

# California Native Plant Society

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Linus Masouredis  
General Counsel  
State of California  
Department of Fish and Game  
1416 Ninth St.  
Sacramento, CA 95814

Regarding: Proposed regulations to implement SB 231

Dear Mr. Masouredis:

The following are the comments of the California Native Plant Society (CNPS) on the proposed regulations implementing Chapter 6, Article 2 of the California Endangered Species Act (CESA) pertaining to take of listed species incidental to routine and ongoing agricultural activities. Enclosed also find our comments on the associated Environmental Document (ED).

We are very troubled by the proposed regulations (Proposal). They are completely inconsistent with the intent of CESA in general and with the intent of SB 231 in particular. The definitions in the Proposal need to be clarified and additional definitions added. Standards and procedures for the voluntary conservation programs must be added. The Regulations must mandate that the Department of Fish and Game (DFG) participate in the development and monitoring of the voluntary programs and that DFG ensure their effectiveness and consistency with the law. Because of these serious problems, CNPS recommends that this Proposal be withdrawn in its entirety, and that DFG develop a new Proposal that is fully consistent with CESA. Our specific comments follow.

## Section 786.0 (a)

This section sets forth the purpose of the Proposal. Inexplicably, this statement of purpose does not even mention species or habitat conservation, despite SB 231's statement of purpose for the voluntary programs:

"encourage habitat for candidate, threatened, and endangered species and wildlife generally." (California Fish and Game Code (FGC) § 2086 (a))

Moreover, the purpose of CESA itself is to

"conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat" (FGC § 2052)

Why are these central concepts absent from the Proposal's statement of purpose? The Proposal should reflect the intent of CESA and SB 231.

#### Section 786.0 (b)

This section states that taking of listed or candidate species is allowed merely upon "filing of a voluntary local program" with DFG; nothing else appears to be required. This Section, and the Proposal generally, implies that there will be no DFG review of the voluntary programs and no standards for their adoption. The Proposal does not require DFG to verify that plans will actually improve habitat or help species. There are no requirements that the voluntary conservation procedures be scientifically sound or even logical. There are no requirements for baseline surveys to determine which or how many listed species are present prior to implementation of the voluntary programs. There are no requirements for any independent DFG monitoring of implementation or effectiveness.

All of this is inconsistent with CESA. The law states that the voluntary programs must meet several strict criteria. Specifically programs must be "consistent with the policies of [CESA], must "avoid and minimize take of [listed] species", and must be "supported by the best available scientific information" (FGC § 2086 (b)). As noted above, the purpose of CESA is to "conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat" (FGC §§ 2052). For any program to be consistent with CESA in general and with §2086 through §2089 in particular, it must meet these standards. In other words, it must be demonstrated to be based on the best science and to contribute to the conservation, protection, restoration, and enhancement of listed species and their habitats. These regulations must therefore require that programs will not be approved unless DFG makes a finding that they (1) are based on the best available science, (2) will measurably improve conservation of rare species and their habitats, (3) will avoid and minimize take of listed or candidate species, (4) meet all other requirements of FGC §2086 (b), (5) meet the requirement of FGC 2086 (a) that programs "encourage habitat" for listed and candidate species, and (6) are consistent with the purpose of CESA stated in FGC § 2052.

#### Section 786.1 (a)

This section defines the management practices that will be authorized by the voluntary local programs. SB 231 (FGC 2086 (b)) states that programs authorized must meet at least three requirements that are not mentioned in this definition: (1) programs must be supported by the best available scientific information for both agricultural and conservation practices (FGC § 2086 (b)(2); (2) programs must be consistent with the policies of CESA to conserve, protect, restore and enhance listed and candidate species and their habitat (FGC § 2086 (b)(3)); and (3) programs must "avoid and minimize take of candidate or listed species" (FGC §2086 (b)(1)). None of these requirements is reflected in the definition of acceptable management practices in the Proposal. As noted above, this Proposal must reflect these requirements throughout, including in definitions.

