protections.

10) Declares this bill is an urgency measure.

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, 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 DFW 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, 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, 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. Where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking; 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 a permit if issuance of the permit would jeopardize the continued existence of the species. Requires DFW 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 permit application fees applicable to incidental take permits (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.** This bill allows DFW to authorize by permit the take of fully protected species resulting from impacts attributable to the implementation of specified project types if all required conditions are met.
- 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 37 fully protected species 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. The 37 fully protected species are as follows:

Fully protected birds (FGC § 3511)

American peregrine falcon (*Falco peregrinus anatum*)
 Brown pelican (*Pelecanus occidentalis californicus*)
 California black rail (*Laterallus jamaicensis coturniculus*)
 California clapper rail (*Rallus longirostris obsoletus*)
 California condor (*Gymnogyps californianus*)
 California least tern (*Sterna albifrons browni*)
 Golden eagle (*Aquila chrysaetos*)
 Greater sandhill crane (*Grus canadensis tabida*)
 Light-footed clapper rail (*Rallus longirostris levipes*)
 Southern bald eagle (*Haliaeetus leucocephalus leucocephalus*)
 Trumpeter swan (*Cygnus buccinator*)
 White-tailed kite (*Elanus leucurus*)
 Yuma clapper rail (*Rallus longirostris yumanensis*)

Fully protected mammals (FGC § 4700)

Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*)
 Bighorn sheep (*Ovis canadensis nelson* and *Ovis canadensis sierrae/californiana*)
 Northern elephant seal (*Mirounga angustirostris*)
 Guadalupe fur seal (*Arctocephalus townsendi*)
 Ring-tailed cat (genus *Bassariscus*)
 Pacific right whale (*Eubalaena sieboldi*)
 Salt-marsh harvest mouse (*Reithrodontomys raviventris*)
 Southern sea otter (*Enhydra lutris nereis*)
 Wolverine (*Gulo luscus*)

Fully protected reptiles and amphibians (FGC § 5050)

Blunt-nosed leopard lizard (*Gambelia sila*)
 San Francisco garter snake (*Thamnophis sirtalis tetrataenia*)
 Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*)
 Limestone salamander (*Hydromantes brunus*)
 Black toad (*Bufo boreas exsul*)

Fully protected fish (FGC § 5515)

Colorado River squawfish (*Ptychocheilus lucius*)
 Thicketail chub (*Gila crassicauda*)
 Mohave chub (*Gila mohavensis*)

Lost River sucker (*Deltistes luxatus* and *Catostomus luxatus*)
Modoc sucker (*Catostomus microps*)
Shortnose sucker (*Chasmistes brevirostris*)
Humpback sucker (*Xyrauchen texanus*)
Owens pupfish (*Cyprinodon radiosus*)
Unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*)
Rough sculpin (*Cottus asperimus*)

Since the creation of the fully protected species lists, Congress and the Legislature enacted the federal Endangered Species Act (ESA) and CESA, respectively. Of the 37 species currently designated as fully protected, eight are listed as threatened and 19 are listed as endangered under CESA. Three species were delisted from CESA by the Fish and Game Commission based on scientific findings that the protections afforded by listing were no longer necessary due to species recovery (American peregrine falcon, brown pelican) or extirpation (localized extinction) in California (thicktail chub). Fully protected status would be removed for those three species under this bill.

Fully protected species and CESA- or ESA-listed species differ 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 have not been updated. The scientific status of most of the fully protected species are not known. DFW conducts five-year reviews of CESA-listed species, with reviews completed recently for nine species, including two fully protected species (Owens pupfish, California bighorn sheep). This bill requires DFW to develop a plan by July 1, 2024, to assess the population status of each fully protected species.

Second, DFW may issue various take authorizations for species listed under CESA, including but not limited to, incidental take permits pursuant to FGC § 2081(b). Take authorizations allow entities to undertake otherwise lawful projects that could result in the take of listed species. Permittees must implement species-specific avoidance and minimization measures and fully mitigate the project's impacts. Take of fully protected species may only be allowed under approved NCCPs or through legislative authorization [see Related Legislation]. This bill would give DFW the authority to issue take authorizations for fully protected species for a limited subset of project types and contingent on avoidance, minimization, and mitigation to ensure a conservation standard.

- 3) **Related legislation.** SB 945 (Laird), Chapter 471, Statutes of 2022, exempts the capture, possession, or training of an American peregrine falcon in the practice of falconry from the prohibitions in the fully protected bird statute.

SB 618 (Wolk), Chapter 596, Statutes of 2011, allows DFW to issue a permit for incidental take of a fully protected species as part of an NCCP if the species is a covered species whose conservation and management is provided for under the NCCP.

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

- AB 1973 (Olson), 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

None on file

Opposition

None on file

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