#### Section 786.1 (b)

This section defines "routine and ongoing agricultural activities". Under SB 231, take of listed and candidate species is not prohibited if it is incidental to "routine and ongoing" agricultural activities that occur under a voluntary program, or if it is "accidental" during "routine and ongoing" agricultural activities. For this reason, as we pointed out in comments on an earlier version of these regulations, the definition of "routine and ongoing" activities is central to the impacts and effectiveness of these regulations.

The definition in the proposal is inadequate for several reasons. It is vaguely worded so that it is not clear precisely what activities are included or excluded. The ED, but not the Proposal itself, states that the definition includes such activities as "rotation from active crop production to fallow land and back to active production, or rotation from grazing land or annual crops to permanent crops such as orchards or vineyards." (ED, p. 4-13) This is highly inappropriate. Such a definition would allow knowing destruction of rare species and their habitats and would thus be in direct conflict with the conservation goals of the state of California, the purposes of CESA, the purposes of SB 231, and the mission of the DFG. Conversion of fallow land or rangeland to row crops involves complete destruction of an existing ecosystem and its replacement by a monoculture or near-monoculture of non-native species. Obviously, row crop agriculture does not support many native plant or animal species, particularly not rare species. This kind of conversion is one of the leading causes in our state of the destruction of native species in general and rare species in particular, and cannot under any circumstances be accurately described as "routine and ongoing".

This definition should be clearly confined to the operation and maintenance of existing facilities and must exclude fallow land and rangeland conversion as well as construction (e.g. of fences, paved or unpaved farm roads, stock ponds, spring developments, water control facilities etc.). All of these activities should require landowners to obtain an incidental take permit under FGC §2081. SB 231 specifically gave DFG the responsibility for this definition to ensure that it would be consistent with the purposes of CESA and result in the conservation of rare species. This definition does not meet that test.

#### Section 786.2 (a)

This section states that those developing a voluntary local program "shall provide one or more conservation groups with an opportunity to consult with them...". This is clearly the weakest possible interpretation of the mandate in SB 231 that voluntary programs must be developed and proposed "in cooperation with conservation groups" (FGC § 2086 (a)). Providing one conservation group with "an opportunity" to consult is by no means the same thing as proposing a program "in cooperation" with conservation groups. This section does not even come close to reflecting the intent and requirement of the law that voluntary programs represent a cooperative, collaborative effort involving scientists, conservation groups, and landowners.

This section also states that preparers of voluntary programs are "encouraged to also consult with" DFG, the California Department of Food and Agriculture, the University of California Cooperative Extension agencies, or other wildlife experts. It is not clear to us how voluntary programs are going to meet the requirement of FGC § 2086 (b)(2) that

they "be supported by the best available scientific information for both agricultural and conservation practices" if the participation of experts is merely "encouraged" rather than required and if they are not reviewed for scientific adequacy by qualified experts upon their completion.

We reiterate that the regulations must require that programs will not be approved unless DFG makes a finding that they (1) are based on the best available science, (2) will measurably improve conservation of rare species and their habitats, (3) will avoid and minimize take of listed or candidate species, (4) meet all other requirements of FGC §2086 (b), (5) meet the requirement of FGC 2086 (a) that programs "encourage habitat" for listed and candidate species, and (6) are consistent with the purpose of CESA stated in FGC § 2052.

#### Section 786.2 (b)

This section creates a series of rather onerous and time consuming new duties and requirements for DFG, but does not create any standard role for DFG in the development, monitoring, or implementation of the voluntary programs, or in ensuring that they will succeed in improving species or habitat conservation. These regulations must mandate participation by DFG in all phases of the development and monitoring of voluntary programs, particularly in providing and interpreting scientific information, and in ensuring that voluntary programs meet the requirements of the law.

Again, the regulations must require that programs will not be approved unless DFG makes a finding that they (1) are based on the best available science, (2) will measurably improve conservation of rare species and their habitats, (3) will avoid and minimize take of listed or candidate species, (4) meet all other requirements of FGC §2086 (b), (5) meet the requirement of FGC 2086 (a) that programs "encourage habitat" for listed and candidate species, and (6) are consistent with the purpose of CESA stated in FGC § 2052.

#### Section 786.2 (e)

This section describes the elements required for the voluntary programs. It has several serious deficiencies.

1. The only monitoring plan that is required is "a record-keeping process such as ... logs, photographs, and other means of maintaining accurate records regarding implementation..." (§786.2 (e)(4)). Apparently, landowners themselves will perform all monitoring. There are no requirements for independent monitoring of implementation or effectiveness by DFG or anyone else. This is clearly inappropriate. Landowners often do not have the expertise to monitor biological phenomena accurately, and they have a vested interest in the programs which must compromise their objectivity.

Moreover, the monitoring requirements themselves are inadequate. There are no requirements for quantification of take that occurs, periodic population estimates for target species, or other methods of tracking the success or failure of the

programs. There are no requirements for baseline surveys to determine how many listed species are present prior to the initiation of a voluntary program. California will be authorizing take of listed species, our most imperiled species, through these programs. We must have some means of making sure that the programs are functioning properly and are achieving the goals of CESA. We must have some means of monitoring effectiveness so that methods that work can be used by other programs and methods that fail can be avoided.

2. The Proposal only requires "a statement with supporting evidence" to document that SB 231's requirement has been met that the best available scientific information has been used (§786.2 (e)(5)). There is no requirement that DFG or anyone else verify the contents of that statement or review the evidence. There is also, as we have noted earlier, no requirement that DFG or the University of California participate in the development of or review the scientific basis for the voluntary programs. There are no provisions for DFG to have the right to provide additional scientific information that was overlooked by the preparers of a program, even if the program is inadequately designed and the scientific information is directly relevant. This is clearly an inadequate implementation of the requirement in SB 231 that the voluntary programs be based on the best available science.

3. Paragraph 8 of this section discusses the terms and conditions for withdrawal from the voluntary programs. SB 231 requires that the programs

"include terms and conditions to allow farmers or ranchers to cease participation in a program without penalty. The terms and conditions shall include reasonable measures to minimize take" (FGC §2086 (b)(5))

The Proposal's implementation of this requirement is that programs

"establish a reasonable time period before habitat is altered to allow salvage or relocation of affected species, and other reasonable measures...."

Despite the mandate in § 2086 (b)(5), neither the words or the concept of "minimizing take" are present in this section. This is yet another instance in which the Proposal is clearly inconsistent with the law.

We are particularly troubled by the emphasis on salvage and relocation. For plants, this practice has been found to be completely ineffective and often lethal. CNPS and the Botanical Society of America have cosigned a policy opposing transplantation of rare plants as mitigation (enclosed) that discusses the reasons why salvage and transplantation cannot be used routinely to mitigate or avoid impacts to rare plants. It is based in part on the DFG's own studies of past mitigation projects and failures.

These regulations must include provisions that will effectively minimize take if a participant withdraws from a voluntary program. This Proposal does not achieve that goal and instead encourages discredited and biologically unsound practices such as salvage. This section should also clarify that when participants withdraw from voluntary programs, they become subject to all of CESA's restrictions on take of listed species.

We welcome the provision in subparagraph 8(C) that voluntary programs include a procedure for terminating participation by participants who fail to follow management practices.

### Section 786.3

This section declares that any plan addressing eight specific elements, regardless of the plan's content, is consistent with CESA and is authorized to be implemented. It is both unreasonable and a violation of law for the Department to ignore its duty to ensure that these plans meet the requirements imposed by law.

The statement in §786.3(a) that voluntary local programs are consistent with the policies of CESA merely because they encourage habitat for candidate and listed species clearly misinterprets the statute. The policies of CESA go far beyond "encourag[ing] habitat". As noted above, the policy of CESA and of the State of California is "to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat..." ("CPRE" policy, FGC § 2052). "Conserve" is defined as "to use, and the use of, all methods and procedures which are necessary to bring any endangered species...to the point at which the measures provided pursuant to this chapter are no longer necessary" (FGC § 2061.) These regulations must fully implement these mandates. They do not do so in their current form.

Again, we reiterate that the regulations must require that programs will not be approved unless DFG makes a finding that they (1) are based on the best available science, (2) will measurably improve conservation of rare species and their habitats, (3) will avoid and minimize take of listed or candidate species, (4) meet all other requirements of FGC §2086 (b), (5) meet the requirement of FGC 2086 (a) that programs "encourage habitat" for listed and candidate species, and (6) are consistent with the purpose of CESA stated in FGC § 2052.

### Section 786.5

This section describes the reports that DFG will be required to submit to the Legislature regarding the voluntary programs. The section is inadequate in that reports will not be required to quantify the amount of take that has occurred either under the voluntary local programs or "accidentally" during the course of routine and ongoing agricultural activities. There is no requirement that the reports evaluate the effectiveness of the voluntary programs in species or habitat conservation. There is no requirement or suggestion that the reports discuss and compare the success or failure of different approaches to and methods of habitat and species conservation under the voluntary

programs. In fact, the reports to the Legislature as described in the Proposal would be largely meaningless and useless.

### Sections should be added

1. These regulations fail to define "accidental take" of listed and candidate species. This is an important omission. SB 231 allows unlimited "accidental" take of candidate and listed species during "routine and ongoing" agricultural activities. Accidental take must be carefully defined to distinguish it from incidental take. If accidental take is not defined and not differentiated from incidental take, there obviously will be absolutely no incentive for landowners to participate in voluntary habitat and species conservation programs in order to exempt themselves from restrictions on incidental take. SB 231 which was enacted specifically to encourage such voluntary programs and the species and habitat conservation they should produce. For these regulations to deliberately remove any incentive for participation in the voluntary programs is therefore both contrary to the intent of the law and absurd. These regulations must define accidental take.
2. The Proposal contains no requirement that landowners enroll in the voluntary programs so that DFG can monitor the numbers of participants and accurately track the amount of land involved. This requirement must be added.

### Comments on the Environmental Document

The ED has many serious flaws. It falsely states in several places that the proposed regulations will have no impact on the environment. Like the Proposal, this ED should be withdrawn and a new one should be prepared which fairly and completely discusses the impacts of the regulations and which meets the requirements of the California Environmental Quality Act.

One example is the discussion of the impacts of the definition of "routine and ongoing" agricultural activities. The ED repeatedly claims on pages 4-13 and 4-14 that its definition will have no impacts on the environment. For example, the ED states

"Since the regulations do not alter routine and ongoing agricultural activities, there will be no impact on the human use of agricultural resource elements of the existing environment" (p. 4-13).

This is simply silly. SB 231 completely removes prohibitions on take of listed species during "routine and agricultural" activities, both through provisions regarding "accidental" take and through voluntary programs. Therefore, the definition of "routine and ongoing" activities will control the quantity, frequency, and location of the take that will occur on millions of acres of agricultural lands in California. As noted above, that is why the drafters of SB 231 specifically delegated definition of this critical term to the DFG, our trustee agency for wildlife. The definition that is proposed in the regulations will allow massive amounts of new take to occur through rangeland conversion, through construction projects, and through other activities, as we note earlier in these comments. On the other hand, narrower definitions would substantially increase the

likelihood that the law will achieve its stated purpose. This definition will have extremely significant impacts on the environment and on rare species. These impacts should be disclosed in the ED as should the merits of alternative definitions.

Another problem with the ED is its justification of the failure of the regulations to provide DFG with a role in approving the voluntary programs or in assuring that they will meet the goals of the law. We have discussed the substantive problems with the Proposal's approach earlier in these comments. The ED's attempt to justify of this approach is poorly thought out and is also misleading in that it relies on only part of the law. The ED notes correctly (p. 4-5) that FGC §2086 (a) states that "[t]he department.. shall adopt regulations that authorize locally designed voluntary programs...". However, the ED fails to quote the later portion of this section which states "[a]gricultural commissioners, extension agents.... may propose such programs to the department". The use of the word "propose" in the law clearly implies that the DFG should have the opportunity approve or reject the voluntary programs. The implications and interpretation of that language are not discussed.

Perhaps the largest problem with the ED is its discussion and dismissal of the "working group alternative" (p. 5-2 et seq.). Many features of the working group alternative as described in the ED would help solve problems we raise in our comments on the Proposal. The justification of the rejection of this alternative in the ED is illogical and unsound.

For example, the only justification for the lack of definition of "accidental" take is that "[t]he statute ... requires no regulatory implementation or clarification". This is an opinion rather than a statement of fact or logical reasoning. Our comments above describe the reasons why definition of accidental take is necessary to make these regulations consistent with CESA. None of these issues is addressed in the ED.

There are similar problems with the discussion of the definition of "routine and ongoing" agricultural activities. Again, the ED states an opinion as the sole justification for the Proposal's inadequate definition of "routine and ongoing" activities without any legal, logical or factual basis.

The justification for the Proposal's extraordinary restriction of DFG's role in implementing this law is even more unfounded. The argument seems to be that allowing DFG to assure that the voluntary programs are based on good science and are likely to be successful in meeting CESA's goals will unacceptably "centralize" the development of the programs. This potential centralization is apparently deemed to be more dangerous than the possibility that unmonitored, poorly designed, ineffective and possibly destructive programs will proliferate and cause substantial loss of habitat and rare species. We simply do not understand the centralization argument. DFG currently participates effectively in rare species conservation activities throughout California both on and off agricultural lands. DFG field office staff are already very familiar with local ecosystems and land use issues. Participation in the development of the local programs would be a natural extension of the duties and activities that DFG already performs.

The ED goes on to argue that DFG participation in the local programs would unacceptably discourage landowner participation. There are several problems with this argument. First, irrespective of DFG involvement, the voluntary local programs still offer landowners exemption from CESA's prohibition on take. This is a substantial incentive and should not require augmentation. Second, there are many ways these regulations could encourage productive collaboration between landowners and DFG without completely excluding DFG from the development of the local programs. Finally, there is no point in encouraging high levels of landowner participation if the state does not realize any conservation benefit because the voluntary programs are not based on good science, are implemented improperly, and do not meet the goals of CESA.

We also take issue with the discussion of growth inducing impacts on page 8-1 of the ED. The ED states that the Proposal will not induce growth. This is a false statement. By failing to define accidental take and by inadequately defining "routine and ongoing" activities, the Proposal would exempt landowners from CESA's take prohibition even if they kill every listed species on their property by converting untilled wildlands to row crops. This will certainly facilitate development and growth because landowners will be able, under this Proposal, to eliminate listed species from their property without penalty. The property can then be subdivided more easily because development will not impact any listed species; they will already have been destroyed. The ED should discuss and disclose this outcome.

### Conclusion

Because our analysis of this Proposal and ED has found so many basic and serious deficiencies, we recommend that this Proposal and ED be withdrawn and that the DFG develop new regulations which are consistent with the intent of SB 231 and with CESA. A new ED should also be developed which accurately discloses the impacts of the regulations. We hope that the new ED will be able to claim with truth that the regulations will not create significant impacts on the environment.

We request notification when and if DFG submits these proposed regulations to the Office of Administrative Law (OAL), and also request notification when and if OAL approves the regulations.

We hope these comments are useful. Please contact me at any time if I can provide additional information or answer questions.

Sincerely,

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Encl. [Transplantation statement](#)